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Employment Policies Alert: New Employment Updates Effective in 2016

Effective in 2016, several new updates in Illinois and around the country will affect employers:

National Employment Updates

Updates to Overtime Classifications:
The Department of Labor ("DOL") was expected to release a final rule by late 2015 or early 2016 redefining which workers are or are not eligible for overtime. Recently, it announced that the final rule will not be published until sometime in late 2016. This means that there may be a very short turnaround time between publication of the DOL final rule and its effective date. The last time that the Fair Labor Standards Act ("FLSA") overtime rules were overhauled was 2004, and employers were provided with 120 days to review the new regulations and to make necessary policy changes. For 2016, there may be as few as 30 to 60 days for implementing the new rule.

The proposed rule, which has 290,000 comments, can be found at:
http://www.shrm.org/publications/conference-today/articles/pages/new-flsa-rules-put-focus-on-compliance.aspx

Employers can prepare for compliance efforts even before the final rule is released:

- Identify currently exempt jobs with salaries that fall below the proposed new salary threshold for exempt employees, which is either $970/week or $50,440/year
- Decide whether employees close to the threshold will be bumped up in salary to maintain exempt status, or reclassified as nonexempt if below the new minimum
- Assess how many hours employees are working per week who will likely be reclassified in order to plan for adjusted pay
- Determine how to set nonexempt pay rates
- For employees subject to the highly compensated standard but who are below the new proposed pay level of between $100,000 to $122,148 per year, determine if these positions satisfy the full duties test of any exemptions, as opposed to the relaxed duties standard applicable for highly compensated employees
- Consider whether to reclassify other positions in advance of the final rule to manage risk and enhance compliance
- Plan operational changes that may be necessary due to reclassification changes to job duties, schedules, and staffing levels
- Identify job duties of potentially reassigned exempt employees that might be assigned to other exempt employees

The 2016 presidential election may also affect the new rule. The Democrats have generally supported the DOL's pending proposal. If the rule is not final by the time the new president takes office, and a Republican is elected, the more likely it is that it could be revoked.

Potential Changes to FLSA Settlement:
The National Labor Relations Board ("NLRB") recently withheld its approval of a global settlement of FLSA claims and NLRB charges, stating that it objected to non-disparagement and confidentiality provisions in the agreement. The employer, Liberato Restaurant, agreed to a $1 million settlement of class action claims alleging non-payment of tips and overtime. There were settlement terms by both parties not to disparage the other and not to disclose the terms to the public. These are provisions that are routinely included in settlement agreements, and the United States District Court for the Southern District of New York found the agreement fair and reasonable. However, the court said that the NLRB would have to approve the dismissal of the NLRB actions as part of the settlement.

The NLRB would not approve the agreement, because the non-disparagement and confidentiality terms limited the employees' ability to discuss terms and conditions of their employment with other employees. According to a 2006 NLRB memorandum, the NLRB could not approve agreements with prohibitions that went beyond disclosure of financial terms.

Although it remains to be seen whether the NLRB's position will derail the settlement, the Equal Employment Opportunity Commission ("EEOC") recently sued CVS/Caremark Corp. over its standard separation agreement in 2014. Part of the EEOC's allegations, among other claims, were that non-disparagement and confidentiality clauses prevented cooperation with EEOC investigations, calling them "overly broad" and "misleading." The CVS/Caremark lawsuit was significant for employers because the language of the separation agreements was similar to language used by many employers.

Based on these recent issues with non-disparagement and confidentiality provisions in settlement and severance agreements, employers should be cautioned to consult with counsel before using "boilerplate" language. For instance, for NLRB charges, confidentiality may be limited to the disclosure of financial terms, and for severance agreements, there should be disclaimers that parties to the agreement are not prohibited from full cooperation with EEOC investigations.

EEOC Issues Guidance on Accommodating HIV/AIDS:
On December 1, 2015, the EEOC issued new guidance regarding the legal rights of employees with HIV/AIDS under the Americans with Disabilities Act ("ADA"). The guidance should be noted by employers not just with accommodating HIV/AIDS, but with accommodation request for virtually any medical condition.

The guidance emphasizes that employment decisions, including whether to grant reasonable accommodations, must be based on objective evidence and not medical myths or stereotypes. Employers are not permitted to speculate on matters such as how a medical condition affects an employee's job performance. The guidance also details what information an employer may require from a health care provider in the context of a reasonable accommodation request. This includes descriptions of how the condition limits performance of job functions and major life activities, and how the condition makes certain accommodations medically necessary.

