Advisory

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Employment Law 2016 - Year In Review

As calendar year 2016 draws to a close, we are once again reminded that employment laws are constantly changing—except, of course, for the one change employers were expecting most, which is where our 2016 employment law year-in-review begins.

FLSA OVERTIME REGULATIONS STUCK ON HOLD

The biggest surprise of 2016, hands down, was an eleventh-hour ruling issued by the U.S. District Court for the Eastern District of Texas enjoining implementation of the U.S. Department of Labor's regulations increasing the salary threshold under the Fair Labor Standards Act's minimum wage and overtime pay exemptions for executive, administrative, and professional employees. This shocking development, discussed at length **here**, stalled the rollout of these regulations nationwide, maddening employers who spent considerable time and resources preparing for compliance, many of whom had already hiked salaries, or announced plans to do so, in order to continue using the exemption. The government has appealed the ruling, and the U.S. Court of Appeals for the Fifth Circuit recently agreed to expedite the appellate process. Even still, final briefs are not due until late January 2017, with oral argument set to follow in February 2017. This timetable postdates President-Elect Trump's inauguration, and there have been hints his administration may drop the appeal after assuming office. What might happen if that comes to pass is anyone's guess. It is conceivable the new administration will consider a less jarring revision to the white-collar exemptions, perhaps increasing the salary threshold to a lesser degree than contemplated by the recently enjoined regulations. Or perhaps the idea of tinkering with the regulations is abandoned altogether. Only time will tell, so this situation is worthy of monitoring.

This includes keeping a close watch on developments at the state level. New York employers are already bracing for increases in the salary threshold under the state's wage and hour laws. Under new regulations proposed by the New York State Department of Labor, scheduled to go into effect on December 31, 2016, the minimum weekly salary for exempt executive, professional or administrative employees is slated to increase as follows:

- $825 for New York City employers with 11 or more employees;
- $787 for New York City employers with 10 or fewer employees;
- $750 for employers in Nassau, Suffolk and Westchester Counties; and
- $727.50 for all other New York employers.

These changes are by no means static; rather the regulations provide for annual increases to the salary thresholds. For example, the salary threshold applicable to New York City-based employers with 11 or more employees is due for a bump-up up to $975 per week on December 31, 2017 and $1,125 per week on December 31, 2018. Increases of a similar magnitude are baked into the regulations for smaller employers in New York City and employers outside the Big Apple. Whether Connecticut or other

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states will follow New York's lead remains to be seen. But it is surely a possibility, especially if the proposed changes to the federal regulations are abandoned and reduced to a historical footnote.

NEW FEDERAL GUIDELINES FOR HR PROFESSIONALS ON RECRUITING AND COMPENSATION

On October 20, 2016, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") jointly issued guidance for human resources professionals regarding the application of federal antitrust laws to hiring practices and compensation decisions. The guidance focuses on: (i) agreements amongst competitors to set wages, salaries, opportunities for advancement, or other terms and conditions of employment; and (ii) competitors who enter into agreements not to "poach" or recruit each other's employees. Under these guidelines, the DOJ intends to bring criminal charges against individuals and companies who participate in such arrangements, equating "[n]aked wage-fixing or no-poaching agreements" with "hardcore cartel conduct" that is "per se" illegal under antitrust law (with "per se" meaning automatic liability). The guidance urges HR professionals to immediately blow the whistle on prohibited conduct because corporations and individuals may avoid criminal convictions and fines by being the first to confess their involvement in such schemes.

Although the guidance is clear that the DOJ and FTC intend to take a hard line and pursue these types of anti-competitive arrangements as per se offenses for which criminal liability is warranted, it is unclear whether courts will agree with the government's interpretation. Indeed, to date, no court has applied a per se analysis, let alone criminal sanctions, to an employee "no poaching" agreement. Nevertheless, HR professionals should not tempt fate and potentially subject themselves or their company to an enforcement action. A good first step would be spreading the word to management about the new guidelines, in particular the "red flag" list of events that could run afoul of federal antitrust laws. This list includes: (i) agreeing with another company about employee salaries or terms of compensation; (ii) agreeing with another company not to solicit or hire the other company's employees; (iii) agreeing with another company about employee benefit offerings; (iv) telling a competitor that your respective companies should not compete too aggressively for employees; (v) exchanging company-specific information with another company about employee compensation or terms of employment; (vi) participating in trade association meetings or social gatherings where these items are discussed with colleagues from other companies; and (vii) receiving documents containing another company's internal data about employee compensation.

