March 22, 2018

Employment Law Year in Review

This memorandum highlights what we believe were the most significant legal developments and trends affecting employers and the employment relationship during the period since our last year-in-review memorandum, available here. The Supreme Court decisively narrowed the scope of whistleblower protections under the Dodd-Frank Act, and heard oral argument on whether employers may require employees to agree to class and collective action waivers in employment agreements. Late in 2017, once President Trump's nominees were in place, the National Labor Relations Board ("NLRB") set about overturning Board precedents relevant to the non-union workplace. The executive branch took steps to halt or narrow several Obama Administration policies, including federal overtime regulations and pay data reporting requirements. On the local level, New York City enacted a sweeping salary history ban and New York State required all employers to provide paid family leave effective January 1, 2018.

This memorandum is aimed at keeping our clients and practitioners informed of key regulatory and other legal developments in areas affecting the employment relationship. We encourage you to contact us if you have any questions about the information and analysis presented in this memorandum or how the developments and trends we highlight may be relevant to your organization. Please follow our blog for ongoing developments in this space.

I. DEVELOPMENTS AT THE SUPREME COURT

Bottom Line: Supreme Court holds in *Digital Realty Trust, Inc.* v. *Somers* that Dodd-Frank Act only protects whistleblowers who report to the SEC and not those who exclusively report internally; clarifies in *McLane* v. *EEOC* by holding that a district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion; heard oral argument in *Epic Systems Corp.* v. *Lewis* regarding whether class-action and collective-action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act; and declined to grant certiorari to address whether Title VII prohibits discrimination on the basis of sexual orientation.

A. SUPREME COURT HOLDS IN *DIGITAL REALTY TRUST, INC.* V. *SOMERS* THAT DODD-FRANK ACT'S WHISTLEBLOWER PROVISIONS COVER PERSONS WHO REPORT CONCERNS TO THE SEC, NOT THOSE WHO EXCLUSIVELY REPORT INTERNALLY. (FEBRUARY 2018)

On February 21, 2018, the Supreme Court issued a decision in a case heard in 2017, *Digital Realty Trust, Inc.* v. *Somers*, 583 U.S. __, No. 16-1276 (Feb. 21, 2018). The Court held that the Dodd-Frank Act's definition of a "whistleblower" is "unambiguous" and "unequivocal": it means "any individual who provides . . . information relating to a violation of the securities laws *to the Commission*." The Court held, in accordance with that definition, that the Dodd-Frank Act's anti-retaliation provision—which prohibits employers from retaliating against "whistleblowers" for each of three types of "lawful act[s]"—provides a private cause of action only for persons who report suspected wrongdoing directly to the SEC, and not for persons who report exclusively to their employers internally.

The decision resolved a conflict in the courts of appeals, which had split over the question of whether the portion of the anti-retaliation provision, which protects "whistleblowers" who made "disclosures that are required or protected under . . . any . . . law, rule or regulation subject to the jurisdiction of the Commission," also protected individuals who made internal complaints about possible violations of securities laws. The Court explicitly declined to extend deference to SEC Rule 21F-2, in which the Commission had taken the position that persons reporting internally may bring causes of action under Dodd-Frank as whistleblowers: "The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term."

The immediate effect of the decision will be dismissal of pending claims under the Dodd-Frank Act's whistleblower provisions brought by individuals who did not report alleged violations to the SEC. Such individuals do not have claims under Dodd-Frank; however, they may well have claims under the Sarbanes-Oxley Act, which explicitly protects individuals who report concerns internally from retaliation for having done so. But because the Court observed that Dodd-Frank permits the SEC to define the "manner" in which information may be reported to the SEC by a whistleblower. In response to this decision, the SEC may adopt a broader definition of the manner in which information can be reported to it, such as providing testimony to the SEC or turning over information to the SEC in an indirect fashion. Our memorandum on the decision may be found here.

B. SUPREME COURT HOLDS IN *MCLANE CO.* V. *EEOC* THAT APPELLATE REVIEW OF DISTRICT-COURT DECISIONS ON ENFORCEABILITY OF EEOC SUBPOENAS IS LIMITED TO DEFERENTIAL, ABUSE-OF-DISCRETION STANDARD. (APRIL 2017)

On April 3, in *McLane Co.* v. *EEOC*, 137 S. Ct. 1159 (2017), the U.S. Supreme Court held that "a district court's decision to enforce an EEOC subpoena should be reviewed for abuse of discretion, not *de novo*." The Court emphasized that "the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena," such as those issued by the EEOC or NLRB, "is to review that decision for abuse of discretion." That is because the enforceability of

administrative subpoenas turns on "case-specific" factors of relevance and burden, which are "well suited to a district judge's expertise."