The documents should be carefully considered in making any decisions regarding requests for accommodation, or before taking any employment actions related to medical conditions. The documents are linked here:

http://www.eeoc.gov/eeoc/publications/hiv_individual.cfm

http://www.eeoc.gov/eeoc/publications/hiv_doctors.cfm

Changing Landscape of Joint Employer Liability: In August of 2015, the NLRB issued a monumental ruling in the *Browning-Ferris Industries of California, Inc.* case, rejecting decades of precedent and the Administrative Law Judge's ruling to establish a new standard for determining joint employer status. In short, the NLRB held that two or more entities are joint employers when they (1) both are employers within the meaning of the common law, and (2) directly or indirectly share or codetermine essential terms and conditions of employment. For the "control" element, the NLRB will now consider whether the employer has exercised or reserved *any* control over terms and conditions of employment, directly or indirectly. This is a very low standard with far-reaching implications for many types of employment relationships, including subcontractors, franchisors, temporary staffing agencies, and more.

In the first reported decision since *Browning-Ferris*, on October 21, 2015, the NLRB Region 5 held in *Green Jobworks, LLC*, that there was *not* a joint employer relationship between the subcontractor and staffing agency. Although the *Green Jobworks* decision is not binding like *Browning-Ferris*, it can be distinguished in several ways from *Browning-Ferris*. For instance, in *Green Jobworks*, there was no ability to require specific employees; no authority to discipline employees; limited influence with hourly rates for projects; and no exercise of supervision.

However, in light of the binding changes from *Browning-Ferris* and the guidance from *Green Jobworks*, employers must review all agreements under the new standard in favor of finding joint employer status. This includes consulting counsel regarding supervisory functions, oversight, training, and other day to day activities of direct employees and third party employees.

Illinois Employment Updates

Medical Marijuana in Illinois: Like 23 states and Washington, DC, Illinois recently legalized

medical marijuana for certain qualifying conditions and diseases. Currently, the 39 qualifying medical conditions include cancer, HIV, and seizures, but as of January 1, 2016, the Illinois Department of Public Health will accept petitions to add debilitating medical conditions or diseases to the Medical Cannabis Patient Registry Program.

The drug is still illegal under federal law, meaning there can be confusion for employers in implementing drug testing. Illinois' pilot program prohibits discrimination against a marijuana patient, but allows drug testing and zero-tolerance drug-free workplace policies. Employers may also discipline qualifying patients for violating those rules. Moreover, the Illinois law does not protect a medical marijuana patient from being fired for failing a drug test, even though this can happen long after the effect of the drug is gone.

Other states that have legalized marijuana provide guidance in this confusing landscape for employers. The Colorado Supreme Court ruled this past year that Dish Network could legally terminate a medical marijuana patient for failing a drug test because a Colorado law protecting employees for lawful activities outside of the workplace did not apply to the use of marijuana, since it violated federal law. Illinois has a similar lawful activities statute.

Although Illinois cases have not yet been litigated, the language of the state law seems to favor employers. Employers can accommodate medical marijuana but are not required to, and the Illinois Human Rights Act and the ADA both exclude current illegal drug users from protection. Therefore, employers in Illinois do not have specific guidance in addressing the issue of medical marijuana at work, but should consider the risk of liability based on the employee's job duties (for instance, whether a position includes operating heavy machinery or sitting at a desk may affect how to address medical marijuana usage).

Another complicating factor is that drug tests may trace marijuana even if the employee is no longer "intoxicated," and there is no legal threshold as there is with alcohol. Marijuana can stay in the system long after it has been used, as much as two to three weeks after usage. However, the Illinois law also states that there is no cause of action against an employer who acts on "good faith belief" that an employee was impaired.

While it remains to be seen how courts in the state address medical marijuana issues, the law allows for employers to continue using drug tests and drug-free workplaces.

Seventh Circuit Allows Seniority System in ADA Accommodation Claim: In December 2015, the Seventh Circuit affirmed dismissal of a failure to accommodate claim brought by an employee who was bumped from a job assignment when it was opened up to seniority-based bidding pursuant to a collective bargaining agreement ("CBA"). The plaintiff had permanent restrictions in the position and was accommodated with more sedentary job duties, but the employer decided to open the position in a seniority-based bidding scheme after the plaintiff had held the position for years. The employee did not have enough seniority to hold the position, and there were no available no-bid positions at the time.

