The “#MeToo” Movement: State Legislatures Spring Into Action

WIGGIN AND DANA

In case you've been under a rock…

- Beginning in October of 2017, claims against Harvey Weinstein sparked the #metoo and #timesup movements across all industries.
- More than 100 bills or resolutions regarding sexual harassment and workplace misconduct have been introduced in statehouses across the country during the 2018 legislative session, including dozens of bills addressed at the conduct of legislators themselves.

Proposed Federal Legislation

- New York Senator Kirsten Gillibrand, with the support of Lindsay Graham, Lisa Murkowski, Dick Durbin, and Dianne Feinstein, proposed a bill to amend the Federal Arbitration Act to prohibit agreements to arbitrate sex discrimination disputes.

Proposed Federal Legislation

- The bill defines sex discrimination dispute as a dispute between an employer and employee arising out of conduct that would form the basis of a Title VII sex discrimination claim regardless of whether a violation of Title VII is alleged.
- The enforceability of these agreements would be determined by a federal judge, not an arbitrator, but would not apply to collective bargaining agreements.

Connecticut

- Connecticut was in the vanguard, passing sexual harassment legislation in 1993.
- In addition to prohibiting sexual harassment, Connecticut's current law requires employers with 50 or more employees to provide sexual harassment training to supervisors every 2 years.

Connecticut

- In 2018, the Senate approved the “Time’s Up” act, 31-5, lowering the “employer” threshold from 50 or more employees to 20 or more.
- The bill also required 2 hours of training to all employees, not just supervisors.
- It also required employers to provide evidence of a sexual harassment policy to the CHRO, and would have the CHRO develop a model policy and training program.

Connecticut

- The bill also proposed extending the statute of limitations for civil actions by the longer of six months after the CHRO issues a release of jurisdiction, or two years after the initial CHRO complaint is filed.
- The Senate bill also eliminated the statute of limitations for a number of criminal charges, including first-degree sexual assault, second and third-degree sexual assault with a firearm and first-degree promotion of prostitution.
- These proposals were direct responses to the prosecutions of Larry Nassar and Bill Cosby, who would not be subject to prosecution under Connecticut's existing laws.

Connecticut

- The Senate bill died in the Democratic majority House without coming to a vote, with concerns directed at the elimination of criminal statutes of limitations.
- It is possible the bill could be revived to include only the employment related provisions in the next legislative session.

Connecticut

- Governor Malloy's sexual harassment legislation, HB503, is still working its way through the legislature.
- This bill drops the employer threshold from 50 to 15 and requires training for all employees, by October 1, 2019, with updates every five years.
- New employees would need to be trained in the first six months of employment.

Connecticut

- Another bill, applicable to executive branch agencies, boards, councils, commissions, and institutions, including the constituent units of higher education, prohibits payments of $100,000 or more to avoid litigation costs or pursuant to a nondisclosure agreement without approval of the attorney general.

Massachusetts

- Current law requires employers with six or more employees to adopt a written policy against sexual harassment.
- Training is encouraged under the law, but not required.

Massachusetts

- One proposal in the state senate would extend the authority of the Massachusetts attorney general to investigate workplace sexual harassment claims and bring a civil action within three years of the last date of objectionable conduct.
- Massachusetts is also considering a bill to end forced arbitration of discrimination claims (it would also ban such agreements for wage claims).

New York State

On April 12, 2018, the New York State legislature enacted several new laws regarding sexual harassment in the workplace, all of which will take effect in 2018.

New York State

- Effective immediately, an employer may be held liable to a contractor, subcontractor, consultant, vendor, or other person providing services pursuant to a contract in the employer's workplace for sexual harassment where the employer, its agents, or supervisors knew or should have known about the harassment and failed to take "immediate and appropriate corrective action."
- The extent of the employer's control over the conduct of the harasser will be taken into account in reviewing these cases.

New York State

- Non disclosure agreements for settlements of sexual harassment claims are banned, effective July 11, 2018, unless the confidentiality provision is requested by the complainant or plaintiff.
- If the complainant or plaintiff requests a confidentiality clause, he or she will be allowed 21 days after receiving the agreement to consider the proposed confidentiality language.
- The complainant or plaintiff will also have a seven day revocation period after executing the agreement, during which time the confidentiality clause will not be effective or enforceable.

New York State

- Employers with four or more employees are prohibited from incorporating mandatory pre-dispute arbitration clauses requiring that sexual harassment claims be adjudicated in arbitration.
- The prohibition is prospective only; existing employment contracts with mandatory pre-dispute arbitration clauses remain in effect.
- In the event of a conflict between the terms of an existing collective bargaining agreement and the new law, the terms of the collective bargaining agreement will control.
- Mandatory pre-dispute arbitration clauses can still be used for claims unrelated to sexual harassment in accordance with state and federal law.