As part of its authority to investigate charges of discrimination, the EEOC has the power to subpoena "the attendance and testimony of witnesses or the production of any evidence." An employer may petition the EEOC to revoke a subpoena, but if the EEOC rejects the petition and the employer refuses to comply with the subpoena, the EEOC may seek an order from a district court to have the subpoena enforced. District courts generally will enforce an EEOC subpoena if the subpoena seeks material "relevant" to the charge, and the subpoena is not "too indefinite," not issued for an "illegitimate purpose," and not unduly burdensome.

The Court's decision resolved the split among circuit courts over the standard of review that applies to the enforceability of EEOC subpoenas: "[a]lmost every Court of Appeals reviews such a decision for abuse of discretion," while "the Ninth Circuit alone applies a more searching form of review." The Court's ruling ensures that all circuit courts will apply "the same deferential review to a district court's decision as to whether to enforce an EEOC subpoena." Our post on the decision may be found here.

C. SUPREME COURT HEARS ORAL ARGUMENT REGARDING ENFORCEABILITY OF CLASS ARBITRATION WAIVERS. (OCTOBER 2017)

On Monday, October 3, 2017, the Supreme Court heard consolidated oral argument in the closely watched consolidated cases *Epic Systems Corp.* v. *Lewis*, No. 16-285, *Ernst & Young LLP* v. *Morris*, No. 16-300, and *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307, which present the question of whether class-action and collective-action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (the "FAA"), or are not enforceable because they violate the National Labor Relations Act ("NLRA"), which gives employees the right to "engage in concerted action for mutual aid or protection." The Department of Justice joined the argument in support of the employers, and the NLRB argued in support of the employees.

At argument, Chief Justice Roberts, Justice Kennedy, and Justice Alito appeared to agree with the employers' and DOJ's position that employment arbitration agreements with class waivers do not violate the NLRA. Justice Kennedy suggested that employees could still act "in concert" by hiring one attorney to represent them in individual arbitrations and sharing information with that attorney to use across the cases. Certain Justices were puzzled by the NLRB's argument that employment agreements mandating dispute resolution in a particular forum, even if that forum did not permit class or collective actions, were distinguishable from agreements with mandatory waivers no matter the forum. Chief Justice Roberts said that he could not "understand how that is consistent with your position that" employers cannot require employees to waive the right to class or collective arbitration. Chief Justice Roberts also expressed concern that if the Court found these agreements to be unlawful, approximately 25 million employment agreements would be invalidated.

Justices Ginsburg, Breyer, Sotomayor, and Kagan appeared to favor the employees' and NLRB's position that employee arbitration agreements with class waivers violate the NLRA. Justice Ginsburg noted that, because many individual employment claims involve relatively modest amounts, employees may be unable to find an attorney willing to pursue their claims unless they can join their claims together in a class or collective proceeding. And Justice Kagan said that, under the NLRA, "employers can't demand as conditions of employment the waivers of concerted rights."

The outcome of these cases is likely to be closely divided. Neither Justice Thomas nor Justice Gorsuch—two of the Court's more conservative members—asked any questions. If they align themselves with Chief Justice Roberts, Justice Kennedy, and Justice Alito, then the Court may hold that class and collective action waivers in employment arbitration agreements do not violate the NLRA. The Court will issue a decision by June 2018. Our post on the oral argument may be found here.

D. SUPREME COURT DECLINES TO RESOLVE CIRCUIT SPLIT REGARDING WHETHER SEXUAL ORIENTATION IS A PROTECTED CHARACTERISTIC UNDER TITLE VII. (DECEMBER 2017)

On December 11, 2017, the Supreme Court denied certiorari in *Evans* v. *Georgia Regional Hospital*, which presented the question of "[w]hether the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination 'because of . . . sex' encompasses discrimination based on an individual's sexual orientation."

Since that denial of certiorari, the circuit split over this question has deepened. In February of this year, the Second Circuit joined the Seventh Circuit in overturning its precedent to hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex." *See Zarda* v. *Altitude Express, Inc.*, No. 15-3775 (2d Cir. Feb. 26, 2018) (*en banc*); *Hively* v. *Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017). All other courts of appeals to consider the question have held that sexual orientation discrimination is not prohibited by Title VII. The *Hively* majority wrote that "the common sense reality [is] that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," and that "the time has come to overrule our previous cases that have endeavored to find and observe that line." Our post on the *Zarda* decision is available here.

