Labor & Employment Law Update

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In This Issue

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A Host of New Laws in New York State and City Merit Your Attention If You Do Business in the Empire State and/or the Big Apple

New Laws Set to Go into Effect Statewide Enhance Women's Rights

Governor Andrew Cuomo recently signed several bills aimed at protecting women's rights in New York State. The bills, collectively known as the Women's Equality Act, amend various state laws and include measures that expand protections for employees with children and improve workplace accommodations for pregnant employees. The new laws go into effect on January 19, 2016.

The Achieve Pay Equity bill (S. 1/ A. 6075), which amends Section 194 of the New York Labor Law, addresses pay equality for women in New York. First, the bill bars employers from prohibiting employees from discussing their salaries by threatening them with suspension or termination. Under the new law, employees may disclose and discuss their salaries with each other while at work, though an employer may implement a written policy to establish reasonable workplace and workday limitations on the time, place and manner of such discussions.

Second, the amendment strengthens the prohibition against unequal pay between men and women. Under Section 194(1) of the Labor Law, men and women may be paid different amounts for similar work only if the employer can prove the differential is based on a seniority system, a merit system, a system that measures earnings by quantity or quality of production or any factor other than sex. After passage of this new bill, an employer must show that any pay differential is based on "a *bona fide* factor other than sex, such as education, training and experience" and is both job-related and consistent with business necessity, which the statute defines as a factor that bears a manifest relationship to the employment in question. However, an employee may be able to overcome the employer's defense if the employee can demonstrate that (i) the employer uses an employment practice that causes a disparate impact on the basis of sex, (ii) an alternative employment practice exists that would serve the same business purpose and not produce such a disparity, and (iii) the employer has refused to adopt such alternative practice.

Third, the bill expands the geographic area throughout which employees' wages are compared for the purpose of determining whether gender-based discrimination exists. The Labor Law prohibits pay differentials between men and

women for equal work performed in the “same establishment.” Under the new bill, employees’ pay rates may be compared even if the employees work in different locations, so long as they are within the same county.

Finally, the bill increases the amount of damages that a plaintiff may recover if an employer is found to have willfully violated the law’s prohibition of gender discrimination in the payment of wages, from one hundred percent of the total amount of wages found to be due to three hundred percent.

The Protect Victims of Sexual Harassment bill (S. 2/ A. 5360) amends Section 292 of the New York State Human Rights Law. It protects employees from sexual harassment regardless of the size of the employer. While the current definition of “employer” under the New York State Human Rights Law excludes those with fewer than four employees, the new law expands this definition (for the purposes of sexual harassment cases only) to cover all employers within New York, regardless of the number of employees.

The Remove Barriers to Remedying Discrimination bill (S. 3/ A. 7189) amends Section 297 of the New York State Human Rights Law and allows a prevailing plaintiff to recover reasonable attorneys’ fees in an employment or credit discrimination case based on sex. Defendants can recover reasonable attorneys’ fees only if they can prove that the action was frivolous.

The End Family Status Discrimination bill (S. 4/ A. 7317) amends Section 292 of the New York State Human Rights Law and makes it unlawful for an employer to discriminate on the basis of familial status. “Familial status” means being pregnant, having one or more children, or securing legal custody of a child under 18 years of age. New York previously protected family status only in the areas of housing and credit. This law prohibits employment agencies, licensing agencies and labor organizations from discriminating against employees based on familial status.

Finally, the Protect Women from Pregnancy Discrimination bill (S. 8/ A. 4272) amends Section 296 of the New York State Human Rights Law and requires employers to provide reasonable accommodation of pregnancy or pregnancy-related conditions and to perform a reasonable-accommodation analysis for employees with pregnancy-related conditions. Employers must accommodate pregnancy unless doing so would create an undue hardship for the business. The amendment also codifies the requirement that an employee cooperate in providing medical or other information upon the employer’s request to verify the existence of a pregnancy-related condition.

