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QUARTERLY LEGAL UPDATE

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TABLE OF CONTENTS

(CLICK TO JUMP TO PAGE)

DOL Announces Intent to Rescind 2011 Tip-Pool Rule

The Department of Labor (DOL) has announced an intent to rescind the notorious 2011 Federal Tip-Pooling Rule, which currently prevents service-industry employers from allowing front-of-house servers to share tips with back-of-house employees (i.e., cooks and dishwashers). Under the 2011 regulation, tip-pools must only include front of house staff. Given the prevalence of tip-pooling in the service industry, the 2011 rule has been the subject of numerous legal challenges, including two petitions that are currently pending before the United States Supreme Court.

As a result of these legal challenges, the White House Office of Management and Budget issued its regulatory agenda in late July, indicating an intent to rescind the 2011 tip-pooling rule.

What does this mean for you?

If the law is revoked, employers who do not utilize a "tip-credit" to meet minimum wage requirements will be permitted to distribute tips amongst both front-and-back of house employees under federal law. Importantly, however, this change will not impact more stringent state laws on this topic. If you have a question about how tip-pooling works in your state, Stokes Wagner is happy to advise.

Required New Form I-9: What HR Needs to Know

On July 17, 2017, the United States Citizenship and Immigration Services ("USCIS") released a revised Form I-9.

While the revised form does not change storage and retention rules, it does include subtle changes to the form's instructions. For instance, the instructions to Section 1 have been revised to remove "the end of" from the phrase "the first day of employment." Also, the form introduces a new name for the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices: The Immigrant and Employee Rights Section.

The most notable change to the Form I-9 relates to USCIS's List of Acceptable Documents, which has been revised to reflect the most current version of the certification of report of birth issued by the U.S. State Department. Specifically, the new Form I-9 compiles all birth certificates issued by the State Department (Form FS-545, Form DS-1350 and Form FS-240) into selection C#2 in List C. The revised form also renumbers all List C documents, except the Social Security card.

The USCIS has also added the Consular Report of Birth Abroad (Form FS-240) to List C, which is issued to employees born overseas to parents who are American citizens. Employers completing the Form I-9 online will now be able to select Form FS-240 from the List C Section 2 and Section 3 drop-down menus. Also, employers using E-Verify will be able to access Form FS-240 when creating cases for employees who present this form to verify employment eligibility.

What does this mean for you?

Effective September 18, 2017, all employers must begin using the new Form I-9. For now, employers will be able to use the revised version or continue using Form I-9 with a revision date of 11/14/16 until September 17, 2017. Failure to comply by the September 18, 2017 deadline may result in fines.

Supreme Court Sets Date for Arbitration Class Waiver Cases

In a recent newsletter, we reported that the United States Supreme Court would decide the hotly contested issue of whether class waivers are valid in arbitration agreements sometime this year.

The Court recently announced that it would hear oral argument on the issue on October 2, 2017. Stokes Wagner will keep you informed as things progress with this hot issue.

Plaintiff Wins 7th Circuit Wrongful Termination Case

In *Stragapede v. City of Evanston*, Illinois, the Seventh Circuit upheld the nearly $580,000 jury verdict in favor of the former City employee. Stragapede, a 14-year veteran of the City's Department of Water Services, suffered a traumatic brain injury at home in 2009. The City placed him on a leave of absence. After weeks of rehabilitation, Stragapede returned to work with medical clearance, initially without incident. Some two weeks in, he was observed struggling at work and, within a month, was again declared unsuitable for the position and placed on administrative leave. Significantly, the doctor only examined Stragapede once in connection with his return to work.

In assessing him after his return to work, the doctor did not examine Stragapede, relying solely on the City's report of the various incidents. The City terminated Stragapede following the doctor's report that he was unable to perform the essential functions of his job.

Stragapede sued for wrongful termination alleging the City violated his rights under the Americans with Disabilities Act. The jury found in Stragapede's favor and awarded him front and back pay.

On appeal to the Seventh Circuit, the City argued it had a good faith belief, based upon their doctor's report, that Stragapede posed a direct threat to the health or safety of others. The court held that the City's good faith belief was insufficient. Rather, the City needed to rely on medical and objective evidence to support their belief. The jury was entitled to discount or even disregard the doctor's report as it was based solely on information provided by the City to the doctor, who did not examine or even interview Stragapede.

What does this mean for you?

With any major decision involving a disabled employee, involve the employee, the employee's doctor and your employment counsel at every reasonable turn.

Update on Proposed Changes to Federal OT Regulations

As we wrote in our June update, the Obama administration raised the minimum salary requirement for major "white collar" exemptions from $455/week to $913/week. In July 2017, the Department of Labor ("DOL") filed its long-awaited reply brief with the 5th Circuit regarding the new minimum requirements. The DOL did not seek to reinstate the Obama's minimum salary level. The DOL did, however, ask the Court to find that the DOL has authority to set a salary test.