New York State

- All New York employers must either adopt a model policy and training program from the New York Department of Labor and Division on Human Rights or adopt their own policy and/or program that meets or exceeds the standards developed by the two agencies.
- The harassment policy must be distributed in writing to all employees, and the training must be delivered to all employees on at least an annual basis.
- The law does not specify the format or desired length for the training program; the Department of Labor and Division on Human Rights may provide guidance in their model program.

New York City

- In addition to the state laws enacted in late April, New York City passed the Stop Sexual Harassment in NYC Act in May 2018.
- Highlights of the New York City act include:
  - An expansion, to three years, of the statute of limitations to file a sexual harassment claim with the City Commission or court;

New York City

- An expansion of liability under the New York City Human Rights Law for sexual harassment claims only to cover all New York City employers, provided they employ one person in New York City;
- A municipally created anti-sexual harassment post in English and Spanish; and

New York City

- A requirement that all private employers with fifteen or more employees in New York City (who work 80 or more hours per year in New York City) conduct annual sexual harassment training. The City Commission will create a model, interactive training program for employers to use, or employers can adopt their own policies.
- The NYC Act also contains record keeping provisions to track employee and new hire training attendance and content requirements.

New Jersey

- Considering a bill banning NDAs with the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment, including claims that are submitted to arbitration.
- NJ's law does not appear to carve out an exception where the claimant requests the NDA.

California

- California's current law, like Connecticut's law, requires employers with 50 or more employees to train supervisors every two years.
- California proposes a law to reduce the "employer" threshold to five or more employees and to require training for all employees by 2020.

California

California is considering a bill that would prohibit nondisclosure clauses for cases involving claims of sexual assault, sexual harassment, or harassment or discrimination based on sex unless the claimant specifically requests the provision. This would not apply if a government agency or public official is a party to the settlement agreement.

California

- A separate piece of legislation looks to provide additional job protection to victims of sexual harassment.
- Under current California law, employers are prohibited from discharging, discriminating, or retaliating against victims of domestic violence, sexual assault, or stalking who request or take related leave.
- The new law extends this to sexual harassment victims and immediate family members who take time off to assist the victim.

Other (Nearby) State Legislation

Delaware: Proposed legislation requiring employers with 50+ employees to provide at least two hours of sexual harassment training to all supervisory employees every two years (mirroring Connecticut).

Pennsylvania: proposed legislation requiring interactive sexual harassment training to all current employees every two years, and additional interactive training to supervisory employees.

Minnesota

- Minnesota's legislature is considering a bill that would expressly eliminate the "severe or pervasive" standard set forth in the US Supreme Court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
- Meritor established several factors for courts to consider for hostile work environment claims:

Minnesota

- the level of offensiveness of the unwelcome acts or words
- the frequency or pervasiveness of the offensive encounters
- the total length of time over which the encounters occurred
- the context in which the harassing conduct occurred.

Minnesota

- In an attempt to expand the definition of hostile work environment, Minnesota's proposed legislation reads, in relevant part:

  An intimidating, hostile, or offensive environment … **does not require the harassing conduct or communication to be severe or pervasive.**

Best Practices

- Train Everyone: Despite the failure of the Times Up bill in the Connecticut legislature, hostile work environment claims can arise from management, supervisors, co-workers, and certain third parties, like vendors, contractors, or customers, if the employer knew or should have known about the harassment and failed to take appropriate corrective action.
- A trained workforce can assist the employer to identify and contain sexual harassment liability.

Best Practices

- Adopt a robust sexual harassment policy
- Evaluate internal complaint procedures
- Express and execute a commitment to prompt investigation of sexual harassment complaints without fear of reprisal
- Maintain records of training and policy distribution

WIGGIN AND DANA

QUESTIONS?

This presentation is a summary of legal principles.
Nothing in this presentation constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney.
The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

A “New” NLRB: Is the Board Truly More Employer-Friendly?

NLRB Update

- Work Rules
- Protected Concerted Activity
- Weingarten Rights
- Joint Employment Standard
- Appellate Developments
- What Else to Expect

Work Rules

- Section 7: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities. . . .”
- Section 8(a)(1): It is an unfair labor practice “to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 . . .”

Work Rules

- Lutheran Heritage: Even if a rule does not explicitly restrict activities protected by § 7, it will nonetheless be found to violate the Act if:
  - Employees would reasonably construe the rule to prohibit § 7 activity;
  - The employer adopted the rule in response to union activity; or
  - The employer applied the rule to restrict § 7 activity.

