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FYI® Roundup
For Your Information®

Volume 38 | Issue 167 | December 22, 2015

Labor and Employment Developments – 2015 in Review

This *FYI Roundup* recaps workplace issues that were front and center for employers during the past year. States and cities across the country increased leave rights and minimum wage rates. Employers faced new limitations on their hiring practices as ban-the-box laws spread and credit checks were curbed. Worker classification and work scheduling came under increased scrutiny. Medical marijuana emerged as a new workplace issue. Employees saw new transit and identity theft benefits. The DOL proposed the expansion of overtime eligibility to an additional 5 million workers, as the SEC required new executive pay disclosures. New union election rules took effect as the NLRB expanded its joint employer standard. The Supreme Court took on same-sex marriage and sexual orientation, pregnancy discrimination, religious accommodation, EEOC conciliation obligations and regulatory interpretations. All in all, a very busy year.

Sick Leave Laws Are Spreading

Philadelphia Adopts Paid Sick Leave Law

In February, Mayor Michael Nutter signed the Promoting Healthy Families and Workplaces Ordinance into law. The ordinance requires employers with at least 10 employees to provide paid sick leave and smaller employers to provide unpaid leave. (See our *For Your Information* from February 25, 2015.) The new law took effect on May 13, triggering employee accruals of sick time and employer notice obligations as Philadelphia joined a growing number of major cities with similar mandates. (See our May 21, 2015 *For Your Information*.)

California and Massachusetts Employers Feverishly Prepare for Paid Sick Leave

Employees in California and Massachusetts who were not previously entitled to paid sick leave became eligible when new statewide mandates took effect on July 1. California employers are now required to provide nearly all

employees with three paid sick days per year. Massachusetts employers have to provide employees with five days of sick leave per year, paid or unpaid depending on the employer's size. (See our *FYI In-Depth* from July 1, 2015.)

Massachusetts Earned Sick Time Safe Harbor is Closing

Employers with existing PTO or paid sick leave plans on May 1, 2015 that satisfied certain criteria were able to take advantage of a transition year safe harbor, which allowed them to continue to operate the plans after July 1, 2015. Employers that have been operating under the transition year safe harbor must adjust their PTO/paid sick leave policies to conform fully with the new law by January 1, 2016. (See our *For Your Information* from December 10, 2015.)

Feel Better? California Amends Paid Sick Leave Law

California's Healthy Workplaces, Healthy Families Act of 2014 required nearly all private- and public-sector employers to provide paid sick leave, beginning July 1, 2015. Since then, California enacted legislation to clarify and amend certain aspects of the new statewide mandate. (See our *For Your Information* from August 4, 2015.)

Massachusetts Extends Parental Leave Rights to Men

In January, Governor Deval Patrick signed into law a parental leave bill, amending and replacing the state's Maternity Leave Act. The new gender-neutral law took effect on April 7, 2015, extending the right to job-protected leave for the birth or adoption of a child to male and female employees alike. (See our *For Your Information* from January 29, 2015.)

DOL Updates FMLA Notices and Certification Forms

The DOL released updated model FMLA notices and medical certification forms for immediate use by employers in administering FMLA leave. The new forms will be effective through May 31, 2018. (See our *For Your Information* from June 4, 2015.)

Who is an Employee?

DOL Says Most Workers Are Employees

The DOL's Wage and Hour Division issued guidance on classifying workers as employees or independent contractors under the Fair Labor Standards Act. Applying an economic realities test, the Administrator's Interpretation takes an expansive view of who is an employee. (See our *FYI Alert* from July 16, 2015.)

Unpaid Intern or Employee?

On July 2, the Court of Appeals for the Second Circuit rejected the DOL's test for evaluating whether an intern is entitled to be paid as an employee. Adopting a "primary beneficiary" test for determining the proper classification of interns, the court focused on who benefits most from the internship and the economic realities of the intern-employer relationship. While employers in Connecticut, New York and Vermont now may be less likely to face class or collective intern-initiated lawsuits, they still will want to approach unpaid internship programs with caution. (See our *For Your Information* from August 19, 2015.)

Intern or Employee? Another Federal Appeals Court Rejects DOL Test

The 11th Circuit Court of Appeals considered the proper test for determining whether an intern is an "employee" for purposes of the FLSA's minimum wage and overtime rules. The court rejected the DOL six-factor test in favor of a more flexible "primary beneficiary" approach to modern internships. In doing so, the court joined two other appeals courts that weigh an internship's benefits to the intern against those to the employer to determine employee status. (See our *For Your Information* from October 6, 2015.)

