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FYI® Roundup
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Labor and Employment Developments 2018 – A Mid-Year Recap

This *FYI Roundup* recaps workplace issues that were front and center during the first half of 2018. New Jersey became the 10th state to adopt paid sick leave, as Rhode Island's paid sick leave law took effect. Massachusetts became the latest state to mandate paid family leave. NYC employers learned they would have to accommodate employees' personal events. California adopted a new standard for who is an employee, and nixed employer use of prior salary history to justify a gender pay gap. The NLRB reinstated the Browning-Ferris joint employer standard, and issued new guidance on workplace rules, employer policies, and handbook provisions. The DOL formally rescinded the Obama-era persuader rule. The Supreme Court altered the legal landscape, upholding employment arbitration agreements that include class waivers, and striking down mandatory public union fees.

Ever-Growing Patchwork of State and Local Leave Laws

Employers faced new obligations as states mandated paid sick leave benefits in Rhode Island and New Jersey, and paid family and medical leave benefits in Massachusetts.

Rhode Island's Paid Sick Leave Law Goes into Effect July 1: Are You Ready?

When Rhode Island's Healthy and Safe Families and Workplaces Act (Act) took effect on July 1, it joined neighboring Connecticut and Massachusetts and seven other states — Arizona, California, Maryland, New Jersey, Oregon, Vermont, and Washington — in requiring businesses to provide paid sick leave to their employees. Employees will be able to earn and use up to a maximum of 24 hours of paid sick and safe leave in 2018, 32 hours in 2019, and 40 hours in 2020 and each subsequent year. Final regulations provide some clarity regarding the new mandate while placing additional compliance burdens on employers. (See our June 29, 2018 *For Your Information*.)

New Jersey: 10th State to Require Paid Sick Leave

On May 2, Governor Phil Murphy signed the New Jersey Paid Sick Leave Act into law. When the new law goes into effect on October 29, it will preempt local paid sick leave ordinances that now exist in 13 New Jersey municipalities

and will require employers throughout the state to annually provide up to 40 hours of paid sick leave to their employees. Moreover, it will prohibit New Jersey counties and municipalities from adopting any ordinance, law, or regulation regarding earned sick leave in the future. (See our May 18, 2018 *For Your Information*.)

Massachusetts Paid Family and Medical Leave on Tap

On June 28, Massachusetts Governor Charlie Baker signed into law a bill that provides the nation's most generous family and medical leave program to date. The program will be established and administered by a new Department of Family and Medical Leave within the Executive Office of Labor and Workforce Development. Beginning in 2021, Massachusetts workers will be entitled to up to 12 weeks of paid family leave and up to 20 weeks of paid medical leave for their own serious medical condition(s) in a benefit year, with a combined maximum of 26 weeks in any year. Benefits will be funded by a payroll tax of 0.63%, starting on July 1, 2019. (See our July 25, 2018 *For Your Information*.)

Localization of Employment Laws Continues

The ongoing trend toward localizing employment laws placed new restrictions on NYC employers.

NYC Employers Must Accommodate Employees' "Personal Events"

Last year, New York City enacted the so-called Fair Workweek Law, a legislative package of five bills imposing varied worker scheduling limitations on retail and fast-food employers operating in the city. (See our June 16, 2017 *For Your Information*.) This year, the city enacted a sixth bill, amending the Fair Workweek Law to give employees in all industries a right to flexible work arrangements for qualifying *personal events*, effective July 18. (See our July 27, 2018 *For Your Information*.)

California Employers Face New Challenges

Courts issued rulings aimed at worker misclassification and the gender pay gap.

The Gig Is Up: California Supreme Court Rewrites Rules for Independent Contractors

On April 30, the California Supreme Court adopted a new, worker-friendly standard for determining whether workers are employees or independent contractors. The so-called ABC test, which presumes that all workers are employees for purposes of California wage orders unless the entity hiring them can establish otherwise, is expected to make it more difficult for businesses to classify workers as independent contractors for these purposes. The decision has significant implications for California employers, particularly those whose business model relies on a contractor workforce, and the gig economy generally. (See our May 23, 2018 *For Your Information*.)

Reversing Course: 9th Circuit Holds Prior Salary Cannot Justify Pay Differentials

Last year, a three-judge panel of the San Francisco-based 9th Circuit Court of Appeals ruled that an employer may justify gender-based pay differentials when it uses salary history alone to set pay, as long as its use is reasonable and serves the employer's business purposes. (See our May 12, 2017 *For Your Information*.) On April 9, the full court reversed course, holding that prior salary history cannot be used by itself or in combination with other factors to justify a gender pay gap. (See our May 9, 2018 *For Your Information*.)

Unpersuaded At Last

The DOL took the final deregulatory action to rescind the controversial 2016 Persuader Rule.

DOL Persuader Rule: Going, Going, Gone

In 2016, a Texas District Court permanently blocked the DOL from implementing and enforcing the Obama administration's final "persuader" rule. The final rule would have required employers and their labor relations advisors to disclose publicly agreements and arrangements that had long been exempt from reporting under the Labor-Management Reporting and Disclosure Act. On July 18, the DOL formally rescinded the rule, leaving in place the reporting requirements as they previously existed. (See our July 20, 2018 *For Your Information*.)

NLRB Rethinks Standards

The NLRB provided enforcement guidance on employer handbook provisions and joint-employer status.

Employer Handbooks: New NLRB Guidance Balances Employee Rights and Business Interests

An NLRB General Counsel memo explained how regional directors should interpret and enforce the more employer-friendly handbook standard established by the board in last year's *Boeing* decision. The guidance provides a road map for employers to navigate the board's new approach on the lawfulness of workplace rules, policies, and handbook provisions, and gives employers more flexibility to communicate important rules without triggering unfair labor practice charges. (See our June 21, 2018 *For Your Information*.)

It's Back: NLRB Reverts to Browning-Ferris Joint Employer Standard for Now

In *Browning-Ferris Industries of California* (2015), a sharply divided NLRB replaced its decades-old standard for determining joint employer status that rested on one entity's exercise of actual, direct, and immediate control over one or more essential employment terms and conditions of another entity's employees with a far more expansive one. In December 2017, the board overruled that decision in *Hy-Brand Industrial Contractors* but later vacated the decision. On May 9, the NLRB announced that it would engage in rulemaking to set the standard for determining joint-employer status under the NLRA. (See our May 10, 2018 *For Your Information*.)

Supreme Court Weighs In

The high court tackled the lawfulness of agency fees for government workers and employment arbitration agreements.

Supreme Court Nixes Mandatory Public Union Fees

In a significant setback for public-sector unions, on June 27 the Supreme Court outlawed mandatory agency fees, holding that requiring public employees who are not members of a union to pay so-called "fair share" fees as a condition of employment violates their First Amendment free speech rights. It also ruled that a public employer cannot deduct such fees from a worker's paycheck without the worker's affirmative consent, making opt-out arrangements unlawful. (See our July 11, 2018 *For Your Information*.)

Supreme Court Gives Employers OK to Use Class Waivers

In 2012, the NLRB ruled in *D.R. Horton, Inc.* that arbitration agreements precluding employees from filing class or collective actions against their employers violate employees' section 7 rights under the National Labor Relations Act. Since then, appellate courts have disagreed whether such agreements are unlawful. On May 21, the Supreme Court held that employers can include class waivers in arbitration agreements that workers sign as a condition of employment, resolving the uncertainty over whether such waivers are lawful and enforceable. The decision is expected to significantly limit the number of employment-related class and collective actions employers face. (See our May 25, 2018 *For Your Information*.)

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