Application of Lutheran Heritage

William Beaumont Hospital, 363 NLRB No. 162 (2016): NLRB found the following rules unlawful:

- Prohibiting conduct that "impedes harmonious interactions and relationships."
- Prohibiting "negative or disparaging comments about the . . . professional capabilities of an employee or physician to employees, physicians, patients, or visitors."
- Prohibiting "Verbal comments or physical gestures directed at others that exceed the bounds of fair criticism."
- Prohibiting "behavior that is. . . counter to promoting teamwork."

Work Rules

- The Boeing Company, 365 NLRB No. 154 (Dec. 14, 2017): Board announced new test for assessing whether a facially neutral policy or rule interferes with the exercise of NLRA rights.
- In assessing work rules, the Board will evaluate two things:
  - Nature and extent of the potential impact on NLRA rights, and
  - Legitimate justifications associated with the requirement(s).
- But: the "perspective of employees" remains the proper lens with which to evaluate facially valid rules.

Work Rules

- The Boeing Company: Board created 3 categories of work rules:
- Category 1: work rules that are lawful either because (i) the rule does not prohibit/interfere with the exercise of NLRA rights or (ii) potential adverse impact on protected rights is outweighed by justification for rule;
- Category 2: rules that warrant individualized scrutiny;
- Category 3: rules that are unlawful because they prohibit/limit protected activity and the adverse impact is not outweighed by the justification for the rule.

Work Rules

Lowes Home Centers, LLC, 19-CA-191665, 2018 WL 1846016 (Apr. 17, 2018)

- Lowes maintained a rule that prohibited disclosure of confidential information, defined to include salary information.
- ALJ applied Boeing and held the rule fell into Category 3 rule so as to be per se unlawful – no application of the test required.

Work Rules

United States Postal Serv., 28-CA-175106, 2018 WL 1255491 (Mar. 9, 2018)

- Rule prohibiting employees from using information resources to "disclos[e] any Postal Service information that is not otherwise public without authorized management approval" unlawful under Boeing test.
- Rule banning employees from using any information resource (again, both on and off-duty) to ""perform[] any act that may discredit, defame, libel, abuse, embarrass, tarnish, present a bad image of, or portray in false light the Postal Service, its personnel, business partners, or customers" unlawful under Boeing test.

Protected Concerted Activity

- Concerted activity: when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.
- Traditional examples of concerted activity:
  - Two or more employees addressing their employer about improving pay.
  - Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
  - An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

Protected Concerted Activity

- Two recent trends in NLRB cases assessing whether employees were unlawfully fired for engaging in protected concerted activity:
  - Finding conduct was for mutual aid and protection where only one employee had an immediate stake in the outcome, and
  - Finding no loss of protection despite obscene, vulgar, or other highly inappropriate conduct.
- GC indicated he wants to revisit these topics.

Protected Concerted Activity

- Meyer Tool Inc., 366 N.L.R.B. No. 32 (Mar. 9, 2018): Ohio manufacturer violated the NLRA when it suspended and discharged a non-union employee for complaining about working conditions.
- NLRB relied on 40 year old case to hold that employee did not lose his NLRA protections when he got into a shouting match with the VP of operations and later the human resources manager.

Protected Concerted Activity

- To determine whether conduct is sufficiently egregious or opprobrious to lose the NLRA's protections, the NLRB applies multi-factor balancing test. The factors reviewed are:
  - The place of the discussion;
  - The subject matter of the discussion;
  - The nature of the employee's outburst; and
  - Whether the outburst was, in any way, provoked by the employer's unfair labor practices.

Protected Concerted Activity

- Mexican Radio Corp., 366 NLRB No. 65 (Apr. 20, 2018)
  - Restaurant violated NLRA when it fired four employees after they replied in support of a former co-worker's email criticizing the restaurant's management, wages, and the tip policy.

Protected Concerted Activity

- Buds Woodfire Oven LLC, 05-CA-194577, 2018 WL 2298221 (May 18, 2018):
  - Ralph Groves fired for showing "disrespect and poor attitude" during staff meeting claimed his termination violated NLRA because he was engaged in protected concerted activity.
  - No evidence that coworkers' shared employee's concerns or that Groves was acting on behalf of other employees during meeting.

Protected Concerted Activity

- August 2017: Google fired engineer James Damore in response to an internal memo he wrote that questioned the role of biology in career choice.
- Damore filed an unfair labor practice charge alleging he was fired in violation of Section 8(a)(1) of the Act for engaging in “protected concerted activity.”

Protected Concerted Activity

- Jan. 2018: NLRB's Division of Advice took the position that the firing did not violate the Act.
- Certain parts of the memo were likely protected by the Act (those expressing dissenting view on matters affecting working conditions, offering critical feedback of policies and programs).
- But Google didn't fire him for the protected parts, so his termination did not violate the Act.
- Google's termination letter and message to other employees affirmed right to engage in protected speech while prohibiting discrimination or harassment.