The new laws will go into effect on January 19, 2016. Employers should review their current policies to ensure compliance with the new provisions. If you have any questions about the application of these new laws, please contact one of Vedder Price's labor and employment attorneys.

New York City Law Limits the Use of Credit History in Employment Decisions

New York City has joined an increasing number of states and cities, including California and Chicago, in enacting laws intended to prevent employers from using the consumer credit history of an employee or applicant when making employment decisions. The Stop Credit Discrimination in Employment Act (the Act or SCDEA), which went into effect on September 3, 2015, amends the New York City Human Rights Law (NYCHRL), making it illegal for most employers to request or use an employee's or applicant's credit history for employment purposes, unless one of eight exceptions applies. The NYC Commission on Human Rights issued a Legal Enforcement Guidance on the Stop Credit Discrimination in Employment Act on September 30, 2015.

Prohibited Acts

The Act generally prohibits an employer with four or more employees from requesting or using an employee's consumer credit history when making decisions related to hiring, compensation, and other terms and conditions of employment. Consumer credit history, as defined by the SCDEA, is "an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by: (a) a consumer credit report; (b) credit score; or (c) information an employer obtains directly from the individual regarding matters such as the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or bankruptcies, judgments, or liens." Notably, the term "consumer reporting agency" is defined more broadly than under either the federal or state Fair Credit Reporting Acts. It is an unlawful discriminatory practice simply to request or use consumer credit history, even if the practice does not lead to any adverse employment action. Whether there was a subsequent adverse employment action is relevant for determining damages or penalties, but is irrelevant for determining liability.

Exemptions

The Act recognizes a number of exemptions pursuant to which an employer may request information about an applicant's or employee's consumer credit history, including employers required by state or federal law or regulation to use an individual's consumer credit history for employment purposes, positions for

which bonding is required by law, as well as non-clerical positions having regular access to trade secrets, and positions involving responsibility for funds or assets worth $10,000 or more. Employers relying on these exemptions must inform the applicant or employee of the claimed exemption and must keep a record of that exemption in a log for five years. There are, not surprisingly, a number of requirements with which an employer must comply in order to maintain a legally sufficient log.

Penalties

Civil penalties under the Act may range from $125,000 for inadvertent violations, up to $250,000 for violations that are the result of willful, wanton or malicious conduct. These penalties are in addition to other remedies available to individuals who may bring a claim under the NYCHRL, including, but not limited to, front and back pay, compensation, punitive damages and attorneys' fees.

Next Steps

Given the breadth of the SCDEA, its narrowly defined exemptions and the severe penalties, New York City employers are encouraged to carefully review the policies and procedures they currently have in place with respect to the use of credit history in hiring or other employment decisions. If you have any questions about the application of this new law, please contact one of Vedder Price's labor and employment attorneys.

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California CFPA: Shifts Burden of Proof to Employers in Equal-Pay Disputes

California Governor Edmund G. Brown, Jr. recently signed into law the California Fair Pay Act (CFPA) (Senate Bill 358). The CFPA, which takes effect on January 1, 2016, is intended to increase wage transparency and will be one of the strongest equal-pay laws in the country.

The CFPA will modify California's existing equal-pay laws (Labor Code § 1197.5) in several important ways. It will make it easier for employees to establish unlawful wage differentials. Previously, the statute required that comparator employees perform the "same" job, with the "same" skill, effort and responsibility; the new standard requires only "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Further, employees need not work in the "same establishment," but rather, employees of a company working in any California city can qualify as comparators.

Under current California law (and federal law), the employee bears the burden of showing that work is the "same" and that equal pay is required. The CFPA shifts the burden to employers. Now, where work is "substantially similar" and there is a wage differential between genders, the employer must "affirmatively demonstrate" that the disparity is based entirely on one or more valid factors: a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a *bona fide* factor other than sex. The "*bona fide* factor other than sex" defense has been expanded to include several examples: education, training or experience. Regarding the *bona fide* factor, the employer must demonstrate that the factor is not derived from a sex-based differential in compensation, is job-related with respect to the position in question, and is consistent with a business necessity (i.e., a legitimate and effective business purpose). The swapping of burdens lowers the bar, effectively making it easier for employees to bring suit.