OSHA AND SEC ATTACKS ON SETTLEMENT AND SEPARATION AGREEMENTS

The Occupational Safety and Health Administration ("OSHA") and the Securities and Exchange Commission ("SEC") have joined the growing list of government agencies interested in your private settlement and separation agreements. Specifically, the agencies are concerned that confidentiality and other provisions in these types of agreements may be unlawfully restricting, or even discouraging, employees from engaging in whistleblowing activities the government wants to protect. On August 10, 2016, the SEC issued a cease and desist order and a $265,000 fine against a publicly traded company for including language in its severance agreements that required departing employees to waive recovery of any monetary award he or she might receive in connection with a whistleblowing complaint filed with the SEC. According to the SEC, "by requiring its departing employees to forego any monetary recovery in connection with providing information to the [SEC]," the company "removed the critically important financial incentives that are intended to encourage persons to communicate directly with the [SEC] about possible securities law violations." The agency also took issue with language that required departing employees to inform the company before disclosing financial or business information to third-parties because there was no carve-out for communications to the SEC. By "forc[ing] those employees to choose between identifying themselves to the company as whistleblowers or potentially losing their severance pay and benefits," the company was undermining SEC regulations designed to encourage open channels of public communication.

On September 15, 2016, OSHA followed the SEC's lead by issuing similar guidelines for settlement or separation agreements addressing the various whistleblowing laws (including the Sarbanes-Oxley Act) it enforces. These guidelines confirm OSHA's plan to reject agreements that: (i) restrict an individual's ability to assist the government; (ii) require the individual to notify the employer before filing a complaint with the government, or to "affirm that he or she has not previously provided information to the government or engaged in other protected activity, or to disclaim any knowledge that the employer has violated the law"; and (iii) require the individual to waive his or her right to receive the full amount of any monetary award from the government. If OSHA determines that an agreement violates any of these rules, it may not only order the offending language removed, but that additional language of its choosing be added to the agreements going forward.

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While the SEC rules are limited to publicly traded companies, OSHA enforces numerous whistleblowing statutes that apply to public and private companies alike. As such, companies of all sizes should be proactive about compliance. That starts with reviewing your template separation and settlement agreements, removing any language that may stifle government communications or otherwise conflict with the new guidance, and rolling out replacement agreements as soon as possible. The last thing any employer wants to find out is that its settlement and severance agreements are not worth the paper they are printed on.

EEOC GUIDANCE REGARDING NATIONAL ORIGIN DISCRIMINATION

In furtherance of its commitment to make immigrant rights a top priority, the Equal Employment Opportunity Commission ("EEOC") recently released guidance on the subject of national origin discrimination. The guidance is focused on bringing together policies and case law interpreting Title VII of the Civil Rights Act of 1964 ("Title VII") that have developed since the EEOC's last published guidance on this topic in 2002, rather than explaining any new EEOC positions. The guidance begins by defining national origin discrimination as "discrimination because an individual (or his or her ancestors) is from a certain place or has the physical, cultural, or linguistic characteristics of a particular national origin group," as well as "discrimination against persons because of their real or perceived national origin." As with other forms of discrimination, the EEOC similarly considers associational discrimination to fall within this category, specifically, employment discrimination against a person on the basis of their association (by marriage, for example) with an individual of a particular national origin.

The guidance draws specific attention to language issues, cautioning employers that basing decisions regarding hiring, firing, promotions, or any other terms or conditions of employment on an employee's language abilities could run afoul of Title VII. Rather, an employer may only lawfully change the status or working conditions of an employee based on language considerations if the position requires spoken English and the employee's accent "materially interferes" with his or her ability to communicate in spoken English. This policy is consistent with the EEOC's longstanding position that any employment practices and policies that could implicate national origin, or any other protected class, must be narrowly tailored to the individual position requirements as well as business necessity.

The new guidance includes "promising practices" that are designed to "reduce the risk of [Title VII] violations." The topics include harassment, recruitment, hiring, promotion, and assignment, as well as discipline, demotion, and discharge. For example, the guidance cautions that relying on word of mouth or personal referrals from current employees for recruiting can amplify existing ethnic, racial, or religious homogeneity and exclude qualified applicants from different national origins than the current employee pool. In order to avoid this pitfall, which the EEOC would consider a type of disparate impact discrimination, the guidance recommends that employers use a wide variety of recruitment tools, such as online publications, job fairs, and postings through community organizations that service groups underrepresented in the workforce.