Weingarten Rights

- Where an employer compels a unionized employee to attend an interview and the employee reasonably fears disciplinary action, the employee is entitled to request and receive union representation in the interview.
- It is an unfair labor practice to discipline or discharge an employee for refusal to cooperate with such an interview without union representation.

Weingarten Rights for Non-Union Employees?

- Epilepsy Foundation, 331 NLRB 676 (2000): extended Weingarten rights to non-union employees.
- IBM Corp., 341 NLRB 1288 (2004): Bush-appointed NLRB overruled Epilepsy Foundation.

Weingarten Rights for Non-Union Employees?

- GC Memo 18-02 says that the NLRB will no longer follow initiatives to overturn IBM in order to restore Weingarten rights to non-union employees, avoiding efforts to revert to Epilepsy Foundation.

A Recent Limitation on Weingarten

- Midwest Div.-MMC, LLC v. NLRB, 867 F.3d 1288, 1292 (D.C. Cir. 2017)
- Under Kansas state law, hospitals are required to establish a peer-review program to monitor quality of care. A peer-review committee was empowered to investigate breaches of standards of care and then refer serious breaches to a state agency.

A Recent Limitation on Weingarten

- Two nurses were asked to attend a non-mandatory meetings (attend “if you choose”), or submit a written response in lieu of appearing.
- Both nurses asked for a union representative and the employer denied both requests. The meetings proceeded with the nurses in attendance.

A Recent Limitation on Weingarten

- The NLRB held that the employer violated the nurses' Weingarten rights by denying them a union representative in the meetings.
- The NLRB also held that the employer should have discontinued the meetings because the nurses were not presented with the choice of voluntarily proceeding with the meetings after being presented with the choice of proceeding without representation or not having the interview at all.

A Recent Limitation on Weingarten

- The DC Circuit reversed, holding that because the meetings were completely voluntary, Weingarten didn't apply.
- A concurring opinion questioned whether Weingarten applied to peer-review committees, which are not part of the employer disciplinary process.

Joint Employer Standards

- Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (2015)

If an employer reserves the right to control another employer's employees, this is sufficient to establish a joint employer relationship regardless of whether control is actually exercised or not.

Joint Employer Standards

- Hy-Brand Industrial Contractors, Ltd., 365 NLRB No. 156 (2017)

The NLRB overturns Browning-Ferris, returning to the NLRB's longstanding rule that an entity will only be considered a joint employer if it exercises actual, direct control over essential employment terms in a manner that is not limited and routine.

Joint Employer Standards

The Hy-Brand Board emphasized a few glaring problems with Browning-Ferris:

- It treated an old problem like a new one: one company exerting some control over another company isn't a modern development.
- It expanded the definition of employer in the Act, something that only Congress can do.

Joint Employer Standards

- It created uncertainty and risk in business arrangements with the ambiguities involved in “potential” or “indirect” control.
- It would impermissibly attempt to correct inequality between businesses by pushing a business with more leverage to the bargaining table because it could possibly exert control over the employees of the other company.

Joint Employer Standards

Hy-Brand is Overturned Due to Ethics Concerns

- The NLRB's inspector general issued a report in early 2018 stating that NLRB Member William Emanuel should have been ethically prohibited from participating in Hy-Brand because his former law firm was involved in Browning-Ferris.
- The Board voted unanimously to overturn the Hy-Brand decision to avoid the appearance of impropriety stemming from the potential conflict.

Joint Employer Standards

Where Does that Leave Joint Employment Standards?

- Uncertainty remains: even with a full complement of five members, Member Emanuel will be prohibited from participating in any decision that could impact Browning-Ferris, leaving 2 members who historically favored indirect control, and 2 who do not.
- Browning-Ferris is on appeal at the D.C. Circuit Court of Appeals, so the indirect control approach is the law, for now.

Appellate Developments

Epic Systems Corp. v. Lewis:

2013: the NLRB rules that employers violate the NLRA if they require employees to agree to resolve work related disputes pursuant to an arbitration provision containing a class or collective action waiver as a condition of employment.

Appellate Developments

- The Court held that the NLRA does not supersede the Federal Arbitration Act (FAA).
- The NLRA is designed to protect employees' rights to unionization and collective bargaining; it does not protect employees' rights to class or collective arbitration or litigation.

Appellate Developments

- In re T-Mobile USA, Inc. v. NLRB (5th Cir. July 25, 2017).

  NLRB found the following T-Mobile policy violated the NLRA: "[T-Mobile] expects all employees to behave in a professional manner that promotes efficiency, productivity, and cooperation. Employees are expected to maintain a positive work environment by communicating in a manner that is conducive to effective working relationships with internal and external customers, clients, co-workers, and management."

