Legal Insight

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March 12, 2013

Practice Group:

Labor, Employment and Workplace Safety

2013 US Labor and Employment Horizon

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Overview

As a resource to our clients, the Labor, Employment and Workplace Safety team at K&L Gates has summarized major legislative changes and key cases affecting employers in 2013 in certain key states in which we are located.

Alaska

Court Establishes New Hurdles for Agency "No Substantial Evidence" Findings

The Alaska Supreme Court issued two decisions last year that will make it more difficult for employers to obtain "no substantial evidence" findings from the Alaska State Commission for Human Rights ("ASCHR"). In *Toliver v. Alaska State Human Rights Commission*, 279 P.3d 619 (Alaska 2012), the court found that an ASCHR investigator failed to conduct an impartial investigation when the investigator interviewed a plaintiff and several store employees, but failed to interview any of the witnesses identified by the plaintiff. In that case, the plaintiff alleged that a liquor store had discriminated against him and other racial minorities by banning them from its premises. The store claimed that the plaintiff was banned because he had verbally abused and physically threatened an employee at that store. The plaintiff identified witnesses who had not been present at the incidents the store claimed led to the ban, but the plaintiff alleged they would have knowledge about other discriminatory incidents. The investigator issued a "no substantial evidence" finding without interviewing the witnesses identified by plaintiff, and the superior court affirmed. However, the Supreme Court reversed, holding that "[a] reasonable effort must be made to interview at least some of a complainant's witnesses who appear to be possessed of relevant information." In addition, in *Grundberg v. Alaska State Human Rights Commission*, 276 P.3d 443 (Alaska 2012), the court again faulted the ASCHR for an incomplete investigation and concluded that the agency improperly issued a no substantial evidence determination. The court explained that ASCHR's role is not to determine at the investigative stage whether non-discriminatory reasons offered by an employer are legitimate, but is instead to determine "whether there is a reasonable possibility that discriminatory reasons motivated the employer's decision," bearing in mind that direct evidence of discrimination is difficult to find. Since the plaintiff had produced at least some evidence of pretext, the ASCHR should not have dismissed plaintiff's complaint. Together, the *Toliver* and *Grundberg* decisions will likely make it more difficult for employers to obtain "no substantial evidence" findings at the conclusion of ASCHR investigations.

Court Recognizes New "Union-Relations Privilege"

The Alaska Supreme Court also issued a decision that broadens the right of employees to keep communications with their union representatives confidential. In *Peterson v. State of Alaska*, 280 P.3d 559 (Alaska 2012), the Supreme Court created a new "union-relations privilege" shields confidential communications between an employee (or his attorney) and union representatives acting in an official capacity, provided the communications were made in connection with anticipated or

ongoing disciplinary or grievance proceedings. The plaintiff in that case had filed a union grievance for wrongful discharge. It was handled by a non-lawyer union representative and was dropped short of arbitration. When plaintiff filed suit for wrongful termination, the state subpoenaed the union representative and sought all written communications between the union and plaintiff's lawyer relating to that grievance. The Supreme Court held that plaintiff was entitled to a protective order, reasoning that allowing a public employer to discover confidential communications between an employee and his union representative made during the mandatory grievance and arbitration process would improperly interfere with the employee's right to union representation, as well as the strong interest in ensuring full and frank communications with a union representative in the grievance setting.

California

The California legislature was particularly busy this past session in enacting new laws that directly affect employers in 2013. The new laws address a wide variety of topics, which are discussed in detail in our publication "Social Media and Beyond: California Ushers in New Employment Laws for 2013" and are summarized here.

Social Media Protections

AB 1844 (which added Section 980 to the Labor Code) prohibits employers from requesting or requiring applicants or employees to disclose their usernames and passwords to personal social media and prohibits employers from discharging, disciplining, or threatening to do the same, or otherwise retaliating against an applicant or employee who fails to comply with such a request or demand. Exceptions are permitted where the employer is requesting access to an employer-issued electronic device and the new law does not limit an employer's existing right to request or demand such information when it is believed to be relevant to an investigation of employee misconduct or the violation of a law.

