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Quarterly Legal Update – October 2016

Senate Bill 654 – Extending Family Leave Mandates to Small Businesses

Dubbed the "New Parent Leave Act," SB 654 currently awaits Governor Brown's signature. If approved, the law will provide six weeks of job-protected unpaid maternity and paternity leave for employees of companies with 20 to 49 employees. To be eligible, the employee must have been employed by the company for at least 12 months, and work at least part time. Current law provides employees of larger companies with 49 or more workers with 12-weeks of job protected leave. If signed, the law will take effect January 1, 2018.

House of Representatives Bill 6094 - New Overtime Regulations

On September 28, 2016, the U.S. House of Representatives passed H.R. 6094 which would delay the implementation of the Department of Labor's new overtime regulations raising the salary threshold to $47,476 for exempt employees. The bill still requires Senate and Presidential approval. If approved, the bill would delay the implementation of the new salary threshold for overtime exemption until June 1, 2017. The bill will also offer some relief for small and non-profit businesses. We will monitor this bill's progress through the legislative procedure and update you to any new developments.

QUARTERLY LEGAL UPDATE:

EEOC on Retaliation

A new guidance from the EEOC replaces the 1998 Compliance Manual on Retaliation. ***(See Page 2)***

Class Action Waivers and the NLRA

Ninth Circuit decision on class action waivers drives a wedge between federal appellate courts. ***(See Page 3)***

New Information for EEO-1 Filings

Final revisions to the EEO-1 reporting requirements bring about major additions to secure salary data. ***(See Page 4)***

"Cat's Paw" Liability

In the Second Circuit, a newly adopted theory of liability puts emphasis on investigating employee claims. ***(See Page 5)***

Post-Incident Drug Testing

Reasonable reporting procedures for employee injuries come into question with a the August 2016 rule by OSHA. ***(See Page 5)***

EEOC Issues Final Guidance on Retaliation

On August 29, 2016, the EEOC issued the long-anticipated "Enforcement Guidance on Retaliation and Related Issues" [1] ("the Guidance"), replacing the 1998 Compliance Manual on Retaliation. Importantly, the Guidance is instructive on how the EEOC will interpret retaliation claims. The highlights include:

Protected Employee Activity – "Protected activity" generally includes participation in or reasonably opposing conduct made unlawful by an EEO law, such as filing an EEO complaint, participating in an EEO matter – even if the underlying claim is ultimately unsuccessful. Furthermore, an employer must not retaliate against an employee who has voiced opposition to a perceived EEO violation. Protection for opposition is limited to that in which there is a good faith reasonable belief in unlawful activity.

Employer Actions Potentially Amounting to Retaliation – Employer conduct that might amount to retaliation under the Guidance, includes: engaging in conduct that would deter a reasonable person from engaging in protected activity; examining an employee's work or attendance more closely; or adversely changing work assignments.

Elements of a Retaliation Claim - A claim for retaliation may be established by showing (through material or circumstantial evidence) that:

- The employee engaged in protected activity;
- The employer took a materially adverse action; and
- Retaliation caused the employer's action.

To rebut retaliation claims, the employer can seek to establish legitimate non-retaliatory reasons for any adverse action(s) or show it was unaware of the employee's involvement in a protected activity.

Rules against interference with the exercise of rights under the ADA. The Guidance provides rules against interference with exercise of ADA rights, including conduct that is reasonably likely to interfere with the exercise or enjoyment of an ADA right.

Remedies for retaliation. Remedies for retaliation include:

- Preliminary relief such as an injunction;
- Compensatory or punitive damages;
- Equitable relief such as back pay, or job reinstatement

Recommendations:

- Revise and maintain written anti-retaliation policies;
- Train all employees on anti-retaliation policies;
- Address current practices and responses to retaliation complaints;
- Immediately follow up and document any alleged claims of retaliation;
- Review proposed adverse employment actions to ensure compliance with new Guidance.

Contact Stokes Wagner for additional information on these guidelines, or for assistance reviewing and revising current retaliation policies and procedures.

