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General labour market and litigation trends

States enact laws banning employer inquiries into applicant salary history

Salary history laws prohibiting employers from inquiring about an applicant's compensation history during the hiring process have been sweeping across the nation. The theory behind these laws is that the gender pay gap is perpetuated when employers rely on compensation history as a factor in determining a new hire's starting pay. The salary history laws are therefore aimed at limiting pay inequality between men and women. *Don't Ask! Delaware Employees' Salary History is Now Off-Limits*, 22 No. 7 Del. Emp. L. Letter 2 (July 2017); *Oregon Legislature Passes Aggressive Equal Pay Law*, 23 No. 10 Or. Emp. L. Letter 1 (June 2017); *Salary Inquiries Are History in NYC: Employers Banned From Asking About Applicants' Pay*, 24 No. 5 N.Y. Emp. L. Letter 3 (May 2017).

Employers should remove any questions about salary history from their job application forms and inform employees involved in the interviewing and hiring process that they are not to ask applicants how much they earned in previous jobs. Employers would be well advised to review the salary history laws applicable to them to ensure they are in compliance.

EEOC's sex-based pay discrimination lawsuits

The Equal Protection Act of 1963 and Title VII of the Civil Rights Act of 1964 both prohibit compensation discrimination based on sex. *See* 42 U.S.C. § 2000e-2; 29 U.S.C. § 206. Ensuring equal pay for men and women by enforcing equal pay laws is one of six national priorities identified by the Equal Employment Opportunity Commission's (the "EEOC") Strategic Enforcement Plan for Fiscal Years 2017–2021. Executive Summary, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017–2021 (on file with author).

In September 2017, as part of its continuing effort to end gender-based pay discrimination, the EEOC initiated three lawsuits alleging wage discrimination against female employees. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files Three Lawsuits in D.C. Metro Area Charging Sex-Based Pay Discrimination (Sep. 27, 2017) (on file with author). The EEOC filed these lawsuits after its attempts at pre-litigation settlements through the conciliation process failed. *Id.*

On September 26, 2017, the EEOC brought a lawsuit in the United States District Court for the District of Washington, D.C., alleging that George Washington University paid a female executive assistant to the University's athletic director less than the University paid her male counterpart who performed substantially similar work. *EEOC v. Geo. Wash. U.*, No. 1:17-cv-01978 (D.D.C. Sep 26, 2017). The complaint further alleged that the University discriminated against the female executive assistant by "failing to provide her with

promotional opportunities, subjecting her to disparate terms and conditions of employment, and depriving her of employment opportunities and advancement because of her sex." *Id.*

In a second lawsuit brought on the same day in the same district court, the EEOC alleged that the National Association for the Education of Young Children ("the "NAEYC"), a professional membership organisation, paid a female associate editor at a lower rate than a male associate editor for performing the same work. *EEOC v. Nat'l Ass'n for the Educ. of Young Child.*, No. 1:17-cv-01989 01978 (D.D.C. Sep 26, 2017). The female associate editor with 30 years of editing and writing experience received a starting salary of $48,000, whereas her male counterpart with 21 years of editing experience received a starting salary of $56,000. *Id.* When the female worker brought the disparity to NAEYC's attention, the organisation refused to remedy the inequality. *Id*.

Finally, on September 27, 2017, in the United States District Court for the Eastern District of Virginia, the EEOC brought a lawsuit against Vador Ventures Inc., dba Total Quality Building Services ("Vador"), which provides janitorial services to commercial buildings. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files Three Lawsuits in D.C. Metro Area Charging Sex-Based Pay Discrimination (Sep. 27, 2017) (on file with author). In its suit against Vador, the EEOC alleged that a female janitorial worker was paid less than her male counterpart. *EEOC v. Vador Ventures, Inc. d/b/a Total Quality Bldg. Serv.*, No. 17-cv-01083-TSE-IDD, (E.D. Va. Sep. 27, 2017). The female worker was paid $11.40 per hour, whereas the male worker who had substantially equal duties was paid $13.10 per hour. *Id.* The complaint further alleged that when the female worker complained to her supervisor about the pay differential and asked for more money, she was fired in retaliation. *Id*.