Appellate Developments

- In re T-Mobile USA, Inc. v. NLRB (5th Cir. July 25, 2017)
- The NLRB interpreted the rule as to how a reasonable employee could interpret the work rule.
- The Appellate Court reversed the NLRB, finding that the question is not what a reasonable employee could interpret, but what the reasonable employee would interpret.

Appellate Developments

- Whole Foods Market Group, Inc., 387 NLRB No. 87 (2015)
- NLRB held that recording, in certain instances, can be a protected Section 7 activity, and that because Whole Foods' no recording policies prohibited all recording without management approval, employees would reasonably construe the language to prohibit recording protected by Section 7.
- Overbroad policy not saved by stated purpose of promoting open employee communications in the workplace.

Appellate Developments

- June 1, 2017: Second Circuit affirmed NLRB's Whole Foods ruling.
- But Second Circuit noted:

  "It should be possible to craft a policy that places some limits on recording audio and video in the workplace that does not violate the Act."

Appellate Developments

- Whole Foods went back to the NLRB, asking the Board to reconsider its now court-enforced order.
- New NLRB chairman John Ring and William Emanuel recused themselves, presumably because of their former firms' affiliations with Amazon, which now owns Whole Foods.
- The Board refused to overturn its order, stating that it did not have the power to modify an order that had been enforced by a court of appeals.

What Else to Expect

- GC Memo 18-02 – Mandatory Submissions to Advice
- Purple Communications (finding that employees have a presumptive right to use their employer's email system to engage in Section 7 activities)
- Banner Health (confidentiality of workplace investigations)
- Piedmont Gardens (disclosure of witness statements to union)
- Off-duty employee access to property

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The Next Big Thing:
State Pay Equity Legislation

Pay Equity: State Laws

- *Almost* every state has some kind of gender equity law on the books (except Alabama, Mississippi, North Carolina….).
- States (and cities and counties) are strengthening pay equity laws in various ways:
  - Banning employers from asking for a job candidate's pay history;
  - Defining the equal pay standard more broadly; and
  - Enacting "pay transparency" laws.

Connecticut's Equal Pay Act

- CT has prohibited discrimination in compensation on the basis of gender since 1949.
- By statute, employers must pay men and women the same wages for "equal work on a job, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."

Connecticut's Equal Pay Act

- In the event of a differential, burden is on the employer to affirmatively demonstrate that pay difference is based on:
  - Seniority system;
  - Merit system;
  - System measuring earnings by quantity or quality of production; or
  - A bona fide factor other than sex (education, training, experience).

Connecticut's Equal Pay Act

- Bona fide factor defense shall apply only if the employer demonstrates that such factor:
  - is not based upon or derived from a sex-based differential in compensation, and
  - is job-related and consistent with business necessity.
- Employee may then demonstrate that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.

Connecticut's Equal Pay Act

- Any agreement by the employee to work for less is not a defense.
- An employer may be found liable for the difference between the amount of wages paid and the maximum wage paid any other employee for equal work, compensatory damages, attorneys' fees and costs, punitive damages if the violation is found to be intentional or committed with reckless indifference to the employee's rights.

Connecticut's Equal Pay Act

- Statute of limitations: actions must be brought within two years, or within three years if the violation is intentional or committed with reckless indifference.
- But… violation occurs with each paycheck.
  - 2009 amendment following Lilly Ledbetter amendment to Title VII

Connecticut – Salary Inquiries

- Effective January 1, 2019, employers may not ask, or direct a third party to ask, about a prospective employee's wage and salary history.
- Employers may ask about other elements of a prospective employee's compensation structure (e.g., eligibility for stock options), so long as there is no inquiry into the value of those elements.

Connecticut – Salary Inquiries

- Connecticut's prohibition does not apply:
  - if the prospective employee voluntarily discloses his or her wage and salary history, or
  - to any actions taken by an employer, employment agency, or its employees or agents under a federal or state law that specifically authorizes the disclosure or verification of salary history for employment purposes.

Connecticut – Salary Inquiries

- A federal court in Pennsylvania recently ruled that a similar ban on inquiries about an applicant's salary history implemented by the City of Philadelphia violated the First Amendment.
- However, the court upheld Philadelphia's ban on using salary history as a basis for setting compensation.
- The case is on appeal.

Connecticut – Salary Inquiries

- An aggrieved employee or prospective employee may bring a lawsuit within two years after an alleged violation of the ban on asking about salary histories.
- Employers may be found liable for compensatory damages, attorneys' fees and costs, punitive damages and other legal or equitable relief as the court may deem just and proper.