The question has also divided the U.S. government. In *Zarda*, the EEOC argued on behalf of the employee, while the Department of Justice argued on behalf of the employer. The EEOC has taken the position that Title VII's prohibition against sex discrimination includes discrimination on the basis of sexual orientation. As a result, courts have struggled with the question of whether allegations of discrimination or harassment brought on the basis of sexual orientation could be actionable under the rubric of gender stereotyping, cognizable under Title VII. Our post on the circuit and government split is available here.

II. STATUTORY AND REGULATORY DEVELOPMENTS

Bottom Line: Tax reform bill eliminates deduction for sexual harassment and abuse settlements with non-disclosure requirements; federal overtime regulations that substantially increased salary thresholds for the white collar exemption remain in limbo; and Trump Administration stays EEOC rule requiring additional pay data reporting on employer form EEO-1.

A. TAX REFORM BILL ELIMINATES DEDUCTION FOR SEXUAL HARASSMENT AND ABUSE SETTLEMENTS REQUIRING NONDISCLOSURE. (DECEMBER 2017)

On December 20, 2017, Congress passed a comprehensive tax reform bill (the "Act") that added to the Internal Revenue Code a Section 162(q), which eliminates the deductibility of amounts paid in connection with settlement of sexual harassment and abuse claims if the settlement agreement requires nondisclosure on the part of the employee.

Section 162(q) reads in full: "(q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—No deduction shall be allowed under this chapter for—(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment." The provision applies to amounts paid after January 1, 2018.

The Act leaves several questions unanswered that will need to be resolved by the courts and the Internal Revenue Service. *First*, what is a claim related to "sexual harassment" or "sexual abuse"? The Act does not define either term. *Second*, settlement agreements often include releases of any and all claims the employee may have had against the employer, including but not limited to sex-based claims. The settlement payment is consideration for the release of all such claims, not just the sex-based claims. Can the harassment-based piece be separated and excluded from an overall non-disclosure covenant and satisfy the provision, preserving the non-disclosure commitment otherwise? That way, at least part of the payment—if such quantification is permissible under the Act—may be deductible. *Third*, what attorney's fees are "related to such a settlement or payment," and, thus, non-deductible? Is it only the fees related to negotiating a settlement, drafting an agreement, and executing payment? May an employer deduct fees incurred in investigating the underlying claims or evaluating the settlement value of a case?

Our article summarizing the provision and addressing its possible unintended consequences may be found here.

B. FEDERAL WHITE COLLAR OVERTIME REGULATIONS REMAIN IN LIMBO (JULY & NOVEMBER 2017)

On July 26, 2017, the U.S. Department of Labor issued a Request for Information ("RFI") inviting comments on the 2016 revisions to the white collar exemption regulations. In particular, the RFI sought comments on 11 questions, which the DOL broadly summarized as concerning the salary level test, *i.e.*,

"whether the standard salary level set in that rule effectively identifies employees who may be exempt, whether a different salary level would more appropriately identify such employees, the basis for setting a different salary level, and why a different salary level would be more appropriate or effective." More than 140,000 public comments were received. Our post on the RFI is available here.

By way of recap, in May 2016 the DOL issued new regulations, originally scheduled to take effect on December 1, 2016, substantially raising the salary threshold from $455 per week ($23,660 per year) to $913 per week ($47,476 per year). The regulations were temporarily enjoined on a nationwide basis by a federal district judge. *Nevada* v. *U.S. Dep't of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016). In a June 30, 2017 brief filed in the case, the Trump Administration's DOL "decided not to advocate for the specific salary level ($913 per week) set in the 2016 Final Rule" and stated that it intends "to undertake further rulemaking to determine what the salary level should be." The RFI does not start the process of formal rulemaking. Rather, the DOL specifically states that it "decided to issue this RFI rather than proceed immediately to a notice of proposed rulemaking."

