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FYI® Roundup
For Your Information®

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Labor and Employment Developments – 2014 in Review

This *FYI Roundup* recaps workplace issues that were front and center for employers during the past year. Proponents of state and local minimum wage hikes and paid sick leave were big winners in 2014. State bans on same-sex marriage fell in record numbers. Employers faced emerging challenges as medical and recreational marijuana gained growing legal acceptance, the threat of Ebola to US workers became a reality, and the NLRB took an expansive view of "employees." Interns, pregnant employees, and individuals with criminal records secured new and expanding legal protections. Employer-sponsored wellness programs came under fire as the EEOC filed the first three lawsuits of their kind. In a year that posed financial and other challenges for many businesses, employers confronted a surge of wage and hour claims and aggressive enforcement by the DOL. Highlighted below are some of the many important labor and employment issues employers faced in 2014.

A Growing Patchwork of Paid Sick Leave Laws

Newark enacts paid sick leave law

In January, Newark became the second city in New Jersey and the seventh major US city to require most private sector employers to provide paid sick time. (See our March 18, 2014 *For Your Information*.) The new ordinance, which took effect on June 21, requires businesses to provide a minimum amount of paid sick time to any of their employees who work in the city for at least 80 hours in a year and imposes employee notice and workplace posting requirements on covered employers. (See our June 13, 2014 *For Your Information*.)

District of Columbia expands paid sick and safe leave

In January, Mayor Vincent Gray signed the Earned Sick and Safe Leave Amendment Act of 2013, which made a number of significant changes to the District of Columbia's Accrued Sick and Safe Leave Act. (See our March 21, 2014 *For Your Information*.) The law requires

employers to provide eligible employees with a minimum amount of paid leave to care for their own or a family member's illness or for reasons related to domestic violence or sexual abuse. Amendments to the law expanded its coverage, availability, enforcement, and penalty provisions, effective October 1, 2014. (See our October 6, 2014 *For Your Information*.)

New York City paid sick leave law takes effect April 1

On March 20, 2014, New York City Mayor Bill de Blasio signed into law legislation that required private sector employers with five or more employees to provide paid sick leave — and smaller employers to provide unpaid leave — to eligible employees who work in New York City beginning April 1, 2014. (See our March 27, 2014 *For Your Information*.)

Paid sick leave moves ahead while paid family leave lags behind

Since San Francisco first required private-sector employers to provide paid sick leave for their employees in 2007, cities in New Jersey, New York, Oregon, and Washington have adopted similar mandates. Although federal and many state laws now allow eligible employees to take unpaid leave to care for a seriously ill family member, newborn, or newly adopted child, only three states — California, New Jersey, and Rhode Island — currently offer paid family leave. In each of these states, family leave is employee-funded through mandatory payroll contributions and is administered through the state disability program. (See our May 28, 2014 *For Your Information*.)

More cities to require paid sick leave

Eugene, Oregon and San Diego, California became the latest to join a growing list of cities that have enacted laws requiring employers to provide paid sick leave. While the expanding patchwork of leave laws share many common characteristics, local variations can complicate employers' leave and attendance policies and their administration. (See our September 5, 2014 *For Your Information*.)

California becomes second state to mandate paid sick leave

When Governor Jerry Brown signed the Healthy Workplaces, Healthy Families Act of 2014 into law on September 10, California became the second state to require employers to provide paid sick leave. The new law took effect on July 1, 2015. (See our September 24, 2014 *For Your Information*.)

Changes to Connecticut's paid sick leave law coming soon

On June 6, Governor Dannel P. Malloy signed into law amendments to Connecticut's Paid Sick Leave Law that fundamentally alter the method of determining covered employer status and the timeframe for accruing paid sick leave, effective on January 1, 2015. (See our October 9, 2014 *For Your Information*.)