[1] [1]https://www.eeoc.gov/laws/guidance/retaliationguidance.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= The Guidance also includes a quick Q&A sheet, which can be found here: https://www.eeoc.gov/laws/guidance/retaliation-qa.cfm

Ninth Circuit Concludes Class Action Waivers Violate NLRA

In an important decision for employers, a 2-1 panel of the Ninth Circuit recently widened the divide between the federal appellate courts with regard to class waivers in employee arbitration agreements, concluding that such waivers violate the National Labor Relations Act ("NLRA").[2]

Historical Background - In 2011, the United States Supreme Court upheld the validity of class arbitration waivers in the context of consumer class actions in the landmark case *AT&T Mobility v. Concepcion.*[3] As a result, employers across the nation have implemented such waivers in their employee arbitration agreements to protect against costly, drawn out class-litigation. Many courts have since upheld the validity of such waivers under the authority of *Concepcion*. The NLRB, however, has continued to challenge class- waivers in the employment context leading to a divide between the circuit courts.

The Circuit Divide - On May 26, 2016 the 7th Circuit became the first appeals court to adopt the NLRB's position and strike down class waivers in *Lewis v. Epic Systems*, holding that class waiver violate Section 7 of the NLRA because they interfere with workers' rights to engage in concerted activity for their mutual benefit and protection. The 9th Circuit echoed this reasoning in *Morris v. Ernst & Young*.

Conversely, the 2nd, 5th, 8th, and 11th Circuits have rejected the NLRB's position and maintain that arbitration agreements with a waiver of class actions are enforceable.

In reaching its decision, the 9th Circuit sided with the 7th Circuit and the National Labor Relations Board ("NLRB") holding that mandatory class action waiver provisions in employee arbitration agreements violate the National Labor Relations Act ("NLRA").

Notably, the court left open the option for "opt-out" provisions in a footnote of the opinion, suggesting that class waivers may be permissible when the employee is not required to sign such waivers as a condition of employment. As such, we recommend revising policies to include an opt-out provision.

Importantly, this ruling does not change the law in most jurisdictions, which have rejected the NLRB's position, and maintain that arbitration agreements containing class waivers are enforceable.

How Does this Decision Affect You? - At this point, employers under the 9th Circuit's jurisdiction should assume that mandatory class waivers in employment arbitration agreements are invalid under this ruling. However, there is hope that a full panel will agree to hear the case on an en banc basis. Furthermore, the continued divide between the circuit courts might be the silver lining needed for the U.S. Supreme Court to address the issue.

Unless and until the 9th Circuit reverses its own decision or the Supreme Court intervenes to settle the matter, employers in the jurisdiction of the 9th Circuit should be prepared to adjust to this new ruling. Specifically, we recommend revising current policies and agreements to include "opt-out" provisions. Stokes Wagner will keep you informed as to any changes in the ruling, including whether and when the United States Supreme Court decides to address the issue.

[2] *Morris v. Ernst & Young* (9th Cir., August 22, 2016)
[3] *AT&T Mobility v. Concepcion* 563 U.S. 333 (2011)

EEO-1 Filings To Include Salary Information Starting March 2018

As anticipated, the EEOC issued its final revisions to the EEO-1 reporting requirements on September 29, 2016, in an effort to promote equal pay in the workforce. Beginning March of 2018, private employers with more than 100 employees will be required to disclose data on the wages and hours of its workforce in addition to the existing EEO-1 reporting requirements. Currently, covered employers are only required to report data on the race, gender, and ethnicity of its workforce. Importantly, these changes have no effect on the EEO-1 reports due September 30, 2016. As noted above, the new requirements contain two major additions to the reporting requirements:

Summary Pay Data – Employers will be required to report the total number of full and part-time employees by demographics in 12 pay bands for each EEO-1 job category according to W-2 wages;

Data on Hours Worked – Employers will be required to report the aggregate number of hours worked by the workers accounted for in each pay-band. For non-exempt employees, employers should consult records already kept to remain compliant with the Fair Labor Standards Act. For exempt employees, employers have the option to report 20-hours per week for part-time employees and 40-hours per week for full-time employees or track report the actual number of hours worked.

How will salary data be reported?

Employers will tabulate and report the number of employees whose W-2 earnings for the prior 12 months fell within 12 pre-identified pay bands.

The pay bands are:

Pay Band	Salary Range
1.	$0 - $19,239
2.	$19,240 - $24,439
3.	$24,440 -$30,679
4.	$30,680 - $38,999
5.	$39,000-$49,919
6.	$49,920-$62,919
7.	$62,920-$80,079
8.	$80,080 - $101,919
9.	$101,920 - $128,959
10.	$128,960-$163,799
11.	$163,800 - $207,999
12.	$208,000 and above

What should you do now?