Notably, the DOL did not ask the 5th Circuit to put the case on pause while it revises Obama's overtime rule. The DOL's decision to not put this case on pause may inadvertently allow the rule to take place before a replacement is ready. However, many still predict that changes will be made to Obama's overtime rules.

What does this mean for you?

Employers should remain alert for any new rule-making that aims to change the $913 salary threshold.

General Contractor Fined for Subcontractor's Wage Theft

For the first time ever, the California Labor Commissioner fined a general contractor nearly $250,000 for wage and hour violations committed by its subcontractor, who had been hired for a hotel construction project in Southern California. This decision is significant for businesses that use subcontractors.

After not receiving four weeks of pay, several of the subcontractor's workers walked off the job and reported the violations to the Labor Commissioner. The Labor Commissioner promptly conducted an investigation and found that the subcontractor had paid the workers from an account with insufficient funds and skipped several pay periods for a majority of the workers. The investigation also revealed that the subcontractor failed to pay overtime wages to many of the workers, who worked up to two overtime hours per day.

As a result, the Labor Commissioner issued citations against both the general contractor and the subcontractor for unpaid overtime and minimum wages, waiting time penalties, rest period premiums and civil penalties for work performed over little more than a one-month period. The general contractor contested the fines. However, on May 16, 2017, the hearing officer affirmed that the general contractor was liable as a "client employer" under AB 1897, which holds client employers liable for wage violations of its subcontractors.

What does this mean for you?

The impact of this finding will have significant effects on businesses and general contractors who require the work of subcontractors. Please contact Stokes Wagner if you have any questions regarding your independent contractor, general contractor, and/or subcontractor agreements.

Employers May Recover Costs in Employment Cases

Ever wonder if you can recover litigation costs in employment cases? On August 15, 2017, in Sviridov v. City of San Diego, the court made it clearer for employers.

Two years ago, in Williams v. Chino Valley Independent Fire Dist., the Supreme Court explained that prevailing employers in employment cases can generally only recover costs if the employee's action was objectively without foundation – an extraordinarily high standard. However, Williams was not asked to consider and did not answer the question of whether costs may properly be awarded in a FEHA action pursuant to a Section 998 offer. That issue was before the court in Sviridov.

Sviridov holds that a Section 998 offer creates economic incentives for both parties to settle rather than try lawsuits. Litigation costs are awarded to an employer if a plaintiff is not awarded damages more than the Section 998 offer, even if the case objectively had foundation.

What does this mean for you?

Majority of employment cases are brought under FEHA. In these cases, it can be beneficial for employers to make reasonable Section 998 offers during litigation. Contact Stokes Wagner if you have any questions.

Arbitration Agreements May Also Waive Informal DLSE Hearings

Employees who sue for unpaid wages can either file (1) a civil lawsuit or (2) a wage claim with the Division of Labor Standards and Enforcement ("DLSE"). An employee who files a wage claim with the DLSE may participate in a settlement conference with his/her employer. If the case does not settle, the DLSE will set the case to an administrative hearing, known as a "Berman Hearing". Berman Hearings are mini, informal trials with a Labor Commissioner. Berman Hearings, compared to civil lawsuits, are designed to provide a speedy, informal, and affordable method for employees and employers to resolve wage claims.

In *OTO, LLC v. Kho*, the Court enforced an arbitration agreement that required an employee to arbitrate his wage claim rather pursue his claim through a Berman Hearing. The Court reasoned that, arbitration still provided an "accessible and affordable" forum for the employee as the employer would pay arbitration costs and the employee still had access to legal representation.

What does this mean for you?

Employer arbitration agreements may now compel employees to arbitrate their wage claims rather than go through a DLSE hearing. Please contact Stokes Wagner if you have any questions regarding arbitration agreements.

More Protections to Breastfeeding Mothers

Starting January 1, 2018, San Francisco requires employers to ensure that any space offered for lactation also includes a place to sit, a surface on which to place a breast pump and/or other personal items, access to electricity, and a nearby refrigerator in which the employee can store expressed milk. An employee's lactation break time may be unpaid if it is not taken within or during an already-specified paid break. The Ordinance strictly prohibits retaliation against anyone who requests lactation accommodation or files a complaint with San Francisco's Office of Labor Standards Enforcement ("OLSE").

The Ordinance sets forth building permit guidelines for the construction or renovation of lactation spaces. The private space may be used for other purposes – even among multiple employers – as long as there is room for all who need it, lactation is given priority over other uses, and other employees are aware of the room's purpose.