The EEOC is seeking back pay, compensatory, punitive, and liquidated damages, in addition to injunctive relief to discontinue the discriminatory compensation practices. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Files Three Lawsuits in D.C. Metro Area Charging Sex-Based Pay Discrimination (Sep. 27, 2017) (on file with author). These three lawsuits demonstrate that sex-based compensation discrimination is a problem in a wide range of industries and that the EEOC is committed to fighting for equal pay for women across all socioeconomic groups.

Predictable scheduling laws across the nation

Major cities are increasingly passing predictable scheduling laws, also known as fair workweek measures, which are intended to afford employees in certain industries more predictable schedules and income stabilisation. Jay-Anne B. Casuga, *Last-Minute Schedule Changes? Some Cities Say Employers Must Pay*, Bloomberg BNA, (Dec. 2, 2016), https://www.bna.com/lastminute-schedule-changes-n73014447981/. Predictable scheduling laws primarily affect retail stores, restaurants, and the hospitality industry, as these businesses have unpredictable scheduling practices that leave their employees constantly uncertain about when they will be working. Predictive Scheduling Provides Shift Notice, Income Consistency, 23 No. 8 Or. Emp. L. Letter 3 (April 2017). These laws generally require that employers give their workers advance notice of their scheduled shifts. *Id.* Under many predictable scheduling laws, employers must compensate employees for schedule changes made after a stated deadline, which is referred to as "predictability pay". *Id.* Schedule changes include shift cancellations, shift reductions, as well as adjustments to the date or time of the scheduled shift. *Id.* Employers also must pay employees who are "on-call" for a shift but are not called in to work. *Id.*

San Francisco was the first to pass a predictable scheduling law, which went into effect in 2015. Laura A. Stutz and Maxine Neuhauser, *San Francisco California Retail Workers*

Bill Of Rights, The Nat'l L. Rev., July 8, 2015, *available at* https://www.natlawreview.com/article/san-francisco-california-retail-workers-bill-rights. Under San Francisco's Predictable Scheduling and Fair Treatment for Formula Retail Employees Ordinance, certain employers are required to give a written "good faith estimate" of an employee's "expected minimum number of scheduled shifts per month, and the days and hours of those shifts". S.F., Cal., Police Code art. 33G (2015). The law further requires employees to be given at least two weeks' notice of their schedules. *Id.*

On September 19, 2016, the Seattle City Council unanimously passed the Secure Scheduling Ordinance (the "SSO"), which went into effect July 1, 2017. Janet I. Tu, *Seattle's 'secure scheduling' rewrites work rules at stores, restaurants*, The Seattle Times, (July 2, 2017), https://www.seattletimes.com/business/retail/seattles-secure-scheduling-rewrites-work-rules-at-stores-restaurants/. Similar to San Francisco's law, the SSO requires certain employers to post employee schedules at least 14 days in advance. Seattle, Wash., C.B. 118765 (2016). The SSO also requires employers to pay employees for one additional hour when an employer increases an employee's scheduled hours. The SSO additionally mandates that employers offer qualified existing employees additional hours before hiring external employees, promoting full-time employment. *Id.* Further, the SSO allows employees to "request schedule preferences regarding times and location of work", and it protects employees' rights "to decline any hours not on the originally posted schedule". *Id.*

On May 30, 2017, New York City's Mayor Bill de Blasio signed into law the Fair Workweek legislation (the "Fair Workweek" laws). Aaron Warshaw and Nicole Welch, *What To Know About New NYC 'Fair Workweek' Laws*, Law 360 (June 21, 2017), https://www.law360.com/articles/936248/what-to-know-about-new-nyc-fair-workweek-laws.