On August 31, 2017, Judge Mazzant permanently enjoined the regulations, declaring them "invalid." *Nevada* v. *U.S. Dep't of Labor*, 275 F. Supp. 3d 795 (E.D. Tex. 2017). Judge Mazzant concluded that "[t]he Department has exceeded its authority and gone too far" with its 2016 overtime exemption regulations. *Id.* at 807. "Congress defined the ["white collar"] exemption with regard to duties," but the 2016 regulations "more than double[] the previously minimum salary level," which "makes overtime status depend predominantly on a minimum salary level, thereby supplanting an analysis of an employee's job duties." *Id.* at 805-06. "[T]he Department does not have the authority to use a salary level test that will effectively eliminate the duties test as prescribed by Section 213(a)(1)." *Id.* at 805. In a footnote, the court offered the caveat that its "opinion is not making any assessments regarding the general lawfulness of the salary-level test or the Department's authority to implement such a test." *Id.* at 805 n.6. Rather, it merely found the salary levels set in the Department's 2016 regulations to be invalid. The court "suggested it would be permissible if the Department adjusted the 2004 salary level for inflation." *Id.* at 807 n.6.

On October 30, 2017, the DOL appealed Judge Mazzant's permanent injunction, and then on November 3, 2017 asked the Fifth Circuit to "hold this appeal in abeyance pending the outcome of new rulemaking." The Fifth Circuit granted the unopposed motion on November 6. Our post on Judge Mazzant's decision may be found here.

C. EEO-1 PAY DATA REPORTING REQUIREMENTS STAYED. (AUGUST 2017)

In September 2016, the EEOC finalized a rule that would have required employers with 100 or more employees to collect and submit pay data on their employer information report, known as the EEO-1, beginning in 2018. The current EEO-1 only collects data about gender, race and ethnicity by job category. The revised form would have required employers to provide that information with (i) summary

pay data, i.e., a reporting of the total number of full- and part-time employees by demographic and job category in each of 12 pay bands; and (ii) the number of hours worked by employees in each pay band. According to the EEOC, the additional data was intended to improve its investigations in pay discrimination based on gender, race and ethnicity. Our post on the pay data requirements is available here.

This rule was considered a likely target for revocation by the recomposed EEOC; in March 2017, Victoria Lipnic, a Republican commissioner who had opposed the new data rule, was named EEOC Acting Chair. On August 29, prompted by Lipnic, as well as by various U.S. senators, the White House's Office of Management and Budget indefinitely stayed the rule's implementation. It stated in its Memorandum to the EEOC that the decision was based on concerns that the regulation does not comply with the Paperwork Reduction Act, as well as concerns "that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

The OMB asked the EEOC to submit a new proposal for the information to be collected for the EEO-1 form. The EEOC may provide more information to justify the original approach in its revised submission, it may abandon the effort entirely, or it may propose a modified level of pay data reporting. Acting Chair Lipnic has stated that she considered the rule overly burdensome to employers.

The EEO-1 reporting requirements as to gender, race and ethnicity by job category remain in effect; employers must file their reports for 2017 by March 31, 2018.

On June 29, 2017, President Trump announced the nomination of Janet Dhillon, the general counsel of Burlington Stores Inc. and former general counsel of US Airways and J.C. Penney, to the EEOC. Ms. Dhillon's nomination has not yet been voted on by the Senate. The term of one of the Democratic members, Jenny Yang, expired in 2017, as well. President Trump has not nominated a replacement for Commissioner Yang. Democrats currently hold a 2-1 majority on the five-member EEOC, so Ms. Dhillon's confirmation, as well as the nomination and confirmation of another Republican appointee, would alter the Commission's partisan balance. The position of EEOC general counsel also remains vacant.

III. NLRB PRECEDENTS IN FLUX.

Bottom Line: By September 2017, the NLRB had a Republican majority and began rolling back Obama-era precedents. But Chairman Philip Miscimarra's term expired on December 16, 2017, leaving the Board evenly split between Democrats and Republicans. President Trump nominated John Ring to take the fifth seat in January 2018 and he is expected to be confirmed this month.