In preparation for the March 31, 2018 filing deadline, Stokes Wagner recommends the following:

✓ Assess your company's current data system and determine if adjustments need to be made for recording required data;
✓ Analyze and assess risk address pay issues that could lead to an EEOC investigation;
✓ Consult the EEOC's Q&A page on the new EEO-1 Revisions; and
✓ Contact Stokes Wagner with additional questions.

Second Circuit Adopts "Cat's Paw" Liability for Employer Negligence

On August 29, 2016, the U.S. Court of Appeals for the Second Circuit joined several other federal courts[4], and for the first time, adopted the "cat's paw" theory of liability in Title VII discrimination claims. The term "cat's paw" refers to a situation in which an employee is subjected to an adverse employment action by a decision maker who has no discriminatory motive himself but who has been manipulated by an employee who does have such intent to bring about an adverse employment action through his or her own bad acts.

The plaintiff in *Vasquez v. Empress Ambulance Service, Inc.* was fired as a result of a "he said, she said" situation where Vasquez accused her co-worker of sexual harassment and he concocted a story in retaliation, claiming that *she* had been sexually harassing *him*. In her lawsuit, Vasquez claimed that her employer negligently failed to recognize that her co-workers actions were retaliatory. The Court held that an employer can be held liable for acting on bad information from ***any*** employee when firing another worker – even a low-level, non-managerial employee.

What does this decision mean for employers?

Proper investigation procedures are crucial. Employers must thoroughly investigate, in a non-negligent manner, all workplace allegations before taking disciplinary action or making a termination decision. Employers should consider the following questions:

- Which coworkers of the employee were involved in reaching the decision?
- Did anyone involved in the decision harbor animosity toward the employee?
- Has the employee offered any credible evidence that the decision was based on an unfair motive or on false factual conclusions?
- Is it is possible that such false conclusions stem from a discriminatory or retaliatory motive relating to the employee's membership in a protected class?

Any investigation should be impartial and should consider both claims and all possible evidence. Investigations should never conclude without speaking to the accused and entertaining all of his/her defenses.

This decision isn't all bad news for employers. The Court stated that an incorrect finding of an employee's misconduct, without more, is insufficient to prove retaliation. As long as the employer can prove that it performed a good faith, reasonable investigation supported by objective evidence, liability for any disciplinary action will not attach.

Post-Injury Drug Testing Under New OSHA Workplace Injury Rules

In our July 2016 Legal Update, we addressed OSHA's new rule on the reporting of workplace injury data. As a result of the rule taking effect on 8/11/16, employers who have policies and procedures which mandate drug and alcohol testing after the occurrence of a workplace accident may be open to penalties of more than $12,000 for first time violations and more than $120,000 for each willful or repetitive violation. ***(Cont. Page 6)***

[4] The following five federal circuit courts of appeals have previously adopted and applied this cat's paw theory of liability to Title VII retaliation claims: the 3rd Circuit, the 5th Circuit, the 6th Circuit, the 7th Circuit, and the 8th Circuit.

(Cont. from Page 5) While the final rule does not directly address the issue of post-injury drug testing, the penalties stem from the requirement that reporting procedures must be reasonable. OSHA's commentary accompanying the final rule states that OSHA views mandatory post-accident drug and alcohol testing as a deterrent to reporting, and that employers who enforce such practices will be subject to scrutiny and penalties. Specifically, OSHA's commentary states that, "Although drug testing of employees may be a reasonable workplace policy in some situations, it is often perceived as an invasion of privacy, so if an injury or illness is very unlikely to have been caused by employee drug use, or if the method of drug testing does not identify impairment but only use at some time in the recent past, requiring that employee to be drug tested may inappropriately deter reporting."

As a result, employers should evaluate their own post injury drug testing policies and procedures to ensure that the procedure is not retaliatory, does not deter employees from reporting incidents, and is not utilized in situations where drug or alcohol use is very unlikely to have been a factor. OSHA did note that any employer who is required to administer a post-accident drug or alcohol test under the requirements of a State or Federal law will be allowed to continue such testing as compliance with applicable laws shall not be deemed to be retaliatory actions.

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