STOKES WAGNER

ATTORNEYS AT LAW

QUARTERLY LEGAL UPDATE
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Contents

NATIONWIDE

EEO-1 Amendments on Pause

To promote equal pay in the workforce, in September 2016, the EEOC revised requirements on the EEO-1 form. Starting in March 2018, private employers with more than 100 employees will be required to disclose data on an employee's wages and hours, in addition to reporting data on race, gender, and ethnicity.

Although approved, these regulations are not final. In February 2017, the Chamber of Commerce and several trade associations petitioned to the Office of Management and Budget ("OMB") to reconsider its approval of the revised EEO-1 form. They argued that the new requirements are overly burdensome on employers, and the EEOC underestimated the time and money employers would have to spend to produce the data on summary pay and hours worked. On the other hand, civil right and workers' organizations contend that the EEOC's estimated burden was based on rigorous and transparent analysis. As the debate between the two groups continue, the decision of the OMB remains pending.

What should employers do? There is no word on whether the OMB will move forward with the revised form. In light of costly time and resources, employers should wait for the OMB's decision before revamping their existing data systems.

Working Families Flexibility Act May Convert Overtime to Comp Time

On May 2, 2017, the House of Representatives passed the Working Families Flexibility Act ("the Act") to amend the Fair Labor Standards Act ("FLSA") and allow employers to offer overtime eligible employees the option of either being paid in cash for the additional hours or accruing an hour and a half of paid time off ("comp time"). Under this Act, non-unionized private employers can offer workers the option to accrue up to 160 hours of "comp time" for hours worked beyond 40 in a workweek.

Under the Act's current language, employees would have to voluntarily agree to such an arrangement, which includes the option to change their mind, cash out their unused time off and return to a cash compensation structure for overtime at any time. Similarly,

employers can choose to stop offering comp time as an option at any time so long as they give employees 30 days' notice.

To qualify for the accrual option, employees must work at least 1,000 hours in a 12-month period before they agree to any comp time arrangement. If an employee's accrued time goes unused at the end of the year, employers must reimburse the employee in cash for that time within 30 days. For union employees, any comp time policy an employer seeks to enact is subject to the CBA.

Although viewed as employer-friendly, the Act will require significant oversight and create administrative burdens to maintain compliance with the law, including keeping track of employees who opt in along with their flex time.

What should employers do? Employers should note that this Act is not yet the law. The Act now must pass the Senate, which analysts agree will be difficult without substantive changes.

Update on Proposed Change to Federal Overtime Regulations

There have not been any changes to the new overtime rules that were stayed as a result of a preliminary injunction entered by a federal court in Texas last year.

On February 22, 2017, the U.S. Court of Appeals for the Fifth Circuit granted a request by the Department of Justice for a 60 day extension, in which to file its final reply brief. Subsequently, two additional extension requests were made and granted. As a result, the final reply brief will not be filed until June 30, 2017, with the oral argument scheduled sometime this summer. This extension not only pushed off the briefing schedule, but it also allowed the Senate to confirm Alexander Acosta, a Trump administration nominee, as the Secretary of Labor.

Many predict Mr. Acosta will not defend the new overtime standards. He has stated that he questions whether the Labor Department had authority to update the overtime rules. However, during his Senate confirmation hearing, he expressed that he found it "troubling" that the salary threshold had not been adjusted since 2004 and that he would look at the matter "very closely."

What should employers do? Employers should remain alert for new white-collar-exemption rulemaking that aims to dial-back the $913 salary threshold, but not down to a $455-a-week level.

CIRCUIT COURTS

Ninth Circuit Rules on Equal Pay Act

Federal and California law prohibits employers from paying one sex a higher salary than that paid to members of the other sex for equal work. In 2016, California amended its Fair Pay Act to state that "prior salary shall not, by itself, justify any disparity in compensation." However, a recent Ninth Circuit decision stirs up debate whether prior salary legally justifies a wage difference.