Paid sick leave initiatives pass by healthy margins

On November 4, voters in Massachusetts, California, and New Jersey approved ballot measures requiring employers to provide paid sick leave. Massachusetts became the third state to mandate paid sick leave for workers, joining Connecticut and California. Paid sick leave continued to pick up steam at the local level as New Jersey voters backed initiatives in Trenton and Montclair, and voters in Oakland, California passed a law that will require employers in that city to provide a greater sick leave benefit than the new state law provides. (See our November 13, 2014 *For Your Information*.)

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Focus on Executive Compensation

Tax reform draft released by Ways and Means may serve as model for future employee benefit tax law changes

On February 26, the chairman of the Ways and Means Committee — Representative Dave Camp (R-MI) — released a draft tax reform plan that proposed significant changes to the tax rules for employee benefits, which raise revenue to pay for reductions to tax rates and other tax cuts. The plan was not expected to become law in 2014, but some of the revenue raisers may be used in the future to offset federal spending and deficits even in the absence of full tax reform. (See our February 27, 2014 *For Your Information*.)

New York limits executive compensation and administrative expenses of state-funded service providers

In 2012, New York Governor Andrew Cuomo issued an executive order (EO 38) to limit executive compensation and administrative expenses at state-funded service providers. In 2013, 13 New York state agencies issued final regulations to implement these restrictions for most covered providers beginning in 2014. (See our February 13, 2014 *For Your Information*.)

IRS finalizes section 83 "Substantial Risk of Forfeiture" regulations for compensation, FICA, and pension funding rules

On February 26, the IRS finalized regulatory changes under Code section 83 with few changes from what was proposed in 2012. The final regulations clarify the definition of a "substantial risk of forfeiture" in connection with compensatory transfers of property (e.g., restricted stock) by employers to their employees (and to other service providers, such as outside corporate directors and independent contractors). The change carries over to other tax rules such as (1) the acceleration of minimum funding contributions under Code section 430, (2) FICA taxes on deferred compensation under Code section 3121(v), and (3) change-in-control "golden parachutes" under Code section 280G. (See our March 10, 2014 *For Your Information*.)

New York court says "no" to executive pay caps at state-funded service providers

The state Department of Health (DOH) adopted regulations to implement EO 38's restrictions on not-for-profit and for-profit service providers in 2013. On April 10, a Nassau County Supreme Court judge threw out the regulations that capped service providers' top executive salaries at $199,000. (See our April 24, 2014 *For Your Information*.)

409A under the microscope — IRS announces audits

IRS selected 50 employers for an audit initiative that will review each of their top ten highest paid employees for compliance with Code section 409A. (See our May 27, 2014 *For Your Information*.)

IRS issues guidance on application of section 457A to stock options and stock appreciation rights

IRC section 457A provides that amounts deferred under a nonqualified deferred compensation plan of a nonqualified entity are includible in gross income when they are no longer subject to a substantial risk of forfeiture. On June 10, the IRS issued Revenue Ruling 2014-18, confirming that certain stock rights with respect to a service recipient's common stock are not taxable under section 457A. The ruling offers certain offshore and other entities increased flexibility in structuring tax-deferred compensation arrangements. (See our June 24, 2014 *For Your Information*.)

New York court upholds executive pay caps as state updates EO 38 guidance

In 2013, the New York Department of Health and 12 other state agencies issued regulations to implement EO 38 limiting the amount state service providers may pay executives and allocate for administrative expenses. On July 29, a Suffolk County court upheld the validity of EO 38 and the same DOH regulations that a Nassau County court invalidated months earlier. (See our August 28, 2014 *For Your Information*.)

Not-for-Profit Governance Reforms

Significant changes to New York not-for-profit laws take effect July 1

The Nonprofit Revitalization Act of 2013 made substantial changes to long-standing laws that have governed not-for-profit organizations operating in the state. The law eased administrative burdens on not-for-profits while strengthening governance and financial oversight requirements, enacting key reforms including new conflict-of-interest and whistleblower protections and a streamlined approval process for corporate transactions. Most of the new law's provisions took effect on July 1, 2014. (See our June 25, 2014 *For Your Information*.)