Emerging Workplace Issues

Colorado High Court: Workplace Drug Policies Apply to Medical Marijuana Users

In a much-anticipated ruling, the Colorado Supreme Court upheld an employer's right to establish and enforce a zero tolerance drug policy even though the state has decriminalized both medical and recreational marijuana use. The court concluded that the state law barring the discharge of an employee for "lawful" off-duty conduct does not protect employees who use marijuana because its use remains prohibited by federal law. (See our *For Your Information* from July 17, 2015.)

Weeding Out Connecticut Convictions for Marijuana Possession

In March, the Connecticut Supreme Court ruled that persons who were previously convicted of possessing less than one-half ounce of marijuana are now entitled to get those records erased. As these conviction records are expunged from public records, employers will no longer be able to access the information through background checks and factor it into their hiring and other employment decisions. (See our *For Your Information* from April 2, 2015.)

San Francisco Amends Formula Retail Employee Rights Ordinances

On July 3, two San Francisco ordinances, together known as the "Retail Workers Bill of Rights," became operative. The ordinances put new hiring, work allocation, scheduling and pay restrictions on "formula retail" businesses — such as chain stores, restaurants, banks and other service providers. On July 15, San Francisco enacted amendments to the new laws that narrowed coverage and provided other clarifications. (See our *For Your Information* from July 24, 2015.)

IRS: Identity Theft Protection Services Tax-Free for Data Breach Victims

On August 13, the IRS issued guidance on the tax treatment of identity protection services for data breach victims. The guidance generally provides that the value of identity theft protection services provided at no cost to data breach victims by the organization experiencing the breach (including employers and their service providers) is not taxable and does not have to be reported on information returns such as Forms W-2 or 1099-MISC. (See our *For Your Information* from August 31, 2015.)

IRS Releases Guidance on Retroactive Increase to 2014 Transit Benefits

In January, the IRS issued guidance on the retroactive increase of the 2014 monthly limit on excludable transit benefits from $130 to $250. The guidance addressed employer questions on the retroactive increase, established a special administrative procedure to alleviate reporting burdens for certain employers, and instructed employers on Form W-2 adjustments. (See our January 9, 2015 *FYI Alert*.)

NYC and DC Employers: Get Your Commuter Benefit Programs in Gear by January 1

Beginning January 1, 2016, employers in New York City and Washington, DC with 20 or more employees will have to offer commuter benefit programs. Employers that do not already offer pretax transit benefits must act quickly to put a transportation benefit program in place that will satisfy the new laws. (See our *For Your Information* from December 7, 2015.)

Ban-the-Box Laws Pick Up Steam and Credit Checks Curbed

Illinois and Chicago Ban-the-Box Laws Now In Effect

New state and local laws that impact the private sector hiring process took effect on January 1. Both the Illinois and Chicago laws restrict employers' ability to inquire about a job applicant's criminal background, but they have important differences. While the state law bans the box only for employers with 15 or more employees, the Chicago ordinance applies to employers in the city regardless of size and requires employers to inform applicants if their criminal history caused or influenced the decision not to hire. (See our *For Your Information* from January 21, 2015.)

New Jersey Ban-the-Box Law Takes Effect

In March, New Jersey became the latest state to ban the box for private employers when its Opportunity to Compete Act took effect. The law generally prohibits both public and private employers with 15 or more employees from obtaining criminal history information from or about a job applicant during the initial stages of the hiring process. (See our March 12, 2015 *For Your Information*.) On December 7, the NJDOL published its final ban-the-box regulations that took effect immediately. (See our *For Your Information* from December 11, 2015.)

NYC Bans Credit Checks by Employers

In May, Mayor Bill de Blasio signed into law a bill prohibiting most employers from running credit checks or considering an applicant's or employee's consumer credit history in making employment decisions. When the *Stop Credit Discrimination in Employment Act* took effect on September 3, NYC joined a growing number of jurisdictions that restrict employers' use of credit history for employment purposes. (See our *For Your Information* from May 12, 2015.) The NYC Commission on Human Rights issued enforcement guidance clarifying available exemptions, recordkeeping requirements and penalties for noncompliance. (See our *For Your Information* from September 28, 2015.)