What does this mean for you?

Employers within San Francisco city limits must develop a lactation accommodation policy that (1) explains how an employee may request lactation accommodations, (2) requires the employer to respond within five (5) business days, and (3) allows for any necessary interactive process between employee and employer. Employers must also maintain written records of these interactions for three (3) years. Please click here for more details on such guidelines.

In 2018, the OLSE will first issue warnings and notices to employers who violate this Ordinance. Thereafter, the OLSE may impose a $500 administrative penalty, and a $50 penalty for each day the violation continues.

San Francisco Bans Inquiry Into Job Applicants' Salary History

Effective July 19, 2017, San Francisco became the first city in California to ban employers from asking job applicants about their salary history. This is the latest in a nationwide movement to promote gender pay equality. As cited in the San Francisco Ordinance, census data shows that women in San Francisco are paid 84 cents for every dollar a man makes, and women of color are paid even less. The ban seeks to stop the "problematic practice" of relying on past salaries to set new employees' pay rates, which perpetuates the historic gender pay gap.

Dubbed the "Parity in Pay Ordinance," the San Francisco law applies to all employers doing business in the City of San Francisco and to all employees applying for positions that will be performed in the City.

What does this mean for you?

Employers in San Francisco may not:

» Ask about an applicant's salary history;

» Consider an applicant's salary history in determining a salary offer, even if the applicant voluntarily discloses his/her salary history;

» Refuse to hire or otherwise retaliate against an applicant for not disclosing salary history;

» Release the salary history of any current or former employee without written authorization from the employee.

San Francisco's ban comes as the California legislature looks to impose a similar ban statewide. The State Assembly passed a proposed amendment (AB168) that is currently awaiting State Senate approval. New York City and the State of Massachusetts have already enacted similar bans, and efforts are underway in Philadelphia.

San Jose Opportunity to Work Ordinance

Effective 3/13/2017, San Jose employers must offer additional hours of work to current part-time employees before agreeing to hire additional, outside workers. These current part-time employees must in "good faith and reasonable judgment" have the necessary skills and experience to perform the work. Employers are not required, however, to offer hours to part-time employees if doing so would require overtime pay.

What does this mean for you?

San Jose employers should create a policy that communicates its offer of additional hours to existing employees and documents the process in writing. Examples:

» Post additional hours in a visible place where any employee can see;

» Post additional hours in any languages spoken by at least 5% of the employees and include timeline for employees to respond to additional hours;

» Email offers of additional hours;

» Individually meet with employees and offer additional hours; and/or

» Have part-time employees indicate their interest or lack of interest in additional hours.

More information can be found by clicking here. Please contact Stokes Wagner with any questions.

Boston Union Members Acquitted in Case Involving "Top Chef" Hosts

Local 25 Teamsters (Union) were recently acquitted of charges of conspiracy to extort and attempted extortion. In June 2014, the Teamsters allegedly slashed tires, used sexist and racist slurs, and threatened to "bash" celebrity host Padma Lakshmi's "pretty little face in."

Federal prosecutors accused the Union members of trying to shut down the filming if the show did not hire Teamsters to drive production vehicles. The prosecutors specifically had to prove that the Teamsters' labor objectives, however egregious their actions, were illegitimate.

In *U.S. v. Enmons*, 10 U.S. 396 (1973), the Supreme Court held that union members on strike could not be prosecuted for extortion if they had legitimate labor objectives. The Court reasoned that "objectives" is based on the members' intent and "illegitimate goals" can include unwanted, unneeded and superfluous work. Using this precedent, the Unions' lawyers successfully defended the Union and proved that, although the men may have used rough language or engaged in behavior that might have seemed threatening, their actions were legal under federal law.

This acquittal exemplifies unions' strong protections under federal criminal law despite union members' violent and threatening behavior. Due to *U.S. v. Enmons* and the standard to prove "legitimate labor objectives," federal jurors have little room in their ability to hold union members accountable for their actions.

Additional Protections to Pregnant and Nursing Women

Massachusetts recently passed the Pregnant Workers Fairness Act, which protects women from discrimination based on pregnancy, childbirth, and expressing milk. Effective April 1, 2018, it is unlawful for an employer to deny reasonable accommodations related to pregnancy, childbirth, or related conditions upon request unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer.

On the flip side, the Act also makes it unlawful to require a pregnant or nursing job applicant or employee to accept an accommodation, including requiring an employee to take leave when there are other accommodations available that would not cause an undue hardship to the employer. The Act makes it unlawful to take adverse action against an employee who requests an accommodation, and mandates that the employee must be reinstated to her original job or to an equivalent position with equivalent pay and benefits upon return from leave. The Act makes it unlawful to make pre-employment inquiries regarding the applicant's condition related to pregnancy or childbirth.

