Employment Law Update

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AGENDA

- #METOO & Sexual Harassment
- FLSA Update
  - White Collar Exemption
  - Interns & the FLSA
  - Other FLSA Developments
- EEO-1 Reminder
- NLRB Update
- Immigration Update
- Tax Cuts & Jobs Act
- Affordable Care Act Update

#METOO AND SEXUAL HARASSMENT

- Title VII – 1964
- Not enough discussion about why NOW
- Indictment of corporate CULTURE, leadership, and to some extent HR

#METOO AND SEXUAL HARASSMENT

- Policies
  - *Sexual* overtures vs. *romantic* overtures
  - Clear, but flexible methods of reporting complaints
  - Prompt and thorough investigations of allegations
  - Consider third party (independent) investigator
  - Prompt and effective remedial action based on investigations
  - Mandatory arbitration of employment claims?
- Training
  - Training that is not meaningful can send message that the company trivializes the issue
  - Attendance should be mandatory for <u>EVERYONE</u>
  - Consider sessions designed specifically for senior executives and boards of directors to focus on unique roles and responsibilities
- Compliance starts at the top

#METOO AND SEXUAL HARASSMENT

- Legislative Response
  - **2014 Obama Executive Order** barred federal contractors from forcing arbitration of an employee's Title VII sexual harassment claims. In March 2017, Trump **rescinded** that Executive Order
  - In May 2017, the **Attorneys General of all 50 states** signed a letter advocating for the elimination of forced arbitration of sexual harassment claims
  - **Tax Cuts and Jobs Act** eliminated ***deduction*** of sexual harassment settlements where a condition of settlement is a non-disclosure agreement
  - **Ending Forced Arbitration of Sexual Harassment Act – HR 4734**, would prohibit sexual harassment claims from being compelled to arbitration, has broad bipartisan support

#METOO AND SEXUAL HARASSMENT

- **Action Items:**
  - **Reconsider your culture**
    - **Does our culture view complaint handling as part of good collaboration?**
    - **Or do we scorn complainers?**
  - **Reconsider your policies**
    - **Are they worded broadly enough to prohibit unwelcome romantic overtures?**
    - **Do they provide an independent avenue for investigation?**
    - **Do we use employment arbitration agreements?**
  - **Reconsider training**
    - **Is it at least annual?**
    - **Is it supported and attended by top management?**

FLSA WHITE COLLAR EXEMPTION

- Obama DOL proposed increase of salary threshold to $47,476 with auto update every 3 years
- Preliminary Injunction entered on Nov. 22 (*State of Nevada v. U.S. Department of Labor*, No. 4:16-cv-731 (E.D. Tex.) (J. Amos L. Mazzant, III))

FLSA WHITE COLLAR EXEMPTION

- White Collar Exemption regulations – changing
  - **June 2017** – DOL substantively **abandoned its appeal** of TX court's nationwide injunction against Obama-era white collar exemption rule
  - **July 2017** – DOL issued a **Request for Information, indicating it is considering a new rule** increasing the minimum salary but probably not as much as the Obama rule – "**somewhere around $33,000**" - ~$634/wk
  - **April 12, 2018** – Secretary Acosta told Congress DOL is working "**diligently**" on a new FLSA white collar exemption rule, which is expected "**soon**"

INTERNS & THE FLSA

- In January 2018, DOL indicated that it will apply a "primary beneficiary test" to determine whether interns are employees for FLSA purposes
  - **Primary Beneficiary Test** allows courts to examine the economic realities of the relationship between the intern and employer to determine which party is the primary beneficiary
- In line with recent U.S. Circuit Court rulings rejecting confusing, inconsistent DOL approach
- Intern vs. Employee also has additional implications, including ACA employer mandate

INTERNS & THE FLSA

Primary Beneficiary Test Considerations:

- The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
- The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
- The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