The Ninth Circuit (covering Alaska, Arizona, Hawaii, Washington, Montana, Oregon, Idaho, and California) recently held that an employer's use of prior salary does not automatically violate federal law. An employer may use an employee's prior salary to justify a wage difference if the employer can prove that the use of prior salary was (1) to effectuate a business policy and (2) reasonable in light of the employer's purpose and practices. The Court did not address California law when it held that an employee's prior salary may fall under the fourth exception of the federal Equal Pay Act – "a differential based on any other factor other than sex". The Ninth Circuit reasoned that it was merely affirming a prior opinion from 1982, *Kouba v. Allstate Ins. Co.*, 691 F.2d 873 (9th Cir. 1982).

What should employers do? Given the Court's decision, employers in California should be wary of relying solely on prior pay as a justification to wage disparity. Employers should review their policies and practices to ensure that any use of prior salary in determining wages is part of a broader business policy and reasonable in light of the employer's purposes and practices and employees' experience and qualifications.

Seventh Circuit Overrules Binary Gender Identity Precedent

After decades of rejecting claims of LGBTQ discrimination, the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) became the first U.S. Court of Appeals to overrule precedent that "sex" under Title VII applies only to binary male-female biological identities. In *Kimberly Hively v. Ivy Tech Community Col-*

lege, the Court found that "sex" as a Title VII protected class has expanded under recent Supreme Court precedents.

As a result, the Seventh Circuit now interprets "sex" to include orientation and prevents employers from discrimination because an employee does not act in accordance with sex stereotypes. Employers should note that the Court's lopsided 8-3 vote shows that it had no difficulty deciding that discrimination on the basis of sexual orientation violates Title VII. This decision is in line with recent EEOC decisions and exemplifies the growing trend nationwide. In response, employers should evaluate all policies and procedures to ensure continued compliance with Title VII, and counsel managers to ensure that all employees are treated fairly and equally under the law.

CALIFORNIA

Updated Sexual Harrassment Guide

On May 2, 2017, the California Department of Fair Employment and Housing ("DFEH") issued a new "Workplace Harassment Guide for California Employers" (the "Guide"). The Guide provides directions and recommendations for employers to implement an anti-harassment program that meets an employer's legal obligations under the Fair Employment and Housing Act ("FEHA").

The Guide details requirements for an employer's written anti-harassment policy and mandatory two-hour training, including: management's modeling of appropriate behavior, specialized training for complaint handlers, policies and procedures for responding and investigating complaints, thorough and fair investigations of complaints, and prompt and fair remedial action.

Key points from the DFEH's recommendations are:

- Utilize open-ended questions, limit confidentiality, and prepare appropriate documentation to help reach effective conclusions to investigations;
- Make credible determinations based on credibility factors (e.g., inherent plausibility, motive to lie, corroboration, history of honesty/dishonesty, habit/consistency, inconsistent statements, demeanor);
- Enforce anti-retaliation measures (counsel witnesses and parties not to retaliate);
- Take appropriate remedial steps when there is proof of misconduct, even if the misconduct does not rise to the level of a violation of Company policy or the law.

What should employers do? Employers should review and distribute the Guide with those who are involved in the company's investigation process (e.g., Human Resources).

New Employer Background Check Regulations

The California Fair Employment and Housing Commission ("CFEH") recently adopted new regulations that complicate employers' use of criminal background checks in employment decisions, paving the way for expanded liability under the Fair Employment and Housing Act ("FEHA").

Starting July 1, 2017, these regulations prohibit the use of any criminal background information that has an "adverse impact" on a protected class under FEHA. In light of these new regulations, employers should be wary in implementing "bright-line" policies of disqualifying applicants for certain criminal histories, such as felony convictions. Employers must carefully assess whether their policy of using criminal background information disproportionately impacts member(s) of a protected class, whether it relates to hiring, promotion, demotion, transfer, discipline, termination, etc. If so, the employer must be able to prove that the use of criminal history information in making the decision is "job related and consisted with business necessity."

What should employers do? Employers should conduct an "individualized assessment" of each applicant to determine whether their criminal history is similarly tailored to the job the applicant seeks. Employers must engage in an interactive process: (1) inform the applicant of a potential adverse decision, (2) give the applicant an opportunity to explain the circumstances, and (3) consider whether the explanation justifies an exception to the employer's policy on excluding applicants with criminal history.