The CFPA also targets "pay secrecy." Employers may not prohibit employees from disclosing their own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging another employee in exercising her rights under the CFPA. Currently, California Labor Code Section 232 contains a similar prohibition, but the CFPA goes further by allowing employees to inquire about the wages of other employees if the purpose of that inquiry is to exercise the right to equal pay for equal work. The CFPA also prohibits retaliating against or discharging employees who seek to enforce their rights under the CFPA.

The CFPA expands record-keeping requirements; employers now must keep records of wages, wage rates, job classifications, and other terms and conditions of employment for all employees for at least three years, instead of the current two-year standard or requirement. That being said, given the extended statute of limitations under California's unfair business practice statute, it is safest to maintain all such records for at least four years.

Aggrieved employees suing under the CFPA may be entitled to several remedies, including reinstatement, reimbursement for lost wages and benefits, and equitable relief. Employees may file a civil action to recover wages or they can go through the Department of Labor Standards and Enforcement's administrative charge process.

With these significant changes coming to California's equal pay laws, employers will face greater burdens and potential liability related to employee compensation. Accordingly, employers are advised to review their policies and procedures carefully to ensure compliance. The Labor and Employment group at Vedder Price is well versed in the new law and stands ready to assist.

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Compliance Alert: EU/US Safe Harbor Arrangement Governing Employee Data Transfers Deemed Invalid

As many employers know, the United States takes a different approach to privacy from that taken by the European Union (the EU). In an effort to harmonize these divergent approaches, the U.S. Department of Commerce developed a "safe harbor" framework, in consultation with the EU, governing the transfer of personal data to non-EU countries that do not meet the EU "adequacy" standard for privacy protection. In October 2015, the European Court of Justice (the ECJ) issued a decision with significant implications for U.S. employers that have, until now, relied on the self-certification provisions of the safe harbor framework. Concluding that U.S. law does not provide "an adequate level of data protection," the European Court of Justice pronounced the safe harbor framework invalid.

Presented with a claim originally made in 2013 to the Irish Data Protection Commissioner regarding Facebook's transfer of personal data from servers in Ireland to servers in the United States, where it was subject to surveillance by entities such as the National Security Agency, the ECJ issued its preliminary ruling on October 6, 2015. When considering whether or not safeguards provided by a third-party jurisdiction were adequate, the ECJ explained it was not considering whether the third-party country must ensure a level of protection "identical" to that of the EU. Rather, the court was looking for a level of protection for fundamental rights and freedoms that is "essentially equivalent" to that guaranteed within the EU. The protections afforded by U.S. law were found inadequate for several reasons, chief among them being that U.S. entities must comply with a number of conflicting obligations imposed by U.S. law, many of which do not comport with EU standards. The ECJ was particularly troubled by the fact that public authorities in the United States have generalized access to the content of electronic communications, thus compromising the fundamental right to privacy. As a result, the court pronounced the safe harbor arrangement invalid.

From this point on, those organizations (or individuals) that relied on the safe harbor framework to legitimize data transfers should review how they transfer and hold employee data. While the ECJ did not address the use of standard contractual clauses or corporate policies in its recent opinion, such safeguards may no longer suffice. These organizations are left to consider whether they can rely upon the data subject's consent for transfer or, alternatively, upon the fact that the transfer and processing of data to and in the United States is necessary "for the fulfillment of the contract"; in other words, it is necessary to enable the

employment contract to continue. One problem with consent, however, is that the freedom with which it is given may be called into question, particularly in the employment context. While a data subject is less likely to raise concerns when it knows it has consented to the transfer of said data, there is always the risk that it will withdraw its consent.