OTHER FLSA DEVELOPMENTS

- **Consolidated Appropriations Act** signed into law on March 23 revised FLSA rules to **expand tip pools** to a broader range of employees (front and back of the house), excluding only managers and supervisors
- DOL is now **publishing opinion letters** again
- New **DOL Fact Sheet #17S** published April 20 provides guidance on applicability of white collar exemptions to **higher education jobs**
- April 2, Supreme Court decision on ***Encino Motorcars*** marked a significant shift in how the courts have interpreted FLSA exemptions. The Court's holding moves away from **"narrowly construed"** exemptions to a **"fair reading"** standard, which is likely to be more expansive in allowing the application of FLSA exemptions.
- DOL rolls out **Payroll Audit Independent Determination (PAID)** program

THE NEW EEO-1

- The New EEO-1 – **Employer Relief**
  - Until the Obama Administration rule in 2016, EEO-1s were to be filed by September 30 each year (employers with 100 or more employees, federal contractors with 50 or more)
  - Obama era rule implemented much more data-heavy EEO-1 requiring reporting on employee pay in addition to demographics; moved reporting to March of each year
  - **August 2017** – EEOC announces "review and immediate stay" of new EEO-1 form; reporting will continue in March of each year but employers to use old form
  - EEO-1s **were due March 31, 2018 for 2017** reporting year

NLRB UPDATE

Browning-Ferris Turmoil

- In 2015, NLRB adopted a new standard to determine **joint employer** liability: even when two entities have never exercised joint control over the essential terms and conditions of employment, and even when any joint control is not "direct and immediate," the two entities will still be joint employers based on the existence of **"reserved" joint control**, or based on **indirect control** or **control that is "limited and routine."**
- Employer **appealed** the Board decision to D.C. Circuit Court of Appeals
- While appeal was pending, the Trump NLRB decided the case of ***Hy-Brand Industrial Contractors, Ltd.*** in which the new Board tossed out its prior *Browning-Ferris* ruling.
- But the unions in ***Hy-Brand*** **moved to strike** the ruling arguing that one of the Board members should have **recused** himself from the decision because his former law firm represented a party to the case. The Board agreed and **vacated the *Hy-Brand* decision**, which effectively reinstated the 2015 *Browning-Ferris* decision.
- Issue is now pending at both the D.C. Circuit and NLRB

NLRB UPDATE

- Revised workplace rule standard – *The Boeing Co.* (December 17, 2017)
  - NLRB overruled prior holding that facially neutral workplace rules unlawfully interfere with NLRA rights if the rules would be **"reasonably construed"** by an employee to prohibit the exercise of NLRA rights.
  - New standard: consider whether rule, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, including: (1) the **nature and extent of the potential impact** on NLRA rights; and (2) **legitimate justifications** associated with the rule.
  - Held: Boeing lawfully maintained a no-camera rule that prohibited employees from using camera-enabled devices to capture images or video without a valid business need and an approved camera permit, finding the rule's impact was relatively minimal and outweighed by important justifications, including national security concerns.
- Employers may ***enforce reasonable policies*** requiring the ***confidentiality of customer information*** among other proprietary information. *Macy's Inc.*, 01-CA-123640 (August 14, 2017)

IMMIGRATION UPDATE

Buy American and Hire American

- In April 2017, President Trump signed the Buy American and Hire American Executive Order (EO)
- Although no regulations implementing the EO have been issued, agencies are making it harder to obtain visas
  - Nearly 50% increase this year in Requests for Evidence (RFE) for H-1B visa petitions
  - These RFEs typically question whether an entry-level job satisfy the requirements of "specialty occupation" or whether the wage level is sufficient

IMMIGRATION UPDATE

What to Expect in 2018 and Beyond?

- Increased I-9 raids and audits
- DACA legislation for DREAMers?
- Merit-based immigration system?
- Pending legislation regarding minimum wage and additional protections for H-1B workers
- Increased scrutiny for nonimmigrant visa extensions
  - USCIS officers must now view H-1B, L-1 and other nonimmigrant visa extensions *de novo* (i.e., no deference given to the fact of a prior visa approval)

IMMIGRATION UPDATE

- Remember the new I-9 from November 2016?