A. *BROWNING-FERRIS* JOINT-EMPLOYER STANDARD REVERSED, BUT SUBSEQUENTLY REINSTATED. (DECEMBER 2017)

On December 14, 2017, in *Hy-Brand Industrial Contractors, Ltd. et al.*, 362 NLRB 186 (2017), the NLRB overturned *Browning-Ferris Industries*, 362 NLRB 186 (2015), in which the Board abandoned its long-standing test that an entity must both possess and exercise direct control over employees' terms and conditions of employment in order to be considered a joint employer and, thus, be required to bargain with a union. The *Browning-Ferris* standard provided that a joint-employer relationship may be found merely based on the putative joint employer's right to control terms and conditions of employment, irrespective of whether such control is directly exercised or exercised at all. The *Hy-Brand* decision returned Board precedent to the long-standing joint-employer standard that was in place prior to *Browning-Ferris*; under that standard, two entities may be considered joint employers if each exercises "direct and immediate" control over the terms and conditions of employment. In its decision, the Board said that the reinstated standard "has served labor law and collective bargaining well" and "is understandable and rooted in the real world." This decision likely was welcomed by franchisors, companies that employ independent contractors and companies that utilize staffing agencies. (The Board found that a joint-employer relationship existed in *Hy-Brand* despite the more relaxed standard.)

On February 26, 2018, the NLRB vacated its decision in *Hy-Brand* because of Board Member William Emanuel's participation in the decision. The NLRB Inspector General concluded that Emanuel should not have cast a vote in the decision because his former law firm had represented one of the unsuccessful litigants in *Browning-Ferris*, the decision that *Hy-Brand* overturned. Emanuel had voted with the 3-2 majority. The Inspector General's conclusion that because *Hy-Brand*'s majority decision relied on language in the *Browning-Ferris* dissent the two cases should be viewed collectively for conflict purposes is analytically dubious, but Member Emanuel chose not to challenge it. It is unclear what Member Emanuel's position will be the next time the issue of joint-employer status reaches the Board.

Even if Member Emanuel is unable to cast a vote to overrule *Browning-Ferris*, the decision may be overturned by the courts. Although Browning-Ferris appealed the NLRB's *Browning-Ferris* decision to the D.C. Circuit Court of Appeals, the NLRB overruled *Browning-Ferris* in *Hy-Brand* before the court issued a ruling. Accordingly, on December 22, 2017, at the NLRB's request, the court remanded the *Browning-Ferris* case to the agency. On March 1, 2018, after the NLRB reinstated its *Browning-Ferris* decision, Browning-Ferris asked the court to reinstate the case to its docket and consider its appeal.

Our memoranda on the *Browning-Ferris* and *Hy-Brand* decisions may be found here and here.

B. *LUTHERAN HERITAGE* EMPLOYEE HANDBOOK STANDARD REVERSED. (DECEMBER 2017)

Also on December 14, 2017, in *The Boeing Company*, the Board overturned its 2004 *Lutheran Heritage* decision, which held that an employee handbook policy is unlawful if employees could reasonably construe it to bar them from exercising their right to concerted activity under the NLRA. The Board,

particularly in recent years, had relied on the *Lutheran Heritage* standard when invalidating widely used employment policies, such as social media rules that prohibit employees from making disparaging comments about their employer on Facebook.

In *Boeing*, the Board held that an employment policy must be evaluated under a balancing test that balances "the nature and extent of the potential impact on NLRA rights" against the "legitimate justifications associated with the rule." The Board stated it henceforth will use this balancing test to classify employer rules, policies and handbook provisions within one of three categories, as follows:

- Category 1: "rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule." A rule requiring employees "to abide by basic standards of civility" is an example of a "Category 1" policy.
- Category 2: rules that require case-by-case scrutiny to determine whether the rule interferes with NLRA rights and, if so, whether the impact of the interference is outweighed by the employer's legitimate justifications for the rule.
- Category 3: rules designated as "unlawful" because they would prohibit or limit an NLRA right and the impact of the rule is not outweighed by the employer's justifications. A rule prohibiting employees from discussing wages or benefits with each other is an example of a "Category 3" rule.

C. *BANNER HEALTH* CONFIDENTIALITY STANDARD FOR WORKPLACE INVESTIGATIONS SURVIVES D.C. CIRCUIT REVIEW. (MARCH 2017)

The NLRB, in its controversial decision in *Banner Health System*, 362 NLRB No. 137 (June 26, 2015), disapproved of employers' practice of directing employees to keep information related to internal investigations confidential. (Banner Health, a nonprofit health system, issued to its human resources consultants a standard interview script to use when conducting workplace investigations, which instructed employees to refrain from discussing the content of their interviews or an ongoing investigation with fellow employees.) The NLRB sanctioned Banner Health and held that employers violate their employees' NLRA Section 7 rights when they require, or even request, that employees keep interviews conducted as part of an internal investigation confidential from other employees, unless the employer can demonstrate that the needs of a particular investigation require confidentiality. *Banner Health* effectively endangered any categorical confidentiality policy; in the NLRB's view, an employer's direction of confidentiality would only be justified if the employer made an individualized determination "that confidentiality was necessary to maintain the integrity of any particular investigation or any particular interview."