New York delays prohibition on employees serving as not-for-profits' board chairpersons

Governance reforms made by the Nonprofit Revitalization Act of 2013 to the New York Not-For-Profit Corporation Law included a prohibition on employees of not-for-profit corporations holding the position of chairman of the not-for-profit's board of directors. The prohibition, slated to take effect on January 1, 2015, was delayed for one year. (See our July 11, 2014 *For Your Information*.)

Labor and Employment Considerations

Supreme Court rules nonqualifying SUB payments are taxable FICA wages

Resolving a split in the circuit courts of appeals, the Supreme Court decided that nonqualifying supplemental unemployment benefit payments, which are made to involuntarily terminated workers but are not linked to the receipt of state unemployment benefits, are taxable wages for FICA purposes. The Supreme Court did not disturb the IRS' longstanding position that qualifying SUB payments tied to the receipt of state unemployment benefits are exempt from FICA tax. (See our April 28, 2014 *For Your Information*.)

NLRB gets in the game: will decide whether Northwestern's football players can unionize

In a high-profile case with broad ramifications for educational institutions and college sports, the National Labor Relations Board's (NLRB's) Chicago-area regional director ruled that Northwestern University's scholarship football players — who have not exhausted their playing eligibility — were "employees" of the university and could unionize. Although the NLRB allowed a representation election to go forward, it impounded the ballots pending review of the ruling. (See our May 13, 2014 *For Your Information*.)

Medical marijuana poses challenges for employers

Over the past few years, advocates of legalizing medical marijuana have increasingly gained ground as state lawmakers weigh the drug's potential value in combating pain associated with diseases such as cancer against the long-standing federal prohibition against its use. By mid-2014, twenty-two states had already legalized the

comprehensive use of medical marijuana, creating new challenges for employers in dealing with drug testing and a range of other employment issues surrounding medical marijuana. (See our June 30, 2014 *FYI In-Depth*.)

New York becomes 23rd state to legalize medical marijuana

On July 7, Governor Andrew Cuomo signed into law the Compassionate Care Act, establishing a medical marijuana program for New York state. New York joined 22 other states and the District of Columbia that already allow the medical use of marijuana. While the bill took effect immediately, implementation was delayed pending issuance of state health department regulations governing the manufacture, distribution, and use of medical marijuana. (See our July 11, 2014 *For Your Information*.)

Employers confront growing Ebola concerns

As the Ebola hemorrhagic virus that is ravaging West Africa reached the US, public concern over the potential for person-to-person transfers within our borders ramped up. As government and public health leaders took steps to contain the spread of the virus, employers faced new workplace concerns and looked to update infectious disease preparedness plans to minimize the potential impact of a future outbreak on their employees and business operations. (See our October 31, 2014 *For Your Information*.)

Reminder for New Jersey employers: posting and annual notice requirements

By December 31, New Jersey employers with at least 50 employees must issue a Gender Equity Notice to their employees and obtain an acknowledgment of receipt. Employers with 10 or more employees must annually distribute and post the Conscientious Employee Protection Act notice. Employers must also post an updated Wage and Hour Law Abstract reflecting the minimum wage increase on January 1, 2015. (See our December 4, 2014 *For Your Information*.)

DOL announces FUTA tax credits for 2014

While the standard FUTA rate is 6% on the first $7,000 of covered wages, employers generally receive a credit of 5.4% for state unemployment insurance taxes they pay, reducing the FUTA rate for most employers to 0.6%. However, employers in states that have outstanding federal unemployment insurance loan balances are subject to reduced tax credits, resulting in higher FUTA taxes. The DOL recently released its list of credit reduction states for 2014. (See our December 5, 2014 *For Your Information*.)

San Francisco's new restrictions on formula retail employers

On December 5, San Francisco enacted the “Retail Workers Bill of Rights” comprised of two separate ordinances that put new hiring, work allocation, scheduling, and pay restrictions on “formula retail” businesses — such as chain stores, restaurants, banks, and other service providers — that have 20 or more locations worldwide and at least 20 employees in San Francisco. The restrictions will become operative in summer 2015. (See our December 11, 2014 *For Your Information*.)