Going forward, employers should carefully consider what employee data must be transferred from the EU to the United States. If possible, they should maintain and enhance an EU hub to store certain data, obviating the need for transfer. If transfers are necessary, employers need to explore whether all data must be transferred, or if only certain data sets need to be moved. Other safeguards may include enhancing contract terms between transferring organizations and ensuring that consents are given by employees to such transfer. Whatever is decided, it is essential that an employer can show, objectively, that its organization has taken adequate steps to secure employee data during transfer, processing and/or storage.

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Are You Cal-OSHA Compliant?

Employers who pay attention to occupational safety and health issues know full well that the federal Occupational Safety and Health Administration (OSHA) has hoped for many years to create a standard requiring employers to adopt illness and injury prevention programs. These programs—often referred to as I2P2 or IIPP—are proactive processes designed to help employers find and fix workplace hazards before workers are hurt or fall ill on the job. Although OSHA has been unable to promulgate such a standard on the federal level, California has required since 1991 that certain employers adopt such programs. All too often, however, employers with limited operations in the Golden State are not aware of this requirement. Employers that fail to comply run the risk of a citation, particularly if Cal-OSHA shows up to conduct an inspection after a workplace injury or an employee complaint. The agency may then not only issue a citation under the applicable hazard-specific standard, but also look to tack on an IIPP violation. Additionally, Cal-OSHA may use the IIPP requirement to impose fines on the employer even if no hazard is found during its inspection.

To comply with the California standard, an IIPP must be written and must:

- Identify the person or persons with authority and responsibility for implementing the safety program;
- Include a system for ensuring that employees comply with safe and healthy work practices;

- Include a system for communicating with employees on matters relating to occupational safety and health, including provisions designed to encourage employees to inform the employer of hazards at the work site without fear of reprisal;
- Include procedures for identifying and evaluating workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices;
- Include a procedure to investigate occupational injury or occupational illness;
- Include methods and/or procedures for correcting unsafe or unhealthy conditions, work practices and work procedures in a timely manner;
- Provide training and instruction to all new employees, to all employees given new job assignments for which training has not previously been received, whenever new substances, processes, procedures or equipment are introduced to the workplace and represent a new hazard, and whenever the employer is made aware of a new or previously unrecognized hazard; and
- Train supervisors to familiarize themselves with the safety and health hazards to which employees under their immediate direction and control may be exposed.

Cal. Code Regs. § 3203.

The above requirements vary for employers with fewer than 20 employees and for those that are in industries designated as “high hazard.” All employers, with the exception of local government entities, must keep records of all training and inspections done pursuant to their IIPP. If you have any questions about illness and injury prevention programs in general or what you need to do to comply with Cal-OSHA requirements, please call Thomas H. Petrides, Aaron R. Gelb or Emily C. Fess.

Recent Accomplishments

Amy L. Bess and **Sadina Montani** won a motion for summary judgment for our client, a government contractor, in a gender discrimination and retaliation case in Maryland District Court.

Kenneth F. Sparks and **Andrew Oppenheimer** won a labor arbitration for a transportation and logistics client. The arbitrator found that the language of the company's new collective bargaining agreement, which Vedder Price negotiated, did not provide employees with PTO that was calculated based on work for a predecessor employer.

Kenneth F. Sparks won a labor arbitration for a healthcare client that reorganized certain patient care units and transferred work that had been performed by represented employees to a new patient care unit whose employees were not part of the union's bargaining unit. The arbitrator upheld the employer's right to make all of these changes, which he found were lawfully motivated by patient care concerns and permitted by the collective bargaining agreement.

Kenneth F. Sparks and **Mark L. Stolzenburg** won a labor arbitration for a healthcare client that unilaterally established productivity standards for a large number of support personnel. The arbitrator found that the collective bargaining agreement allowed the employer to establish reasonable productivity standards and other work rules. He also found that the standards established were reasonable and consistent with well-established benchmarks.

Working with the firm's West Coast M&A team, **Patrick W. Spangler** handled the benefits and labor aspects of an acquisition of an entertainment services company on behalf of one of the firm's corporate clients.

Patrick W. Spangler successfully negotiated a collective bargaining agreement with AFSCME on behalf of a Chicago-based social services agency.

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