- The **New** New I-9 – Effective September 17, 2017, all employers should be using the **new** new I-9 form which shows a revision date of “7/17/17 N” and an expiration of “8/31/2019”

- Includes modest changes to the Instructions and Lists of Acceptable Documents

TAX CUTS & JOBS ACT

- **Tax Credit for Paid FMLA Leave** – Businesses can claim a general business credit between 12.5% and 25% of the amount of wages paid to qualifying employees during any period in which the employees are on FMLA
  - **Rate of payment must be at least 50% of the wages normally paid to the employees**
  - Credit increases .25% for each additional percentage point paid compared to normal wages
  - **Strings attached**, include that all qualifying full-time employees have to be given at least two weeks of annual **paid** family and medical leave (all less-than-full-time qualifying employees have to be given a commensurate amount of leave on a pro rata basis)
  - **In April, IRS issued FAQs** for employer guidance on claiming the credit: https://www.irs.gov/newsroom/section-45s-employer-credit-for-paid-family-and-medical-leave-faqs

TAX CUTS & JOBS ACT

- Repeal of the **Individual Mandate** effective 2019
- No business (individual?) **deduction for sexual harassment settlements** involving non-disclosure agreements
- Qualified **Moving Expenses**
  - Suspends both the **employee tax exclusion for employer-paid moving expenses and the employee tax** deduction for work-related moving expenses that are not reimbursed by the employer; intent is **unclear** on deductibility for employer

AFFORDABLE CARE ACT UPDATE

- House – The American Health Care Act
  - Amended AHCA passed in the House on May 4, 2017
- Senate – The Better Care Reconciliation Act
  - Proposed on June 22, 2017
- Senate #2 - The Graham-Cassidy Bill
- All comprehensive reform bills deemed DOA

TrumpCare? ObamaCare? WhoCares?

- ACA is still the **law of the land**
- ACA changes in **short-term spending bill**
  - **Cadillac tax** further delayed until **2022** (the 40% excise tax on high-cost employer-sponsored group health plans)
  - Additional **one-year suspension of the tax on health insurers**
- **Association Health Plans**
- Continue as usual…
  - Employer mandate
  - ACA reporting

ACA Employer Shared Responsibility Assessments

- **2015 ESRPs**
- IRS has issued Letter 226J to employers for which it has determined that, for at least one month in the year, one or more of the employer's full-time employees was enrolled in an exchange plan for which a premium tax credit was allowed (and the ALE did not qualify for an affordability safe harbor or other relief for the employee)
- Based on information reported to the IRS on Forms 1094-C and 1095-C and information about full-time employees of the ALE that were allowed the premium tax credit
- Exchange appeals do NOT determine liability for ESRP
- Initial focus appears to be on Code section 4980H(a) penalty – $2,080/year or $173.33/month

ACA Employer Shared Responsibility Assessments

New Process and Forms

- Letter 226J – Initial IRS Contact regarding ESRP
- Form 14765 – Employee Premium Tax Credit (PTC) List
- Form 14764 – ESRP Response [Alternate Link]
- Letter 227 – IRS Response
- Written Request for Pre-assessment Conference
- Notice CP 220J – Notice and Demand for Payment
- Response window: 30 days from the date of the Letter
- Payment options include installment payments

Lessons Learned from the First Employer Shared Responsibility Assessments

- Initial focus appears to be on Code section 4980H(a) penalty – $2,080/year or $173.33/month
- Significant liability (e.g., $2.5M)
- Mailroom should be "on alert"
- Check your Form 1094-C
  - If errors, work to correct them
    - To file or not file?
  - Obtain letter of explanation from service provider
- Form of your response
- IRS's template letter approach can lead to confusion
- Establish and document ACA Measurement Period (and policy)
- Available defenses??

ACA Reporting
2018 Deadlines for 2017 Reports

To IRS	To Employees
Paper Filers **February 28, 2018**	**March 2, 2018** **(Normally January 31)**
Electronic Filers **April 2, 2018**	

*** Good faith standard extended, but not for late filing**

Maynard Cooper Client Advisory

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