Similar to other predictable scheduling laws, the Fair Workweek laws aim to ensure that employees in the retail and fast food industry receive predictable paychecks and work schedules. *Id.* Under the Fair Workweek laws, retail employers with 20 or more employees must provide a written work schedule at least 72 hours prior to the schedule beginning and notify an employee at least 72 hours prior to making changes to the schedule. Additionally, the Fair Workweek laws put an end to on-call scheduling in the retail industry. Press Release, Mayor de Blasio, Speaker Mark Viverito Announce That New York City Is The Largest City To End Abusive Scheduling Practices In The Fast Food And Retail Industries, The Official Website of the City of New York (May 30, 2017) (on file with author). Employers that violate the on-call ban will face a $500 or greater penalty for each employee affected or will be liable for the amount of actual damage the employee suffers. William R. Horwitz, *New York City Enacts Predictable Scheduling Law*, The Nat'l L. Rev., June 27, 2017, *available at* https://www.natlawreview.com/article/new-york-city-enacts-predictable-scheduling-law.

Under the Fair Workweek laws, certain fast food establishments may not require an employee to work two shifts within 11 hours of each other. However, the employer may do so if the employee is paid an additional $100 in compensation. Further, in order to provide greater access to working hours, regular or on-call shifts must be offered to current employees before hiring new employees or transferring employees from other locations. Aaron Warshaw and Nicole Welch, *What To Know About New NYC 'Fair Workweek' Laws*, Law 360 (June 21, 2017), https://www.law360.com/articles/936248/what-to-know-about-new-nyc-fair-workweek-laws.

Predictable scheduling laws such as the ones enacted in San Francisco, Seattle, and New York are important to workers who face unpredictable work schedules. Unpredictable work schedules have been found to be detrimental to employees and their families for

numerous reasons: (1) income instability; (2) difficulty arranging child care, elder care, and transportation; and (3) difficulty pursuing education or obtaining additional employment. S.F., Cal., Police Code art. 33G (2015); Press Release, Mayor de Blasio, Speaker Mark Viverito Announce That New York City Is The Largest City To End Abusive Scheduling Practices In The Fast Food And Retail Industries, The Official Website of the City of New York (May 30, 2017) (on file with author). Employers in the affected industries should familiarise themselves with these new predictable scheduling laws, which are likely to keep popping up across the nation.

Business protection and restrictive covenants

Defend Trade Secrets Act of 2016

The Defend Trade Secrets Act of 2016 ("DTSA"), which took effect on May 11, 2016, federalizes and strengthens trade secrets law. 18 U.S.C. § 1836. Under the DTSA, employers can now file civil lawsuits for trade secrets theft under the federal Economic Espionage Act ("EEA"). Prior to the enactment of the DTSA, prosecutors could bring criminal cases under the EEA for trade secrets misappropriation, but private civil cases had to be brought under State law. Now, for the first time, there is also federal jurisdiction over civil causes of action for trade secret misappropriation. The DTSA does not preempt State law; rather, the DTSA will exist alongside existing State laws. Employers can therefore pursue relief in either federal or State court.

The DTSA's *ex parte* seizure provision provides a new powerful tool in trade secret litigation. The provision allows a trade secret owner to ask the court for an *ex parte* seizure order to prevent the dissemination of a trade secret. 18 U.S.C. § 1836(b)(2). This extreme remedy gives a trade secret owner the right, "in extraordinary circumstances", to seize property of a competitor without providing any notice. *Id.* The court obtains custody of the property and is then required to hold a seizure hearing during which the party who obtained the seizure order has the burden to prove the facts underlying the order. *Id.* To prevent potential abuse of this procedure, the DTSA allows parties to seek damages if they are harmed by a "wrongful or excessive seizure". *Id.*

In addition to seizures, courts may grant other types of relief, including:

- an injunction;
- monetary damages, including damages for the actual loss suffered by the trade secret owner and unjust enrichment caused by the trade secret theft;
- "exemplary damages" if the misappropriation was willful and malicious; and
- reasonable attorney's fees to the prevailing party.