Copies of Personnel Files

AB 2674 amends Labor Code Section 1198.5 to require employers to respond within 30 days to written requests from employees and former employees, or their representatives, to inspect and/or receive a copy of their personnel records relating to the employee's performance or to any grievance concerning the employee. The amendment also requires employers to maintain a copy of each employee's personnel records for a period of not less than three years after termination of employment. Employers who fail to comply with the law are now subject to a penalty of $750. In addition, aggrieved employees or former employees may obtain injunctive relief directing compliance with the law, and may recover their costs and attorneys' fees in such action.

Additional Wage Statement Requirements

AB 2674 also amends Labor Code Section 226, which already afforded current and former employees the right to inspect and obtain copies of the itemized wage statements required to be provided by the employer each pay day pursuant to Section 226(a), by defining "copy" to include a duplicate of the itemized statement provided to an employee, or a computer-generated record that accurately shows all of the information required by Section 226(a). SB 1255 further amends Labor Code Section 226 by making it easier for an employee "suffering injury" to recover the penalties under Section 226 as a result of a knowing and intentional failure by an employer to comply. The amendment provides that an employee is deemed to "suffer injury" if the employer fails to provide a wage statement, or if the employer fails to provide accurate and complete information as required by any one or more of the

required items of Section 226(a) and the employee cannot "promptly and easily determine" from the wage statement alone the missing information, meaning that a reasonable person would be able to readily ascertain the information without reference to other documents or information.

Religious Dress and Grooming Protections

AB 1964 amends the California Fair Employment and Housing Act ("FEHA"), Government Code Sections 12926 and 12940, to broaden the definition of "religion" to include religious dress and grooming practices. The amendments define religious dress practices to include religious clothing, jewelry, artifacts, face and head coverings, and any other item that is part of religious observance. "Grooming practices" is defined to include "all forms of head, facial, and body hair," which are part of religious observance. Under the amendments, an accommodation is not reasonable if it segregates an employee from the public or other employees.

Breastfeeding Protections

AB 2386 amends FEHA, Government Code Section 12926, to add "breastfeeding" and medical conditions related to breastfeeding to the definition of "sex." The amendment states that it is a declaration of current law. Consequently, this amendment is effective immediately and may be applied retroactively.

Limitations on Fixed Salaries for Non-Exempt Employees

AB 2103 amends Labor Code Section 515 to clarify that a fixed weekly salary paid to a non-exempt employee covers *only* the regular, non-overtime hours of work in a workweek, regardless of any wage agreement to the contrary. This amendment expressly overrules *Arichega v. Delores Press, Inc.*, 192 Cal.App.4th 567 (2011).

Written Commission Agreements

In 2011, the legislature enacted AB 1396, which amended Labor Code Section 2751, and imposed a requirement on employers that by January 1, 2013, whenever an employer enters into a contract of employment with an employee for services to be rendered within California and the contemplated method of payment involves commissions, the contract shall be in writing and shall set forth the method by which the commissions shall be computed and paid. Section 2751 further provides that the employer shall give a signed copy of the contract to the employee and shall obtain a signed receipt for the contract from the employee. AB 2675, enacted this year, further amends Labor Code Section 2751 by clarifying that "commissions" do not include temporary variable incentive payments that increase, but do not decrease, payment under the written contract.

Expanded Whistleblower Protections

AB 2492 amends California's False Claims Act ("CFCA"), Government Code Sections 12650, 12651, 12652, and 12654 and adds Section 12654.5, to expand protection for whistleblowers with respect to government contractors who provide goods or services to the state or a political subdivision. The amendment allows contractors and agents, as well as employees, to bring claims under the statute and share in any recovery. The amendment also expands anti-retaliation protection to include anyone who tries to stop violations. It also broadens the definition of a "false claim," increases civil penalties, alters the statute of limitations, and expands the courts' authority to award attorneys' fees and costs on CFCA cases.

Workers' Compensation Reforms

SB 863 amends, creates, and repeals numerous sections of the Government Code and Labor Code that relate to California's workers' compensation system. The main topics of reform include changes to the method for calculating benefits, establishment of an independent medical review process, alteration of requirements for self-insured employers, revisions to liens and related procedures, and implementation of return to work rules. The reforms seek to lower costs and increase efficiency.