The employee brought suit claiming his employer failed to accommodate him by refusing to let him stay in the sedentary position and by failing to place him in a no-bid position. The Court held the employer was not required to violate a uniformly enforced seniority system to accommodate the disability. The plaintiff also failed to show that a vacancy existed at the relevant time, affirming that the ADA does not require employers to create vacancies or "bump" other employees to provide accommodations. A dissent pointed out precedent that "special circumstances" can warrant a finding that a requested accommodation is reasonable despite the seniority system. The dissent argued that the employer excluding the position from the seniority system for so many years could warrant "special circumstances."

This case provides guidance to employers that a CBA does not need to be violated to accommodate an employee, but that it must be uniformly enforced in order to avoid violating the ADA. However, the dissent's arguments underline that there are no clear answers when balancing a CBA seniority system and obligations under the ADA.

Other City and State Employment Updates

New York City and Washington, DC Transit Benefit Requirements: As of January 1, 2016, New York City and Washington, DC will require employers with 20 or more employees to offer qualified pretax transportation benefits to their workers. This mandate follows San Francisco and nearby cities in the San Francisco Bay Area that already have this requirement in place.

The amounts that can be excluded from gross income and not taxed as ordinary income are subject to monthly maximum caps under the Internal Revenue Code ("IRC"); for 2016, the federal limit will be $130 for transit/vanpool expenses and $255 for parking expenses. For employers in cities mandating a benefits plan, the employer should ensure that the plan it decides to implement meets IRC requirements. Employers should also consult with counsel to avoid employment law issues, such as unintentional discrimination against employees with disabilities or encouraging hourly nonexempt employees to work off the clock.

California: California has a couple new laws taking effect January 1, 2016. The state's Fair Pay Act will mandate that male and female employees doing "substantially similar" work be paid the same wages, unless employers demonstrate factors like seniority, education, experience, or other factors account for disparities. Employers must look at essential job descriptions to make judgments about what are substantially similar positions, and identify compensation employees are paid for the positions. One consideration is to have counsel involved in this process, so that the analysis and work product is protected by attorney work product and attorney client privileges. This may help avoid the data being used against the company in later litigation.

California also has new mandatory changes that must be made to the state's workers' compensation posting, which must be displayed beginning January 1, 2016. The revised Notice to Employees - Injuries Caused By Work includes updates to information about benefits and treatment by a predesignated physician, and additional space for medical provider network information.

Colorado: Colorado has an updated Minimum Wage Order 31 posting indicating the new rate of $8.23/hour, effective in 2015. It also lists the new tipped employee wage of $5.21/hour.

Connecticut: Connecticut passed a new law that became effective October 1, 2015, which regulates electronic nicotine delivery systems and vapor products in venues that include many places of employment. The law prohibits use of these products in buildings such as health care institutions, retail food stores, restaurants, and more. Covered employers are required to post signs in conspicuous places stating that use of the products is prohibited by state law, with specific requirements about signage, such as about the font. Employers can be fined under state law for failing to post required signs, and should verify whether they are subject to the new law. The law also requires a public hearing held by the General Assembly, which employers should note, in case new legislation results in expanded coverage and/or penalties.

Florida: The Florida Department of Economic Opportunity released its 2016 minimum wage posting, which shows the minimum wage of $8.05/hour and the tipped minimum wage of

$5.03/hour. The rates are the same as in 2015, but the state indicates that employers must display the new poster effective January 1, 2016.

Kentucky: The Kentucky Cabinet released an updated OSHA posting including new reporting requirements taking effect January 1, 2016. Employers must report incidents resulting in the loss of an eye within 72 hours from the time the incident is reported to the employer, employer's agent, or another employee. There is also additional information about employee requests of medical records.

Maryland: Maryland's Department of Labor, Licensing and Regulation has made a mandatory change to the Equal Pay for Equal Work posting, removing the requirement that an employer keep records relating to an employee's race and gender. The posting also removes the statement that the Commissioner of Labor and Industry may analyze records to study pay disparity issues. Employers are required to conspicuously post the Equal Pay for Equal Work subtitle in each place of employment.

Michigan: The state's Occupational Safety and Health Administration updated the minimum wage posting to list the 2016 minimum wage of $8.50/hour and the minimum rate for tipped employees of $3.23/hour. Minors who are 16 or 17 years old may be paid a minimum wage of $7.25/hour.