18 U.S.C. § 1836(b)(3).

However, if an employer did not provide notice of the DTSA's immunity provisions to the misappropriating employee, the employer cannot recover exemplary damages or attorney's fees. The immunity provisions, which allow employees in certain circumstances to avoid liability for the disclosure of a trade secret, should therefore be included in new or updated employment and independent contractor agreements. The provisions are as follows:

> (b) Immunity from liability for confidential disclosure of a trade secret to the Government or in a court filing.
>
> (1) Immunity – An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that–

(A) is made –

(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and

(ii) solely for the purpose of reporting or investigating a suspected violation of law; or

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

(2) Use of trade secret information in anti-retaliation lawsuit – An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual –

(A) files any document containing the trade secret under seal; and

(B) does not disclose the trade secret, except pursuant to court order.

18 U.S.C. § 1833(b).

DOJ and FTC issue *Antitrust Guidance for Human Resource Professionals*

On October 20, 2016, the Department of Justice Antitrust Division (the "DOJ") and the Federal Trade Commission (the "FTC") released guidance to inform human resource ("HR") specialists how antitrust laws apply in the employment context. *See* Department of Justice Antitrust Division & Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October 2016), *available at* https://www.justice.gov/atr/file/903511/download. The guidance advised that HR professionals should not enter into agreements with competing firms concerning terms of employment. *Id.* at 3. Specifically, naked wage-fixing and no-poaching agreements are illegal under the antitrust laws. *Id.* The guidance states:

"An individual likely is breaking the antitrust laws if he or she:

- agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements), or
- agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called 'no-poaching' agreements)." *Id.*

The DOJ and FTC announced in the guidance that for the first time the DOJ is going to proceed criminally against naked wage-fixing and no-poaching agreements. *Id.* at 4. This decision reflects that these agreements hinder competition in the same way as agreements to fix prices or allocate customers, which have traditionally been subject to criminal prosecution. *Id.* In light of this guidance, it is important that HR professionals review their companies' practices and existing agreements to ensure they are in compliance with the antitrust laws.

It is important to note though that wage-fixing and no-poaching agreements can still be lawful when they are not "naked restraints" on competition. A "naked restraint" is generally an agreement that serves no purpose other than to hamper competition. *Id.* at 3. An "ancillary restraint", on the other hand, has a legitimate business purpose and, therefore, would likely not be criminally prosecuted. For example, restraints on trade made in pursuit of a legitimate commercial interest, such as a merger or acquisition, would be considered ancillary, rather than naked restraints on trade.

Discrimination protection

Sexual orientation discrimination

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex. 42 U.S.C. § 2000e-2. While Title VII does not explicitly include sexual orientation as a protected class, the Equal Employment Opportunity Commission (EEOC) has taken the position that sexual orientation discrimination is sex discrimination under Title VII. *See Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015). Despite the EEOC's position, courts have been reluctant to hold that sexual orientation discrimination is prohibited under the law. On April 4, 2017, the Seventh Circuit became the first circuit court to hold that Title VII prohibits sexual orientation discrimination. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

Plaintiff Kimberly Hively filed a complaint against Ivy Tech Community College, alleging she was denied full-time employment and promotions because she is a lesbian. The United States District Court for the Northern District of Indiana granted Ivy Tech's motion to dismiss on the ground that Title VII does not cover sexual orientation discrimination. *Hively v. Ivy Tech Community College*, No. 3:14-cv-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015). On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's decision, holding that claims for sexual orientation discrimination are not cognisable under Title VII. *Hively v. Ivy Tech Community College, South Bend*, 830 F.3d 698 (7th Cir. 2016). Hively's petition for an *en banc* rehearing was granted, and the Seventh Circuit, sitting *en banc,* reversed the district court's decision. *Hively*, 853 F.3d at 341.