What does this mean for you?

Starting April 1, 2018, Massachusetts employers must post a notice, through a handbook, pamphlet or other means, of the rights of pregnant and nursing mothers to be free from discrimination in relation to pregnancy and pregnancy-related conditions.

The Act also provides examples of what qualifies as a reasonable accommodation including but not limited to: more frequent or longer paid or unpaid breaks; time off to attend to a pregnancy complication or recover from childbirth, with or without pay; acquisition or modification of equipment or seating; a temporary transfer to a less strenuous or hazardous position; job restructuring; light duty; private non-bathroom space for expressing breast milk; assistance with manual labor; and modification of work schedule.

MA Court Ruling on Medical Marijuana

Employers in Massachusetts may not terminate employees who use medical marijuana in accordance with a prescription according to the Massachusetts Supreme Judicial Court's recent ruling in Barbuto v. Advantage Sales and Marketing, LLC. Barbuto, a former Advantage employee, disclosed her medical marijuana usage at the time of her hire. Ms. Barbuto worked for only one day before she was terminated for failing the company's mandatory drug test. The company's drug policies followed the federal drug schedule, not local Massachusetts law. The court found for Ms. Barbuto by stating that, in terminating her employment, the company illegally discriminated against her.

The Court reasoned that medicinal marijuana prescribed for treatment purposes is as lawful as the use and possession of other prescribed medications, and that limiting access to medicinal treatments constitutes disability discrimination. The court, in part, relied on a Massachusetts law that states: any person who falls under the medical marijuana act shall not be penalized in any manner, or denied any right or privilege. This differs from California law, which legalizes medical marijuana yet specifically allows employers to prohibit marijuana in the workplace.

What does this mean for you?

Massachusetts employers may not use blanket "drug-free workplace" policies to terminate employees whose doctors have prescribed marijuana to help treat medical conditions. This Court found that these policies deny handicapped employees the opportunity of a reasonable accommodation—a violation of the anti-handicap discrimination laws. Massachusetts employers must be sure to not effectively deny a handicapped employee the opportunity of a reasonable accommodation.

New York City – Clarifications on 'Ban the Box'

On August 5, 2017, the New York City Commission on Human Rights published final regulations which expand on and clarify the already burdensome requirements of the Fair Chance Act ("FCA"). These newly released regulations will make background checks particularly difficult for national employers and/or employers with a consolidated hiring process in multiple states.

Through these final rules, the Commission (1) significantly expands on per se violations, clarifying what conduct will subject an employer to liability and/or fines regardless of whether an adverse action is taken; (2) creates a discretionary mechanism to resolve per se violations by sending employers an Early Resolution Notice; (3) confirms that non-convictions may not be considered in the hiring process; (4) provides guidance to employers who inadvertently discover information relating to an applicant's criminal history; (5) adds steps to the post-conditional offer phase before an employer may complete the FCA review process and rescind a conditional offer of employment; and (6) imposes a rebuttable presumption that a rescinded conditional offer of employment is based on the applicant's criminal history.

The above list is not intended to be exhaustive. Employers should contact Stokes Wagner regarding their current hiring practices to ensure compliance with these new regulations.

Visit the NYC Rules website for more information.

NYC Fast Food Worker Protections

The City of New York enacted the following bills affecting fast-food employers, effective November 26, 2017:

No More "Clopening." Employers are banned from scheduling employees to work consecutive night and morning shifts with fewer than 11 hours between shifts. If the employer requests an employee to "clopen," the employer must pay an additional $100. There is an exception for employees who request to "clopen" (Intro. 1388).

Current Employees Are Favored. Employers must offer all available work hours to current employees until interested employees are required to receive overtime pay, or until all current employees have rejected the available hours, whichever comes first (Intro 1395).

Fair Workweek. Employers must provide employees with an estimate work schedule upon hire and provide regular 7-day work schedules with 14 days' advanced notice. Employers must also pay a premium when making a scheduling change.

» $10 for each shift added with less than 14 days' notice but at least 7 days' notice.
» $15 for each shift added with less than 7 days' notice.
» $20 for each shift cancelled or subtracted, with less than 14 days' notice but at least 7 days' notice.
» $45 for each shift cancelled or subtracted with less than 7 days' notice, but at least 24 hours' notice.
» $75 for each shift cancelled or reduced less than 24 hours before the shift.

Contact Stokes Wagner for details about premium pay mandates and exceptions (Intro. 1396).

Payroll Deductions. Employers must provide employees with the ability to make voluntary contributions to eligible non-profit organizations through payroll deductions. The law establishes a minimum contribution of $6 per biweekly paycheck and $3 per weekly paycheck to minimize burden to employers (Intro. 1384).