Connecticut – Salary Inquiries

Before January 1, 2019…

- Review job applications and make any necessary revisions to remove inquiries regarding applicants' current salary, and
- Ensure that personnel involved in the hiring process are properly trained on the new restrictions.

Connecticut – Pay Transparency

As of July 2015 CT employers may not:

- Prohibit employees from disclosing, inquiring about, or discussing the amount of his or her wages or the wages of another employee;
- Require an employee to sign a waiver or other document that purports to deny the employee his or her right to disclose, inquire about, or discuss the amount of his or her wages or the wages of another employee; or
- Discharge, discipline, discriminate against, retaliate against, or otherwise penalize any employee who discloses, inquires about, or discusses the amount of his or her wages or the wages of another employee.

Connecticut – Pay Transparency

- Employees may recover compensatory damages, attorneys' fees and costs, punitive damages, and equitable relief.
- Two year statute of limitations.
- Duplicative of NLRA restrictions, at least as applied to rank-and-file employees.

New York

- Achieve Pay Equity Act ("APEA") (2016)
- Burden on employer to affirmatively demonstrate that pay difference is based on:
  - Seniority system;
  - Merit system;
  - System measuring earnings by quantity or quality of production; or
  - A bona fide factor other than sex (education, training, experience).

New York

- Bona fide factor cannot be based upon or derived from a sex-based differential in compensation, and must be job-related with respect to the position in question and consistent with business necessity.
- Employee can overcome this defense by showing:
  - The employer's practice causes a disparate impact on the basis of sex;
  - That alternative practices exist that would serve the same business purpose and not cause a disparate impact; and
  - The employer has refused to adopt the alternative practice.

New York

- Comparators need not work at same location, so long as they work in the same "geographic region," no larger than the same county.
- Liquidated damages increased to 300% of wages due.
- APEA also makes it unlawful for employers to prohibit employees from discussing their wages or the wages of other employees.

Massachusetts

- Effective July 1, 2018, employers may not seek the salary history of a prospective employee (either from the prospective employee or current/former employer).
- If an employee voluntarily discloses prior salary, employer may confirm with prior employer.
- May seek salary history after an offer of employment, including salary, has been made.

Massachusetts

- Prohibits employers from paying any person a salary or wage less than the rates paid to its employees of a different gender for comparable work.
- "Comparable work" = work that requires substantially similar skill, effort, and responsibility, and is performed under similar working conditions.

Massachusetts

- Differences in pay for comparable work permissible only when based upon:
  - Seniority;
  - Merit;
  - Earnings measured by sales, revenue, quantity or quality of production;
  - Geographic location;
  - Education, training, or experience to the extent those factors are reasonably related to the particular job; or
  - Travel requirements, if a regular and necessary condition of the job.
- Salary histories may not be used to justify pay differences.

Massachusetts

- Complete affirmative defense for any employer that, within the previous three years and before an action is filed against it, has conducted a good faith, reasonable self-evaluation of its pay practices.
- Self-evaluation must be reasonable in detail and scope and the employer must also show reasonable progress towards eliminating any impermissible gender-based wage differentials revealed by its self-evaluation.

New Jersey

- Legislation goes into effect on July 1, 2018 that includes pay equity protections for all characteristics covered under state anti-discrimination law – *not limited to gender*.
- Allows for comparisons of pay across all of the employer's operations or facilities (it is unclear whether this is limited to locations within NJ).

New Jersey

- A differential in rate of pay will be allowed if an employer can demonstrate that the difference is pursuant to a seniority or merit system or one or more legitimate, job-related factors other than the protected characteristic (such as training, education or experience) that "are not based on, and do not perpetuate, a differential in compensation" due to a protected characteristic, and are justified by business necessity.

New Jersey

- If an alternative business practice exists that serves the same purpose as an alleged business necessity (but would not result in a pay differential), that factor or consideration may not serve as a defense to any legal action.
- In other words, the “business-necessity” defense includes the caveat that the employer must consider alternatives before making a decision that results in a pay disparity based upon a protected trait.

New Jersey

- Expressly permits disclosure or discussion of compensation among employees and with legal counsel.
- Prohibits an employer from requiring an employee to sign a waiver or agreement to not make any such requests or disclosures regarding compensation.
- Violations will pack a punch:
  - Six year statute of limitations
  - Treble damages

New York City

- Effective Oct. 31, 2017, employers may not (i) inquire about the salary history of a job applicant or (ii) rely on the salary of a job applicant in determining salary, benefits or other compensation.
- May discuss prospective employees' expectations with regard to salary, and may consider (and confirm) a candidate's prior salary if voluntarily disclosed.

Westchester County, NY

- Effective July 9, 2018, it will be illegal for employers with 4 or more employees to:
  - rely on a prospective employee's current or prior wage history in setting wage rate;
  - request or require that a prospective employee disclose current or prior wage information as a condition of being interviewed, considered, or offered employment; and/or
  - seek from any current or former employer the prior wage information of a prospective employee.