EEOC GUIDANCE REGARDING ACCOMMODATIONS FOR WORKERS WITH MENTAL HEALTH CONDITIONS

The EEOC also recently released guidance focused on the protections afforded employees with mental health conditions covered by the Americans With Disabilities Act ("ADA"). The guidance, entitled "Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights," is geared towards employees, but offers important reminders for employers regarding ADA compliance. Specifically, the guidance provides that individuals with mental health conditions cannot be discriminated against in any of the terms or conditions of their employment, such as hiring, dismissal, promotional opportunities, and/or compulsory leave. Employers may only lawfully make employment-related decisions based on an employee's mental health condition if the employer has "objective evidence" that the employee cannot perform one or more essential job duties, or poses a significant risk of substantial harm to himself/herself or others, even with a reasonable accommodation.

The guidance reiterates the EEOC's position regarding reasonable accommodations, namely, that the ADA provides a right to such accommodations for any mental health condition that would, if untreated, substantially limit an employee's ability to concentrate, communicate, sleep, regulate his thoughts or emotions, or any other major life activity. The EEOC cautions that an employee need not stop treatment in order to qualify for a reasonable accommodation, nor must the employee disclose his specific diagnosis. Rather, an employee need only generally describe his condition and how it impacts his ability to perform his job functions. However, an employer may require an employee to provide documentation from his health care provider confirming the employee suffers from a mental health condition and that a particular accommodation, such as a quiet working space or a change to the employee's work schedule, would meet the employee's

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needs. Finally, the guidance provides that in circumstances where an employee cannot perform the essential functions of her job even with a reasonable accommodation, she may be entitled to leave, whether paid or unpaid, pursuant to the Family Medical Leave Act ("FMLA"). In other words, employers are reminded by this guidance that dismissal is not necessarily the answer if attempts to provide a reasonable accommodation fail — employers must first consider their obligations under both the ADA and the FMLA to provide a leave of absence for treatment or other purposes that might enable the employee to perform the job's essential functions upon returning.

CHRO STATISTICS SHOW INCREASE IN "TERMS AND CONDITIONS" CLAIMS

Earlier this year, the Connecticut Commission on Human Rights and Opportunities ("CHRO") released its annual report detailing the number and types of claims filed over the past fiscal year. The CHRO received a total of 2616 complaints of discrimination, the vast majority of which—2160—were employment related. The number of employment discrimination complaints were up again this year, continuing a four year trend. Of those complaints, an increasing number involved claims of discrimination in the terms and conditions of employment and/or harassment, as opposed to claims alleging that a particular adverse employment action, such as termination, was due to discriminatory animus. Specifically, in 2014, 782 claims alleging "terms and conditions" discrimination were filed, compared to 1056 this past fiscal year. For harassment claims, 380 were filed in 2014, compared to 545 in FY 2016. The upward trajectory in "terms and conditions" charges illustrates the criticality of carefully and expeditiously responding to requests for accommodation or any other change in a term or condition of employment, as well as complaints of harassment of any kind.

ANNUAL MINIMUM WAGE INCREASE IN CONNECTICUT AND NEW YORK

On January 1, 2017, the minimum wage in Connecticut will increase to $10.10 per hour. In New York, the minimum wage will increase to $9.70 per hour, although the rate differs for employers located in Nassau, Suffolk and Westchester counties ($10.00 per hour) and employers in New York City ($10.50 or $11.00 depending on the number of employees). The national minimum wage will remain at $7.25 per hour, where it has been since 2009. This is unlikely to change under the new administration.

REMINDER: CONNECTICUT'S BAN THE BOX LEGISLATION

Finally, as we **noted** this past summer, beginning on January 1, 2017, Connecticut law prohibits employers from inquiring about a prospective employee's prior arrests, criminal charges or convictions on initial employment applications. The exceptions to this legislation are where (i) state or federal law compels an employer to inquire about a candidate's criminal history and (ii) a security or fidelity bond is required for the position. In order to ensure compliance with this new law, employers should revisit their initial application materials and remove any questions regarding prior arrests, criminal charges or convictions. Violations of the law may subject employers to a complaint with the State Labor Commissioner but not, at least for now, a lawsuit.