In an 8-3 decision written by Chief Judge Diane Woods, the court finally held that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes." *Id.* at 351-52. The court accepted both of Hively's approaches in reaching its holding: (1) "the tried-and-true comparative method in which we attempt to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?" and (2) the associational theory, based on the *Loving v. Virginia* line of cases, "protect[s] her right to associate intimately with a person of the same sex." *Id.* at 345. Judge Woods also raised the EEOC's 2015 announcement of its view that sexual orientation constitutes sex discrimination, describing the EEOC as "the agency most closely associated with [Title VII]".

Hively is a landmark decision for the LGBT community. While Title VII sex discrimination claims have been fairly successful for LGBT plaintiffs when the harassment alleged is based on the plaintiff's noncompliance with gender stereotypes, the Seventh Circuit is the first circuit to explicitly hold that sex discrimination encompasses sexual orientation discrimination. With the resultant circuit split, the issue of sexual orientation discrimination will likely be before the Supreme Court in the near future.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

Over-broad no-recording policies violate the NLRA

On June 1, 2017, the United States Court of Appeals for the Second Circuit affirmed a National Labor Relations Board (the "NLRB") finding that Whole Foods' over-broad no-recordings policies violated the National Labor Relations Act (the "NLRA"). *See Whole*

Foods Mkt. Grp., Inc. v. NLRB, 691 F. App'x 49 (2d. Cir. 2017). Section 7 of the NLRA protects an employee's right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Further, Section 8(a)(1) of the NLRA prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of" their guaranteed Section 7 rights. 29 U.S.C. § 158(a)(1). An employer's policy or rule amounts to an unfair labour practice in violation of Section 8(a)(1) if the policy or rule "tends to chill" employees' rights to engage in protected concerted activity. *See Whole Foods Mkt. Grp.,* 691 F. App'x at 51.

Whole Foods distributed to its employees a General Information Guide that contained two policies prohibiting recording at work without management approval. *Whole Foods Mkt., Inc.*, 363 N.L.R.B. 87 (2015). The first policy, which appeared under the heading "Team Meetings", provided: "It is a violation of Whole Foods Market policy to record conversations, phone calls, images or company meetings with any recording device . . . unless prior approval is received from your Store/Facility Team Leader, Regional President, Global Vice President or a member of the Executive Team, or unless all parties to the conversation give their consent." *Id.* The second policy appeared under the heading, "Team Member Recordings", and provided: "It is a violation of Whole Foods Market policy to record conversations with a tape recorder or other recording device (including a cell phone or any electronic device) unless prior approval is received from your store or facility leadership . . . ." *Id.*

On appeal, the Second Circuit applied the *Lutheran Heritage* test, under which a policy that does not explicitly restrict employees' protected activity can still violate the NLRA if: "(1) employees would reasonably construe the language to prohibit [protected] activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of [protected] rights." *Id.* As the parties agreed the policy was not implemented in response to union activity or applied to restrict protected activity, the focus was on whether the no-recording policy violated the "reasonably construe" standard. *Id.*

Under this test, the Second Circuit found that the no-recording policies' language was over-broad and could "chill" an employee's exercise of his rights protected under Section 7 of the NLRA. *Id*. An employee would reasonably conclude that the policies banned even protected activities since the no-recording policies prohibited all recordings, without limiting the prohibition to "those activities in which employees are not acting in concert." *Id*. The Second Circuit unanimously rejected Whole Foods' argument that its no-recording policies were implemented to promote candid communication by assuring employees their statements would not be recorded. *Id*.

Although the court found Whole Foods' no-recording policies unlawful for their over-broad language, the court did not reject every no-recording policy. In a footnote, the Second Circuit stated that employers should be able "to craft a policy that places some limits on recording audio and video in the work place" without violating the NLRA. *Id*. at 51 n.1 ("Whole Foods' interest in maintaining such [no-recording] policies can be accommodated simply by their narrowing the policies' scope.") Therefore, companies can craft policies that pass muster with the courts by narrowly tailoring their no-recording policies to prohibit the recording only of information that is not protected under the NLRA, such as information about vendors or suppliers.