NYC Bans the Box for Private Employers

In 2011, New York City barred city agencies from asking about an individual's criminal history on job applications and during the early stages of the hiring process. In June, the city council passed the Fair Chance Act prohibiting most employers from conducting criminal background checks or inquiring about a job applicant's criminal history before a conditional offer of employment. It also imposes a number of requirements on an employer that seeks to base a hiring decision on criminal history information it later receives. (See our *For Your Information* from June 18, 2015.) NYC has now released enforcement guidance as well as a form that employers may use to comply with these requirements. (See our *For Your Information* from December 1, 2015.)

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Expanding Protections Against Employment Discrimination

NY Increases Workplace Protections for Women

Governor Andrew Cuomo recently signed the so-called Women's Equality Agenda — a group of bills that expand employment-related protections for women who work in New York state. The new laws, effective January 19, 2016, will increase existing equal pay protections, expand employer coverage for sexual harassment, prohibit employment discrimination based on familial status, allow recovery of attorneys' fees in sex discrimination cases, and require employers to reasonably accommodate pregnancy-related conditions. (See our *For Your Information* from December 18, 2015.)

EEOC Revises Pregnancy Discrimination Guidance

The EEOC updated its Enforcement Guidance on Pregnancy Discrimination in response to the Supreme Court's decision in *Young v. UPS*. The revised guidance reflects the Court's view that women may be able to prove pregnancy discrimination if an employer's light duty policy accommodated a large percentage of non-pregnant workers but did not accommodate a large percentage of pregnant workers with similar work restrictions. (See our *For Your Information* from July 16, 2015.)

EEOC: Title VII Prohibits Employment Discrimination Based on Sexual Orientation

In a groundbreaking decision on July 15, the EEOC ruled that sexual orientation discrimination is a form of "sex" discrimination prohibited by Title VII. The ruling takes a more expansive view of Title VII protections than federal courts have. (See our *For Your Information* from August 14, 2015.)

Telecommuting: A Reasonable Accommodation?

The Sixth Circuit Court of Appeals recently considered whether telecommuting is a reasonable — and workable — accommodation under the Americans with Disabilities Act. In an important ruling for employers, the court confirmed regular on-site presence is an essential function of most jobs — particularly interactive jobs — and that an employer is not required to remove an essential job function to accommodate an individual with a disability. In other circumstances, however, telecommuting may be a viable reasonable accommodation. (See our *For Your Information* from May 7, 2015.)

Supreme Court Weighs In

Supreme Court Says Federal Agencies Can Change Regulatory Interpretations without Formal Rulemaking

When the DOL reversed a 2006 opinion letter and reclassified mortgage loan officers as nonexempt under the FLSA, its action was challenged. In March, the Supreme Court ruled that changes to interpretive rules do not require "notice-and-comment" rulemaking, making it easier for regulatory agencies to shift course and more complicated for employers to develop effective compliance strategies. (See our *For Your Information* from March 18, 2015.)

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Supreme Court Gives New Life to Pregnancy Discrimination Claim

In March, a divided Supreme Court allowed a delivery driver to pursue a discrimination claim based on her employer's denial of a request for light duty due to pregnancy-related lifting restrictions. Without deciding the merits of her claim, the Court sent the case back to the Fourth Circuit Court of Appeals to determine whether the company failed to reasonably accommodate this driver. The decision left open questions on the extent to which employers must accommodate pregnant workers — and what types of accommodations they must provide. (See our *FYI Alert* from March 26, 2015.)

Supreme Court OKs Judicial Review of EEOC's Conciliation Efforts

In a unanimous decision issued in April, the Supreme Court acknowledged that the EEOC has wide — but not sole — discretion in deciding how to conciliate employment discrimination claims, and endorsed limited federal court review of the agency's efforts to achieve an employer's voluntary compliance. Whether the ruling will affect EEOC litigation strategies or give employers more leverage to reach pre-suit settlements with the agency remains to be seen. (See our *For Your Information* from May 11, 2015.)

Supreme Court Clarifies Employers' Religious Accommodation Obligations

In June, the Supreme Court ruled an employer may not refuse to hire a job applicant if the applicant's need for a religious accommodation was a motivating factor in that decision. Reversing a lower court ruling, the Court affirmed that an employer could be liable for intentional discrimination regardless of whether it had actual knowledge of the need for an accommodation. (See our *For Your Information* from June 22, 2015.)