Westchester County, NY

- Employers may seek to confirm wage information from a current/former employer after:
  - an employment offer with compensation has been made;
  - the prospective employee responds to the offer by providing his or her prior wage information to support a wage higher than the one offered by the employer; and
  - the employer has obtained written authorization from the prospective employee to confirm wage history from the current and/or former employer(s).

Equal Pay Act: Ninth Circuit Ruling

- Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018)
- Under the EPA, an employer can excuse gaps in pay between men and women performing the same work if the difference is "based on any other factor other than sex."
- Fresno County had a policy of setting a new employee's salary by adding 5% to their prior salary and then placing the employee in the corresponding step in a salary schedule.

Equal Pay Act: Ninth Circuit Ruling

- Majority of Ninth Circuit held that prior salary history, alone or in combination with other factors, cannot justify a wage differential.
- But also said: "[W]e express a general rule and do not attempt to resolve its applications under all circumstances. We do not decide, for example, whether or under what circumstances, past salary may play a role in the course of an individualized salary negotiation."

WIGGIN AND DANA

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This presentation is a summary of legal principles.

Nothing in this presentation constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney.

The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

The DOL Charts A New Course: Opinion Letters, the PAID Initiative, and (Perhaps) A New Approach

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Class Waivers

- 2012: NLRB ruled that employers violate the NLRA when they require employees, as a condition of employment, to agree to resolve work-related disputes pursuant to an arbitration provision containing a class or collective action waiver.
- Federal appellate courts split over whether the NLRA got it right.

Class Waivers

- May 21, 2018: Supreme Court rejects the NLRB's view, says mandatory arbitration agreements requiring individualized proceedings are enforceable.
- Section 7 of the NLRA is focused on employees' rights to unionize and engage in collective bargaining but does not extend so far as to protect an employee's right to participate in a class or collective action.

Class Waivers

- Review whether you have an arbitration program, including whether it is voluntary or mandatory.
- If you have a mandatory arbitration agreement, consider including a class waiver.
- Given costs, consider limiting the arbitration program to just wage and hour claims, which have the greatest likelihood of being brought as class claims.

Class Waivers

- General benefits of arbitration:
  - quicker resolution of claims,
  - more predictable outcomes compared to a jury,
  - arguably lower attorneys' fees to take a case through completion in arbitration than in court, and
  - greater chance of keeping the proceedings and outcome confidential.

Class Waivers

But be careful what you wish for…

- Arbitration is expensive and employers typically must foot the bill.
- Potential spike in claims? Some plaintiffs' firms are filing a large number of individual arbitrations, driving up costs for employers.
- Arbitration = more rulings on the merits? Many class actions settle after the class certification stage (and arbitrators are unlikely to grant dispositive motions).
- Limited appeal options with arbitration.

DOL Opinion Letters

- Opinion letters assist employers in complying with the FLSA and may also be used to establish a good faith defense.
- 2010: DOL stopped issuing Opinion Letters answering questions submitted by employers and other stakeholders, replacing them with more general "Administrator Interpretations"
  - Opinion Letters: official written opinion by Wage & Hour Division of how a particular law applies to the specific circumstances described in the request for an opinion
  - Administrator Interpretations: general interpretation of the law and regulations addressing topics selected by DOL

DOL – Administrator's Interpretations

- Administrator's Interpretation No. 2015-1, Independent Contractors
- Administrator's Interpretation No. 2016-01 - Joint Employment
- Both were criticized for creating informal standards outside of the notice-and-comment process required for formal agency rulemaking.
- New Labor Secretary withdrew both AI's in 2017.

DOL Opinion Letters

- 2010 – 2016: DOL issued 11 Administrator Interpretations (compared to dozens of Opinion Letters per year)
  - Two Administrator Interpretations since withdrawn (those addressing independent contractor classifications and joint employment)
- June 2017: DOL announced return of Opinion Letters

DOL Opinion Letters

- 3 new Opinion Letters issued April 12, 2018:
  - What counts as compensable working time under the FLSA when employees travel for work.
  - Whether 15-minute rest breaks required every hour due to an employee's serious health condition must be paid.
  - Whether certain lump-sum payments are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act.

Rest Breaks and the FMLA

- Whether 15-minute rest breaks required every hour due to an employee's serious health condition must be paid.
- Employer reported that several nonexempt employees had provided FMLA certifications saying they needed 15 minute breaks every hour due to their serious health conditions (so in an 8 hour work day, these employees perform 6 hours of work).
- Asked DOL to weigh in on whether those breaks are compensable or non-compensable under the Fair Labor Standards Act.