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Employee Transit Benefits

San Francisco Bay area employers required to provide commuter benefits

The Metropolitan Transportation Commission and the Bay Area Air Quality Management District jointly launched the Bay Area Commuter Benefits Program to reduce greenhouse gas emissions and traffic congestion by encouraging employees to commute by means other than driving alone. The pilot program, which extends through December 2016, required employers with 50 or more full-time employees in the San Francisco Bay area to offer commuter benefits to their employees by September 30, 2014. (See our May 13, 2014 *For Your Information*.)

NYC to require employers to offer pretax transit benefits

Federal law allows — but does not require — employers to offer employees the opportunity to set aside a limited portion of their wages to pay for qualified commuting expenses with pretax dollars. On October 20, New York City Mayor Bill de Blasio signed into law the Affordable Transit Act, which will require employers in the city to offer pretax transit benefits in 2016. (See our November 6, 2014 *For Your Information*.)

Congress extends transit benefit tax parity, but only for 2014

On December 16, Congress passed legislation that retroactively increased the 2014 transit benefit monthly limit from $130 to $250. However, the legislation does not change the 2015 transit benefit limit, which remains at $130. Employers may be required to adjust 2014 tax withholding and reporting to reflect this increase. (See our December 18, 2014 *For Your Information*.)

IRS updates guidance on transportation fringe benefits provided through electronic media

IRS guidance on employers' use of smartcards, debit cards, and other electronic media to provide qualified transportation benefits for employees reflects changing technology, and allows the value of transit benefits provided via cards restricted to use as transit fare (or to purchase transit fare) as well as delivery charges for transit passes purchased online to be excluded from gross income. Beginning December 31, 2015, cash reimbursements for qualified transportation benefits may no longer be used where terminal-restricted debit cards are readily available. (See our December 22, 2014 *For Your Information*.)

Expanded Nondiscrimination Protections

NYC extends workplace protections to interns

On April 15, New York Mayor Bill de Blasio signed into law a bill that expanded statutory protections against workplace discrimination to unpaid interns, effective June 14. (See our April 30, 2014 *For Your Information*.)

Reminder: NYC employers must provide pregnancy rights notices by May 30

The New York City Human Rights Law was amended to require most NYC employers to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, effective January 30. The amendment required employers to provide written notice to new employees when they begin employment and to existing employees by May 30. (See our May 29, 2014 *For Your Information*.)

Supreme Court to decide whether employers can challenge EEOC conciliation efforts

The Supreme Court agreed to decide whether employers can challenge — and courts can review — the Equal Employment Opportunity Commission's (EEOC's) efforts to resolve discrimination claims before bringing suit. Of

the circuit courts that have considered the issue, only the US Court of Appeals for the Seventh Circuit holds that those efforts are nonreviewable, and the failure to conciliate cannot be used as an affirmative defense to an EEOC suit. (See our July 9, 2014 *For Your Information*.)

New York state expands workplace protections of interns

Following NYC's lead, Governor Andrew Cuomo signed amendments to the New York Executive Law into law on July 22, making New York state the fourth jurisdiction to prohibit employment discrimination against unpaid interns. The amendments took effect immediately. (See our August 15, 2014 *For Your Information*.)

EEOC enforcement guidance expands protections against pregnancy discrimination

On July 14, the EEOC published the first comprehensive update of enforcement guidance under the Pregnancy Discrimination Act since 1983 and under the Americans with Disabilities Act. Consistent with the EEOC's identification of pregnancy discrimination as a strategic enforcement priority, the new guidance broadly interprets both statutes to expand protections for past, current, and intended pregnancies and pregnancy-related conditions. The Supreme Court is poised to weigh in on whether, and to what extent, employers may be required to accommodate pregnant workers. (See our September 4, 2014 *For Your Information*.)

States and cities are banning the box

Thirteen states and more than 60 cities and counties across the country have adopted so-called "ban-the-box" laws that generally prohibit employers from asking about an individual's criminal history on job applications. What began as an effort to modify public-sector hiring practices has substantially widened, and a growing number of states and major cities — such as San Francisco, Philadelphia, and Seattle — now restrict criminal history inquiries on applications and during the early stages of the hiring process by most private employers as well. (See our October 8, 2014 *FYI In-Depth*.)