Increased Focus on Executive Compensation

SEC Expands Executive Pay Disclosures

On August 5, a divided SEC adopted a final "CEO pay ratio" rule, mandated by the Dodd-Frank Act. The rule will require public companies to disclose the ratio of CEO pay to the median employee pay in registration statements, proxy and information statements, and annual reports that call for executive compensation disclosure. Because disclosure will be required for the first fiscal year beginning on or after January 1, 2017, the rule will affect companies beginning with the 2018 proxy season. Like the "pay versus performance" rule recently proposed by the SEC, the pay ratio rule is intended to increase transparency and assist shareholders in evaluating executive pay practices at major U.S. companies. (See our *For Your Information* from August 21, 2015.)

SEC Proposes Pay Versus Performance Disclosures

In May, the Securities and Exchange Commission issued a proposed rule under the Dodd-Frank Act that would require public companies to disclose the relationship between compensation actually paid to executives and the company's financial performance. The "pay versus performance" rule would require disclosure of the chief executive's actual pay, the average pay of other named executive officers, total shareholder return, and peer group comparisons. The proposed changes would be phased in over a three-year period. (See our *For Your Information* from June 9, 2015.)

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FICA Case May Have Broad Implications for Deferred Compensation Plans

An employer was held responsible for not obtaining optimal FICA tax withholding on nonqualified deferred compensation, resulting in steeper tax bills for retirees. The fact that the court pointed to language to support the retirees' cause of action suggests plan language aiming to save the plan from inadvertent mistakes may cause more harm than good for employers. (See our *For Your Information* from February 11, 2015.)

An Active NLRB

NLRB Blocks Drive to Unionize Northwestern Football

In a closely watched case with potentially broad ramifications for college sports, the NLRB declined to exercise jurisdiction over a union petition to represent Northwestern University's scholarship football players. In a unanimous decision on August 17, the board dismissed the petition without deciding whether student-athletes are "employees" within the meaning of the National Labor Relations Act and union-eligible. While the decision may deter student-athlete unionizing efforts for now, the NLRB left the door open to reconsider the issue someday. (See our *For Your Information* from August 28, 2015.)

NLRB Adopts Expansive Joint Employer Standard

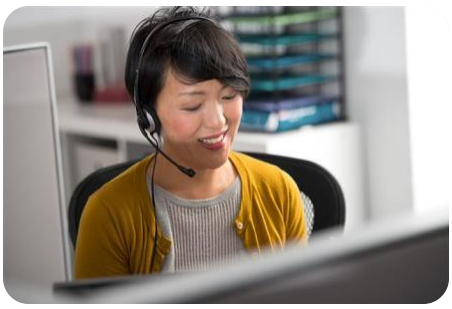
On August 27, a sharply divided NLRB replaced its decades-old standard for determining "joint employer" status under the National Labor Relations Act with a far more expansive one. In *Browning-Ferris Industries of California, Inc.*, the board significantly altered its definition of joint employment to include employers that do not actually control essential employment terms and conditions of a third-party's employees — but may affect them indirectly. As a result, businesses that use temporary or contingent worker, franchising and outsourcing arrangements are at increased risk of being deemed joint employers for collective bargaining and other purposes. (See our *For Your Information* from September 25, 2015.)

President Vetoes Congressional Resolution Blocking NLRB Election Rule

In March, President Barack Obama vetoed a joint resolution of Congress disapproving the NLRB's new union election rule, paving the way for the rule to take effect on April 14. The rule significantly alters how the agency administers representation elections. (See our *For Your Information* from April 6, 2015.)

A Hike in Wage and Hour Issues

Majority of State Minimum Wages Higher Than Federal Rate for 2015



On January 1, nearly half of the states raised rates for 2015, with other increases to follow. For the first time, a majority of states now have higher minimum wages than the federal minimum. Multistate employers in particular will have to factor the new rates into overtime pay calculations and, in some cases, employee exemptions from overtime requirements. (See our January 20, 2015 *For Your Information*.)

Employers Face Higher Minimum Wages in 2016

While the federal minimum wage remains unchanged, a number of states and cities will be hiking local wage rates on January 1. Other state and local increases are slated for later in the year. As minimum wage requirements continue to change, employers will have to adjust their payroll systems, overtime pay rates and, in some cases, employee exemptions from overtime requirements to ensure compliance with the laws in each of the locations where they operate. (See our *For Your Information* from December 9, 2015.)

Illinois Rescinds Minimum Wage Hike for State Contractors

In January, before leaving office, former Illinois Governor Pat Quinn signed an executive order increasing the minimum wage to $10.00 per hour for all state government contracts. By executive order, Governor Bruce Rauner rescinded the increase, restoring the minimum wage for Illinois government contractors to $8.25 per hour — the same rate that applies to Illinois employers generally. (See our *For Your Information* from February 9, 2015.)