Employers who fail to follow these regulations will likely face increased exposure to discrimination lawsuits under FEHA. In addition, to assess whether a background check policy complies with state and federal

laws with regard to objective criteria – i.e., what may be reported and how it is obtained – employers must now consider whether their policies violate subjective criteria related to its potential "adverse impact." The crime statistics referenced in the regulations suggests that all criminal background information may adversely impact a particular protected class.

More FEHA Protections On the Way for Transgender Employees

California law protects individuals who identify as transgender, providing protections on the basis of both gender identity and gender expression. More protections are on the way after the Federal Employment and Housing Council (FEHC) unanimously voted to adopt proposed FEHA amendments regarding transgender identity and expression on March 30, 2017. The amended regulations have been sent to the Office of Administrative Law for approval. If approved, the final text would be effective on July 1, 2017.

Importantly, the amended regulations will:

- Expand the definition of gender identity and expression to include "transitioning" employees;
- Add specific protections against discrimination for transitioning employees;
- Prohibit employers from requiring applicants to disclose their sex, gender, gender identity, or expression on application materials;
- Require employers to honor an employee's preferred name, gender, and pronoun;
- Require employers to provide equal access to bathrooms, locker rooms, and similar facilities – regardless of an employee's sex.

What should employers do? Employers should familiarize themselves with these amendments to prepare for the possible July 1, 2017 effective date.

California Employees' Day of Rest

California law now entitles an employee one day of rest per workweek. Periods of more than six consecutive days of work that stretch across more than one workweek are not prohibited per se. Employers and employees are given some latitude, as employees can still choose to work on their day of rest. However, employers may not encourage or force an employee to work on their day of rest. Employers must ensure that an employee receive "days of rest equivalent to one day's rest in seven." Thus, on balance the employee must average no less than one day's rest for every seven.

Employees who work more than thirty hours per workweek are entitled to this day of rest. The Day of Rest requirement does not apply to employees who work shifts of six hours or less on each day of the work week. In other words, if an employee works less than six hours every day, they can work seven days in a workweek without premium pay.

What should employers do? If your employees are working 7 days within a work week, consider the following practices (which should be tailored to your property):

- Define work week in your handbook;
- Include a "Day of Rest" policy in your handbook;
- Train managers on how this new case affects their scheduling practices.

NEW YORK

Freelance Isn't Free Act (FIFA)

On May 15, 2017, New York City Local Law 140 of 2016 took effect. The law establishes and enhances protections for freelance workers, specifically the right to a written contract, timely and full payment, and protection from retaliation. Violations of these new rights will allow freelance employees, to seek statutory damages, double damages, injunctive relief, and attorney's fees in state court. If there is evidence of a pattern or practice of violations, the Corporation Counsel may bring civil actions against employers to recover penalties up to $25,000.

What should employers do? Employers who hire independent contracts must:

1. *Have a Written Contract:* All contracts worth $800 or more must be in writing. If, in the aggregate, any agreements amount to more than $800 in any 120-day period, those agreements must also be in writing. The contracts must include an explanation of the work to be done, the pay for the work, and the payment date. Both the employer and the independent contractor must maintain copies of the agreement.

2. *Make Timely Payments:* Employers must pay a freelance worker for all completed work on or before the contracted date. If there is no contracted payment date, payment must be issued within 30 days of the completion of services.

3. *Must Not Retaliate:* It is illegal to penalize, threaten, or refuse to work with freelance workers because they have exercised their rights pursuant to FIFA.

Equal Pay Legislation

On October 31, 2017, New York City employers will no longer be permitted to inquire about previous compensation data under a new law. The law bans employers from asking about previous salary information in an attempt to halt systematic wage discrimination. The bill is in response to a report that found that women in New York City earn approximately $5.8 billion less than men in wages each year.

The legislation follows executive orders from both New York Governor Cuomo and Mayor de Blasio to ban hiring practices that incorporate questions about salary history.

New York City is not the first to ban such inquiries. It joins the State of Massachusetts, the territory of Puerto Rico, and the city of Philadelphia in passing the legislation. In sum, 20 other legislatures have introduced similar provisions. At a Federal level, the Paycheck Fairness Act, has been introduced by Rep. Rosa DeLauro.

What should employers do? To ensure compliance with this changing legal trend, employers should implement policies that ban inquiries into an applicant's historical pay data.

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