Rest Breaks and the FMLA

- Per DOL: Rest breaks up to 20 minutes in length are ordinarily compensable because they "primarily benefit the employer."
- But 15-minute rest breaks requested by a doctor "predominantly benefit the employee" and therefore need not be paid.
- Note: employees covered by the FMLA must receive the same number of paid breaks as their co-workers.

Compensable Travel Time

- What counts as compensable working time under the FLSA when employees travel for work?
- Employer reported that its hourly technicians (who repair, inspect, and test cranes) do not work at a fixed location, but instead at different customer locations each day with no fixed daily schedule.
- Technicians may work up to 16 hours a day and may need to stay in a hotel overnight to complete the job in the morning.
- Company provides vehicles.

Compensable Travel Time

- Scenario 1: An employee travels by plane from home to another state on Sunday for a training course beginning Monday morning, and home again on Friday evening/Saturday morning after the course ends.
- General rules: travel away from home is worktime when it cuts across regular workday, and travel outside of regular workday spent as a passenger on an airplane, etc. is not worktime.
- How do you determine what travel time is compensable when employees do not have a regular work schedule?

Compensable Travel Time

1. Review time records for last month to pick typical work hours;
2. Use average start and end times; or
3. (in rare case where truly no normal work hours) Negotiate with employee.

Compensable Travel Time

Scenario 2: Hourly technician travels from home to home office to pick up itinerary, then travels to customer location.

Scenario 3: Hourly technicians drive from home to multiple different customer locations on any given day.

Compensable Travel Time

- Compensable work time generally does not include time spent commuting from home to work, even when the employee works at different job sites.
- Travel between job sites after arriving at work is compensable.
- Use of a company vehicle for commuting does not alone make an ordinary commute compensable.

Internships

- DOL had implemented a rigid six factor test, so that an intern at a for-profit company was an employee unless all six factors of the test were met.
- Jan. 2018: DOL announced it would use the 7-factor "primary beneficiary test" to determine if an unpaid intern is an employee.

1. The extent to which the intern and the employer clearly understand there is no expectation of compensation. Any promise of compensation, express or implied, suggests the intern is an employee—and vice versa.

Internships

2. The extent to which the internship provides training 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.

Internships

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
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.

DOL PAID Initiative

- Self-reporting initiative adopted by DOL as a 6-month pilot program starting April 3rd designed to facilitate early settlement of wage claims.
- Employer conducts self-audit, discloses violations to WHD, and with WHD's approval distributes back wages in exchange for waiver of rights under federal wage and hour laws.

DOL PAID Initiative: Potential Pitfalls

- What happens if an employee rejects the offer of reimbursement? Is the offer a red flag? Does the offer invite litigation?
- Aggrieved employees might find litigation a more appealing option for remediating the admitted violation due to the availability of class actions and potential recovery of liquidated damages and attorneys' fees.
- Analogous state law claims, some with longer limitations periods and more favorable remediies, are not waived.
- State AG's vow to fight the federal initiative.

Encino Motorcars, LLC v. Navarro

- Second trip to the U.S. Supreme Court
- Issue was whether service advisors employed by an auto dealership qualify for the FLSA exemption applicable to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles…"
- Court ruled that exemption applied since service advisors are "salesmen" responsible for selling services for vehicles and are integral to the servicing process.

Encino Motorcars, LLC v. Navarro

- The broader implication: Supreme Court rejects the principle that FLSA exemptions are to be construed narrowly in favor of a "fair reading" approach.
- This eliminates the "thumb on the scale" favoring a finding of non-exempt status in close cases.
- Whether this sea change in the approach to construing FLSA exemptions has any practical effect on outcomes remains to be seen.

Friedman v. National Indemnity Co. (D. Neb. 2018)

- "[A]s the Supreme Court has recently made clear, exemptions to the overtime requirement are to be given a 'fair reading' … That is, those exemptions are not to be construed narrowly. With that understanding in mind, the Court will consider whether Friedman qualifies for any, or all, of the overtime exemptions claimed by National Indemnity."

Friedman v. National Indemnity Co. (D. Neb. 2018)

- Agreed with employer that employee performed a combination of work generally reserved for highly-skilled computer employees pursuant to the "computer employee" exemption.

Friedman v. National Indemnity Co. (D. Neb. 2018)

Employee whose primary duty is:

A. the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

B. the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

C. the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

D. a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills.

Friedman v. National Indemnity Co. (D. Neb. 2018)

- Rejected employee's argument that he primarily performed simple tasks such as repairing computer hardware and equipment; and installing, testing, and troubleshooting networks and operating systems.
- Employee was responsible for designing employer's computer infrastructure and core network, which necessarily required completion of tasks like moving equipment and laying cables.

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