EEOC challenges employer wellness programs

In the third EEOC lawsuit in 2014 to challenge an employer-sponsored wellness program, the EEOC sought to block the implementation of any penalty or cost imposed on employees who decline participation in biometric testing under an employer's wellness program. The EEOC sought a temporary restraining order and preliminary injunction, claiming the imposition of any such costs or the loss of incentives violates both the ADA and GINA. (See our October 30, 2014 *FYI Alert*.) A federal court in Minneapolis rejected the EEOC's contention that employees would be irreparably harmed if the employer's wellness program moved forward in 2015, but stopped short of addressing the EEOC's likelihood of success if the case continues. (See our November 4, 2014 *FYI Alert*.)

Same-Sex Marriage Guidance

IRS guidance addresses same-sex spouse issues for cafeteria plans and HSAs

The IRS released guidance on the application of the Supreme Court's *Windsor* decision to cafeteria plans, including health and dependent care flexible spending accounts, and to HSAs. The guidance confirmed that the contribution limits that apply to dependent care spending accounts and HSAs will apply on a combined basis for same-sex married couples. (See our January 8, 2014 *For Your Information*.)

Tying a *Windsor* knot

Proponents of same-sex marriage had momentum on their side in 2013 as the Supreme Court struck down parts of the Defense of Marriage Act and overturned California's Proposition 8, and five state legislatures legalized same-sex marriage. New Jersey and New Mexico state courts decided marriage licenses cannot be denied to same-sex couples, while federal court rulings striking down Oklahoma's and Utah's bans on same-sex marriage were put on hold pending appeal. Employers focused on necessary changes to their retirement and employee benefit plans and their employment policies to reflect the changing legal landscape. (See our January 29, 2014 *FYI In-Depth*.)

IRS *Windsor* guidance limits retroactivity for retirement plans

The IRS released more guidance on how to apply the Supreme Court's decision on same-sex marriage to qualified retirement plans, confirming that there is no penalty for non-recognition of same-sex marriages prior to June 26, 2013 or for non-recognition of same-sex marriages in states that only recognized marriages in the state of domicile prior to September 16, 2013. The deadline for amending retirement plans with terms that conflict with the decision is generally December 31, 2014. (See our April 9, 2014 *For Your Information*.)

Same-sex marriage developments — new guidance from CMS and HHS

The Centers for Medicare & Medicaid Services issued guidance in the form of an FAQ explaining that issuers subject to the Affordable Care Act's guaranteed availability requirement must offer coverage to same-sex spouses on the same terms and conditions as it is offered to opposite-sex spouses. This requirement does not change an employer's ability to define spouse or to establish the eligibility terms of its plan; but if the employer does include same-sex spouses, the issuer must offer coverage. The Department of Health & Human Services also reported that Social Security was able to process Medicare applications for same-sex spouses. (See our April 16, 2014 *For Your Information*.)

Amendment permitted mid-year for safe harbor 401(k) plans to comply with spousal definition under *Windsor*

The IRS released guidance affirming that a safe harbor 401(k) plan can be amended mid-year if the definition of spouse in the plan's document is in conflict with the *Windsor* decision. (See our May 16, 2014 *For Your Information*.)

Proposed FMLA regulations and CMS guidance redefine "spouse"

Since the Supreme Court's *Windsor* decision in 2013, federal agencies have issued guidance and updated regulations to ensure that legally married, same-sex couples enjoy the same status under federal law as legally married, opposite-sex couples regardless of where they reside. The DOL proposed revised FMLA regulations, and CMS issued guidance for group health plans under the Medicare Secondary Payer provisions to include the broader definition of spouse. (See our July 14, 2014 *For Your Information*.)