<u>President Trump signs Whistleblower Protection Act into law</u>

On October 26, 2017, President Trump signed the Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017 (the "Protection Act") into law. Dr. Chris Kirkpatrick Whistleblower

Protection Act of 2017, Pub. L. No. 115-73, 131 Stat. 1235. The Protection Act was introduced by Wisconsin Senator Ron Johnson after Dr. Chris Kirkpatrick committed suicide the day he was fired from the Department of Veteran Affairs Medical Center for questioning "the over-prescription of opioids to veterans". Press Release, Johnson, Ernst Whistleblower Protection Bill Signed by President (Oct. 26, 2017) (on file with author). The Senate Homeland Security and Governmental Affairs Committee (the "Committee") conducted a 16-month investigation into the "mistreatment of veterans and retaliation against whistleblowers". Press Release, Chairman Johnson Releases 359-Page Report Detailing Committee Investigation Into The Tomah VA Tragedies (May 31, 2016) (on file with author). The Committee determined that the Department of Veteran Affairs systematically failed to address employee concerns regarding "mismanagement at the facility" and the retaliation against whistleblowers for questioning particular practices, which resulted in "multiple tragedies." *Id*.

The Protection Act expands current whistleblower protections for federal employees by increasing awareness of the available whistleblower protections and strengthening disciplinary actions for those supervisors who retaliate against whistleblowers. Dr. Chris Kirkpatrick Whistleblower Protection Act of 2017, Pub. L. No. 115-73, 131 Stat. 1235.

Specifically, the Protection Act requires federal agencies to:

1. "[R]efer to the Special Counsel . . . any instance . . . an employee of the agency commit[s] suicide;
2. provide training regarding how to respond to complaints alleging a violation of whistleblower protections;
3. [provide] information regarding whistleblower protections available to new employees during the [employee's] probationary period;
4. [inform employees of] the role of the Office of Special Counsel and the Merit System Protection Board with regard to whistleblower protections; and
5. make available information regarding whistleblower protections applicable to employees of the agency on the [agencies] public website." *Id*.

Although these expansions to existing whistleblower protections are quite new, it is clear that violators of the Protection Act will face greater penalties than before and the protections will be increasingly transparent.

EEOC issues final rule on Affirmative Action for Individuals with Disabilities in Federal Employment

On January 3, 2017, the Equal Employment Opportunity Commission (the "EEOC") issued its final rule ("Final Rule") on affirmative action for individuals with disabilities in federal employment. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Issues Regulations on the Federal Government's Obligation to Engage in Affirmative Action for People with Disabilities (Jan. 3, 2017) (on file with author). The Final Rule revises the regulations implementing Section 501 of the Rehabilitation Act of 1973 ("Section 501"), which is a civil rights law that prohibits employment discrimination based on disability in the federal sector, and further requires federal agencies to establish affirmative action plans for individuals with disabilities. U.S. Equal Employment Opportunity Commission, *Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, *available at* https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm. The EEOC issued this Final Rule to explain what "affirmative action" means under Section 501 and to improve employment opportunities for individuals with disabilities in the federal sector. ***Id.***

The EEOC's rule codifies various existing obligations mandated by management directives and Executive Orders and imposes two additional affirmative action requirements on federal agencies. Affirmative Action for Individuals With Disabilities in Federal Employment, 82 Fed. Reg. 654 (Jan. 3, 2017). First, the rule mandates that federal agencies take steps that are reasonably designed to increase the number of employees who have disabilities in order to meet the goals set by the EEOC. *Id.* The Final Rule set a 12% representation rate goal for individuals with disabilities, which are defined broadly, and a 2% representation rate goal for individuals with "targeted disabilities", which are those disabilities that most substantially impede employment, such as blindness, deafness, paralysis, convulsive disorders, and mental illnesses. *Id.*