In *Banner Health System* v. *National Labor Relations Board*, 851 F.3d 35 (D.C. Cir. 2017), the D.C. Circuit denied enforcement of that part of the NLRB's decision that sanctioned Banner Health for maintaining a categorical policy of asking employees not to discuss HR investigations – not because the court rejected the NLRB's position on investigative confidentiality, but because it found that there was no evidence in the record that there was such a categorical policy in place at Banner Health. The court

explicitly declined to opine "on the Board's requirement of a case-by-case approach to justifying investigative confidentiality." Our post on the decision is available here.

IV. NEW YORK STATE AND CITY STATUTORY DEVELOPMENTS

Bottom Line: New York City enacts sweeping salary history ban in hiring; New York State Paid Family Leave Benefits Law ("PFLBL") took effect on January 1, 2018.

A. NEW YORK CITY BANS EMPLOYER INQUIRIES INTO APPLICANT SALARY HISTORY. (OCTOBER 2017)

On October 31, 2017, an amendment to the New York City Human Rights Law took effect that makes it an unlawful discriminatory practice for employers to inquire about the salary history of an applicant for employment or to rely on the applicant's salary history in determining the compensation to be offered.

The law provides for certain exceptions to the general prohibition. The ban does not apply if an applicant "voluntarily and without prompting" discloses his or her salary history; in that situation, the employer may "consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history." Employers may also, "without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer."

Because the law is an amendment to the New York City Human Rights Law, it provides employees with the procedural and substantive rights set forth therein. An employee asserting discriminatory treatment based on the use of his or her salary history thus may file a complaint with the New York City Commission on Human Rights or bring suit in State Court. Should the employee succeed with a claim in State Court, the Human Rights Law provides for significant employer liability, including punitive damages and attorneys' fees.

Our memorandum on New York City's salary history law is available here. The New York City Commission on Human Rights published three Frequently Asked Questions (FAQ) documents that contain its views regarding the salary history ban: (1) a general set of FAQs; (2) a set of FAQs entitled "Job Applicant Fact Sheet: Protections Against Inquiries into Job Applicant's Salary History"; and (3) a set of FAQs entitled "Employer Fact Sheet: Protections Against Inquiries into Job Applicant's Salary History." The Employer and Job Applicant fact sheets are largely identical in content and generally restate the provisions of the law in more accessible language. The general set of FAQs groups questions and answers into five categories: "General scope of coverage under the Law"; "What employers can and cannot do to learn about applicants' salary expectations"; "How 'compensation' is defined"; "Miscellaneous"; and "Best Practices." Our post on the FAQs is available here.

B. NEW YORK STATE PAID FAMILY LEAVE REQUIREMENTS TOOK EFFECT JANUARY 1, 2018. (JANUARY 2018)

Effective January 1, 2018, the New York State Paid Family Leave Benefits Law requires almost every employer in the state to provide employees of a certain tenure with up to eight weeks of paid leave to care for a family member with a serious health condition, bond with a child within the first 12 months after the child's birth or adoption, or attend to family duties occasioned by the active military duty of the employee's spouse, domestic partner, child or parent. Although the law is similar to the federal Family Medical Leave Act, there are several important differences: in New York, leave is paid rather than unpaid; paid family leave may not be used for the employee's own serious health condition, including pregnancy disability; and the coverage is far more expansive, applying to employers of at least one employee and employees with tenure as brief as 175 days. New York's paid family leave is designed to be self-funding: the paid leave amounts will be paid for by post-tax employee payroll deductions, which employers must use to either purchase insurance or to self-fund. New York State requires that all insurance carriers add PFL coverage to existing disability policies as of January 1, 2018.

The maximum paid leave period will phase in over time, increasing to a maximum 12 weeks as of January 1, 2021. Leave may be taken intermittently, of durations as brief as one day. An employer may require that the paid leave entitlement run concurrently with FMLA leave. What is not clear in either the statute or the final regulations issued on July 19 by the Workers' Compensation Board is whether other employer-provided paid-time-off benefits may run concurrently with paid family leave.

New York State has published two fact sheets regarding the PFLBL, one for employees and one for employers, and the New York State Department of Taxation and Finance issued guidance regarding certain tax implications of the law. Our memorandum on New York's PFLBL is available here.

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