Increasing Focus on Wage and Hour Issues

Obama directs DOL to change overtime rules

On March 13, President Barack Obama directed the DOL to modernize and streamline the regulations governing which employees are entitled to receive overtime pay, but provided few specifics. If, as expected, the DOL narrows the FLSA's white-collar exemptions, it would substantially alter the nation's long-standing overtime rules to extend overtime pay to potentially millions of currently exempt workers. (See our March 14, 2014 *For Your Information*.) The DOL initially set a target date of November 2014 to propose the new FLSA regulations for executive,

administrative, and professional employees. (See our June 4, 2014 *For Your Information*.) The DOL later announced that the proposed regulations would be delayed until February 2015. Because the DOL would still need to complete other steps before any changes could become final, it is unlikely new regulations would be in place before next summer. (See our December 8, 2014 *For Your Information*.)

Fair Labor Standards Act — Are you sure you're in compliance?

The federal Fair Labor Standards Act establishes minimum wage and overtime pay standards that govern how and how much private and public sector employers must pay their workers. The recent surge in private lawsuits and more aggressive enforcement by the DOL show just how costly and disruptive FLSA claims can be. To minimize potential liability, employers should review their employee classification, timekeeping, and payroll practices to ensure that they are paying employees covered by the FLSA for all compensable hours. (See our April 3, 2014 *FYI In-Depth*.)

Emerging trend toward higher state and local minimum wages

With congressional legislation to raise the federal minimum wage stalled in Congress, states and cities are taking steps to hike local minimum wages impacting employers' current pay practices and in some cases adjustments to their pay structures for a series of increases. In some states, changes in the applicable minimum wage can trigger other compliance obligations (such as required wage theft notices), raise the minimum salary basis for exempt status from overtime pay under state law, and increase minimum payments for commission-based employees. (See our July 8, 2014 *For Your Information*.)

New York legislature nixes annual wage notices

Among other things, New York's Wage Theft Prevention Act requires employers to provide wage notices to new employees at the time of hire and to existing employees by February 1 of each year. Governor Andrew Cuomo is expected to sign into law a bill passed by the state legislature in June that would eliminate the annual notice requirement. The bill would also increase liability and penalties for noncompliance with state wage payment laws. (See our July 22, 2014 *For Your Information*.)

NYC expands living wage law

On September 30, New York City Mayor Bill de Blasio signed an executive order that raises the city's minimum wage and benefit rate for hourly employees of certain city contractors and other employers receiving city subsidies of $1 million or more, and expands coverage of the living wage law to additional employers. The order requires covered entities to pay an increased living wage of $13.13 per hour for employees who do not receive health benefits and $11.50 for employees who do. (See our November 7, 2014 *For Your Information*.)

Voters boost state and local minimum wage rates

On November 4, proponents of higher wage rates scored resounding victories as voters in four states and two major cities approved ballot initiatives that will gradually increase their minimum wage floors. Voters in a fifth state sent a non-binding message to legislators supporting a statewide minimum wage hike. (See our November 18, 2014 *For Your Information*.)

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Supreme Court rules security screenings not compensable

In March, the US Supreme Court agreed to consider whether employers must pay workers for the time they spend clearing required security checks after their regular work shift. (See our March 7, 2014 *For Your Information*.) In a ruling that will have far-reaching implications for employers and employees alike, the Court clarified what constitutes compensable time. On December 9, it unanimously held that the time workers spend in line for and undergoing post-shift security checks is not compensable, making FLSA compliance easier for employers. (See our December 11, 2014 *For Your Information*.)

New York's annual wage notice requirement eliminated

New York's Wage Theft Prevention Act requires employers to provide annual wage notices to current employees by February 1 of each year and to new employees at the time of hire. In June, the New York State Legislature passed a bill eliminating the annual notice requirement, but six months later the bill had still not been signed into law. (See our December 17, 2014 *For Your Information*.) On December 29, Governor Andrew Cuomo provided welcome relief to New York employers when he approved the bill repealing the requirement for current employees, effective immediately. Both the governor's signing statement and a posting on the state department of labor's website confirm that annual notices will not be required in 2015. Employers must, however, continue to provide wage notices to new hires. (See our January 6, 2015 *For Your Information*.)

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