Second, the rule requires federal agencies to provide personal assistance services to disabled employees, which are non-medical services that help with the performance of daily living activities, such as "assistance with removing and putting on clothing, eating, and using the restroom". *Id.* Agencies are only required to provide these services if, with their help, the disabled employee is able to perform his job up to normal standards. U.S. Equal Employment Opportunity Commission, *Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, *available at* https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm. Through these personal assistance services, the EEOC not only aims to allow disabled individuals to enjoy the benefits of paid employment, but also hopes to decrease the amount of taxes needed to fund disability benefits. *Id.*

The Final Rule became effective on March 6, 2017. Affirmative Action for Individuals With Disabilities in Federal Employment, 82 Fed. Reg. 654 (Jan. 3, 2017). The EEOC recognizes, however, that federal agencies need time to come into compliance and has therefore provided until January 3, 2018 for agencies to make "any necessary changes in policy, staff, or other aspects of their operations". *Id.* Note that the Final Rule only applies to federal agencies, and neither private sector employers nor state or local governments need to comply with the new rule. *Id.* Private employers, however, are covered by the Americans with Disabilities Act (ADA), which prohibits employers with 15 or more employees from discriminating on the basis of disability, but the ADA does not require employers to engage in affirmative action. U.S. Equal Employment Opportunity Commission, *Questions and Answers: The EEOC's Final Rule on Affirmative Action for People with Disabilities in Federal Employment*, *available at* https://www.eeoc.gov/laws/regulations/qanda-ada-disabilities-final-rule.cfm.

Employee privacy

Workplace drug testing expanded to include testing for opioids

The Department of Health and Human Services' federal mandatory guidelines for drug testing in the workplace have been revised to include testing for four semi-synthetic opioids: oxycodone, oxymorphone, hydrocodone, and hydromorphone. Press Release, SAMHSA, Mandatory Guidelines for Urine Testing Updated to Include Four Semi-Synthetic Opioids (Sept. 29, 2017). These prescription pain medications, more commonly known by their brand names such as OxyContin, Vicodin, Percocet, Dilaudid, are frequently abused and taken without doctor approval. *Id.*

These new mandatory guidelines, which became effective on October 1, 2017, cover all federal employees who work in "testing designated positions", as defined by each federal agency's Drug-Free Workplace Program. *Id.* The Substance Abuse and Mental Health

Services Administration reported that positive test results that have a valid medical explanation will not be reported to federal agencies. *Id.*

Other recent developments in the field of employment and labour law

Federal judge strikes down Obama's Overtime Rule

On August 31, 2017, a federal judge in Texas invalidated an Obama administration rule that would have made over four million currently exempt employees eligible for overtime pay. *U.S. Judge Strikes Down Obama Administration Overtime Pay Rule*, 32 Westlaw Journal Employment 2 (Sept. 12, 2017). The case was heard by Judge Amos Mazzant of the United States District Court for the Eastern District of Texas. *Nevada v. United States Department of Labor*, No. 16-cv-731, 2017 WL 3837230 (E.D. Tex. Aug. 31, 2017).

The rule primarily updated the salary and compensation levels used to determine whether executive, administrative, and professional employees are exempt from the Fair Labor Standards Act's (the "FLSA") overtime pay protections. United States Department of Labor, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act*, *available at* https://www.dol.gov/WHD/overtime/final2016/. Specifically, the rule:

1. "Set[] the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage Census Region, currently the South ($913 per week; $47,476 annually for a full-year worker);
2. set[] the total annual compensation requirement for highly compensated employees (HCE) subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and
3. establishe[d] a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption." *Id.*

In addition, the rule "amend[ed] the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level." *Id.*