Minnesota: The Minnesota Department of Labor & Industry updated its job safety and health posting, to include new injury reporting requirements. Employers must report all accidents resulting in amputation, eye loss, or inpatient hospitalization within 24 hours.

Missouri: The Missouri Department of Labor and Industrial Relations has made a mandatory change to its minimum wage posting, showing the 2016 minimum wage of $7.65/hour. The rate is the same as 2015, but the posting lists a new effective year.

New Jersey: In 2015, the cities of Elizabeth and Jersey City in New Jersey updated their paid sick leave laws. Elizabeth's law takes effect on March 2, 2016, following the language of paid sick leave ordinances in other New Jersey municipalities. Covered employees accrue one hour of paid sick leave for every 30 hours worked, with caps on total paid sick time depending on the number of employees. The law outlines the permitted uses of sick time, and allows employers to require reasonable advance notice (no more than seven days) of the use of paid sick time if foreseeable. Employers can request documentation from a healthcare professional for sick time of more than three consecutive days that the time is used for a covered purpose, but cannot ask for the nature of the illness. There are also notice and posting requirements.

For the city of Jersey City, the paid sick time ordinance was revised to conform to more generous paid sick leave ordinances in other municipalities. For employers with fewer than 10 employees, employees are now provided 24 hours of paid sick time per year and 16 hours of unpaid sick time. There are exceptions for certain workers who are required to receive 40 hours of paid sick leave her year, regardless of the size of the employer. There is also an exception for employees covered by a CBA, allowing CBAs to contain waivers of paid sick time. There are also changes to the definition of employee and to the penalties for violation of the statutes.

New York: New York's Labor Law Section 193, which allows employers to make deductions from employee wages in circumstances that are otherwise impermissible by the state's Department of Labor, was extended for another three years until November 6, 2018. These permissible wage deductions included recovering wage overpayments and repayments of employer loans.

In addition, the state's Department of Labor published a revised minimum wage posting, reflecting the new state minimum wage rate of $8.75/hour, effective December 31, 2015.

Ohio: The Ohio Department of Commerce released its 2016 minimum wage posting, showing the minimum wage of $8.10/hour and the tipped minimum wage of $4.05/hour. The rates are the same as 2015, but the state requires employers to display the 2016 poster.

Oregon: The state's Bureau of Labor and Industries has made mandatory changes to two postings and released a new mandatory notice. Effective January 1, 2016, employers must provide employees with notice of the state's sick time laws. The state also made a mandatory change to its Family Leave Act posting, which now indicates that employees are entitled to group health insurance benefits during family leave as if they continued working. This law also takes effect January 1, 2016. Finally, the minimum wage posting has added information about rules that apply to domestic service employment, also taking effect on January 1, 2016.

Rhode Island: The state's Department of Labor and Training is also making a mandatory change to the minimum wage posting, indicating that as of January 1, 2016, the state minimum wage will be $9.60/hour. For full time students aged 19 and under in certain jobs the minimum wage is $8.64/hour, and for minors aged 14 and 15 the rate is $7.20/hour. For employees in tipped jobs, the rate is $3.39/hour.

Texas: Texas has a couple state laws expanding gun rights. Effective January 1, 2016, handgun license holders in the state can carry a holstered handgun anywhere a concealed handgun is permitted. Handguns are not allowed in places such as hospitals and nursing homes, amusement parks, government buildings, churches, and other places of religious worship.

Another law effective August 1, 2016, allows carrying of concealed handguns by handgun license holders in university buildings including public and private colleges, universities, and other independent institutions of higher learning. For public junior and community colleges the law goes into effect on August 1, 2017. Private universities may opt out and public universities may set up gun-free zones.

Employer policies prohibiting guns on private property are lawful under the new open carry law, with the requirement that private property owners that want to ban guns notify the public orally or via written communication. Signs must be posted in a conspicuous manner, clearly visible, with mandated language and placement. Additionally, most public and private employers may not prohibit employees with a license to carry a handgun from transporting or storing a lawfully possessed firearm in a locked, privately owned motor vehicle in the employer's parking area. There are certain exceptions, including employer owned vehicles or school districts.

If you have questions regarding these new laws or need assistance to review your current policies, please contact our office. We look forward to working with you in 2016!

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