Chicago Hikes Minimum Wage

On July 1, new minimum wage rates took effect for most private-sector employees who work in Chicago and for city employees. Employers have to factor the new rates — and scheduled increases — into their compensation plans and overtime pay calculations. (See our *For Your Information* from July 10, 2015.)

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 December, Governor Andrew Cuomo signed a bill eliminating the annual notice requirement for 2015 and beyond. (See our *For Your Information* from January 6, 2015.) The bill also increased penalties for wage theft and expanded liability for wage payment violations, effective February 27. (See our *For Your Information* from March 6, 2015.)

District of Columbia's Amended Wage Theft Prevention Act Takes Effect

Mayor Vincent Gray signed the Wage Theft Prevention Amendment Act of 2014 into law last September, and approved emergency amendments on December 29 to clarify its employee notice and recordkeeping requirements and penalties for noncompliance. The DC Council later approved additional amendments to avoid several unintended consequences of the new law. (See our *For Your Information* from February 20, 2015.) The law took effect on February 26, 2015, triggering employer posting and pay notice requirements. (See our *For Your Information* from March 30, 2015.)

DOL Proposes Significant Expansion of Overtime Eligibility

More than a year ago, the president directed the secretary of labor to "modernize" long-standing overtime regulations and "restore the common sense principles" governing who is entitled to overtime pay. For fifteen months, the DOL worked on proposed revisions to the FLSA's white-collar exemptions. (See our *For Your Information* from March 31, 2015.) In June, the DOL unveiled a proposal that would significantly expand overtime eligibility by more than doubling the salary threshold for the so-called "white-collar" exemptions in 2016 to an estimated $970 per week, or $50,440 annually. (See our *FYI Alert* from June 30, 2015.)

DOL on Overtime: Targets July for Final Rule

In June, the DOL unveiled proposed rules that would expand overtime eligibility to an estimated 5 million workers by more than doubling the minimum salary threshold for the so-called "white-collar" exemptions. The public comment period ended on September 4, and the DOL is reviewing the comments it received. The DOL has now announced a July 2016 target for the release of a final rule. (See our December 2, 2015 *For Your Information*.)

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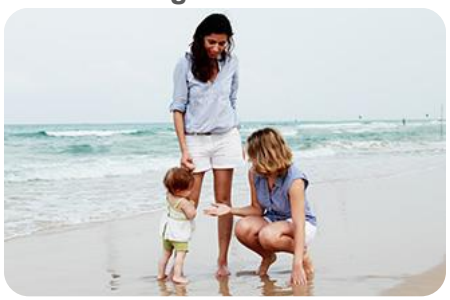
Same-Sex Marriage

DOL Extends FMLA Rights to Same-Sex Spouses

In February, the DOL issued a final rule that revises the definition of "spouse" under the federal Family and Medical Leave Act to cover all legally married, same-sex spouses regardless of where they live. (See our *For Your Information* from February 27, 2015.)

Federal Judge Blocks FMLA's Expanded Definition of Spouse



In March, the attorneys general of Texas, Arkansas, Louisiana and Nebraska filed suit to strike down the DOL's final rule redefining "spouse" under the federal Family and Medical Leave Act as contrary to their state laws. A federal judge in Texas granted a preliminary injunction to stop DOL enforcement of that rule. (See our *For Your Information* from April 7, 2015.) The DOL unsuccessfully sought to dissolve the injunction at an April hearing. (See our *FYI Alert* from April 13, 2015.)

Love and Marriage: The Evolving Landscape

Last November, the Sixth Circuit Court of Appeals became the first federal appeals court to uphold state bans on same-sex marriage since the Supreme Court decided *US v. Windsor* in 2013. With four other federal appellate courts — and more than 30 district courts — having struck down bans, the Supreme Court agreed to hear same-sex marriage cases from Kentucky, Michigan, Ohio and Tennessee. The Court set oral argument for April 28 on whether a state must issue marriage licenses to same-sex couples and recognize same-sex marriages performed elsewhere. (See our *FYI In-Depth* from April 27, 2015.)

High Court Says "I Do" to Same-Sex Marriage

In June, the Supreme Court ruled in a 5-4 decision that same-sex couples have a constitutional right to marry. The Court held that the 14th Amendment's equal protection and due process clauses guarantee this right, and thus require all states to permit and recognize same-sex marriages. (See our *FYI Alert* from June 26, 2015.)

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