Judge Mazzant held that the Department of Labor exceeded its authority in promulgating the rule. The court explained that by setting the salary threshold at a level so high, the Department "essentially ma[d]e an employee's duties, functions, or tasks irrelevant if the employee's salary f[ell] below the new minimum salary level." *Nevada*, 2017 WL 3837230, at *8. It was Congress' intent, however, that an employee's duties should determine exempt status and that employees with executive, administrative, and professional employees should not be eligible for overtime. *Id.* The Department's rule made "overtime status depend predominantly on a minimum salary level, thereby supplanting an analysis of an employee's job duties". *Id.*

The Department of Justice is appealing Judge Mazzant's decision to the U.S. Court of Appeals for the Fifth Circuit. United States Department of Labor, *Important Information Regarding Recent Overtime Litigation in the U.S. District Court of Eastern District of Texas*, *available at* https://www.dol.gov/whd/overtime/final2016/litigation.htm. In addition, on October 30, 2017, the Department of Labor announced it will be commence new rulemaking with regard to overtime. United States Department of Labor, *Department of Labor Provides Update on* Overtime, *available at* https://www.dol.gov/newsroom/releases/osec/osec20171030. For now, the annual salary cutoff for overtime pay remains at $23,660 ($455 per week).

DOL withdraws pro-employee guidance on joint employment and independent contractors

On June 7, 2017, U.S. Secretary of Labor Alexander Acosta announced that the Department of Labor had withdrawn two of its recent administrator interpretations on joint employment and independent contractor status. United States Department of Labor, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance*, *available at* https://www.dol.gov/newsroom/releases/opa/opa20170607.

In Administrator's Interpretation ("AI") No. 2015-01, which was released in July 2015, the Department took an expansive view of "employment" and announced that "[M]ost workers are employees under the FLSA's broad definitions," rather than independent contractors. *DOL Withdraws Guidance on Joint Employment, Independent Contractors*, 14 No. 11 Fed. Emp. L. Insider 4 (July 2017). AI No. 2016-01, released in January 2016, provided the factors courts should look to when determining joint employment in the context of the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act. In this AI, the Department similarly took the view that the concept of joint employment should be defined broadly, increasing the ability for a worker to be considered an employee of two or more employers. *Id.*

In retracting its interpretive guidance, the Department noted that "[R]emoval of the administrator interpretations does not change the legal responsibilities of employers under the Fair Labor Standards Act and the Migrant Seasonal Agricultural Worker Protection Act, as reflected in the department's long-standing regulations and case law." United States Department of Labor, *US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guidance*, *available at* https://www.dol.gov/newsroom/releases/opa/opa20170607. Nonetheless, employers around the U.S. are rejoicing, as the Department's withdrawal of the 2015 and 2016 AIs sends a message that under the Trump administration, the Department will take a more pro-business stance to employment law issues. *DOL Withdraws Guidance on Joint Employment, Independent Contractors*, 14 No. 11 Fed. Emp. L. Insider 4 (July 2017).

Minimum wage for federal contractors

The Department of Labor released the 2018 minimum wage rate for federal contractors as required by Executive Order 13658, "Establishing a Minimum Wage for Contractors". *Federal Contractors' Minimum Wage Goes Up to $10.35, Over $3 More Than Federal Standard Hourly Wage*, 41 No. 23 Construction Contracts Law Report NL 1 (Nov. 10, 2017). Executive Order 13658, signed by President Obama on February 12, 2014, set the minimum wage for federal government contractors' employers at $10.10 per hour for 2015 and requires the Department of Labor to adjust for inflation each year in determining the minimum wage. *Id.*; 29 C.F.R. § 10.5.

Effective January 1, 2018, the minimum wage for federal contractors will increase to $10.35 per hour. *Federal Contractors' Minimum Wage Goes Up to $10.35, Over $3 More Than Federal Standard Hourly Wage*, 41 No. 23 Construction Contracts Law Report NL 1 (Nov. 10, 2017). Employers, of course, must consult applicable state laws before setting these workers' wages, as state law may require higher hourly rates of pay.

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