Supreme Court Issues Rest and Meal Period Guidance

On April 12, 2012, the California Supreme Court issued its long-awaited decision in *Brinker Restaurant Corp., et al. v. Superior Court ("Brinker").* For California employers, the key holdings of this case regarding meal period and rest break issues with respect to non-exempt employees are as follows:

- Employers satisfy their meal period obligation if they relieve an employee of all work duties, relinquish control over activities and permit a reasonable opportunity to take an uninterrupted 30 minute break, and do not impede or discourage the employee from doing so. Employers are not obligated to police meal breaks or ensure no work is performed.
- Employees who work a shift of more than five hours are entitled to a first meal period by no later than the end of their fifth hour of work. Employees are entitled to a second meal period only if they work more than ten hours. A second meal period must start no later than the end of the 10th hour of work on the shift. There is no restriction on the number of hours between meal periods as long as these basic timing requirements are satisfied.
- Non-exempt employees whose shifts exceed 3 ½ hours in a day are permitted to take rest breaks for each 4 hours worked or major fraction thereof. "Major fraction" means more than one-half (i.e., more than 2 hours). In other words, employees are permitted to take one ten minute rest break if their shift exceeds 3 ½ hours up to 6 hours, a second break if their shift exceeds 6 hours up to 10 hours, and a third rest break if their shift exceeds 10 hours up to 14 hours. An employer who has a policy that misconstrues the term "major fraction" and therefore does not provide a second break for a shift exceeding 6 hours is at risk for class action litigation.
- Although an employee rest break should ordinarily be allowed near the mid-point of each 4 hour period, different factual situations can warrant deviations. As a result, the mid-point standard does not mean that employees must always be permitted to take a rest break before they receive a meal period.

A more substantive treatment of this significant California decision can be found in our publication "Employers Catch a Break: California Supreme Court Clarifies Meal and Rest Break Obligations."

Florida

2012 did not bring the passage of any significant new employment law legislation in the state of Florida. However, the Eleventh Circuit Court of Appeals, the federal appellate court with jurisdiction over Florida, Alabama and Georgia, did issue three opinions of interest to employers.

The most significant of these decisions was *Hamilton v. Southland Christian School, Inc.*, 680 F.3d 1316 (11th Cir. 2012). The decision confirmed a trend that could make it easier for employees to sue their employers for discrimination. The facts of *Hamilton* are somewhat unique. While asking for maternity leave, a teacher at a private Christian school revealed that she had conceived her child with

her husband before their marriage occurred. She was fired shortly after asking for leave; it was the school's position that she was fired because she had sinned by engaging in premarital sex and was insufficiently contrite. The teacher sued, claiming she was fired because of her pregnancy.

The trial court granted summary judgment to the school. The teacher had no direct evidence of pregnancy discrimination, so the trial court applied the traditional burden-shifting formula for proving employment discrimination through the use of indirect or circumstantial evidence. The so-called *McDonnell Douglas* framework requires an employee to establish a *prima facie* case of discrimination, which the employer can then rebut simply by articulating a legitimate non-discriminatory reason for its actions. The burden then shifts back to the plaintiff to prove that the stated reason was a pretext and that the real reason for the adverse action was intentional discrimination.

Under the *McDonnell Douglas* framework, the employee typically demonstrates as part of her *prima facie* case that someone not in her protected group (i.e., in the case of the teacher, someone not pregnant) was treated more favorably. Here the trial court found that the teacher had provided no evidence of any non-pregnant person being treated more favorably than she. As a consequence, it ruled that her case could not go to trial and should be decided in favor of the school.

The Eleventh Circuit reversed. It held that evidence of a comparator being treated more favorably is *not* necessary if an employee presents sufficient non-comparator evidence such as would raise a reasonable inference of intentional discrimination. It found that, in the case before it, school administrators had made sufficient statements to suggest that they fired the teacher because they did not want to deal with the costs of granting maternity leave, rather than because of qualms about her moral rectitude. Because it was uncertain why the school had fired the teacher, and there was enough plausible evidence to suggest that the school fired her because she was pregnant, the teacher was entitled to have a jury decide her claims.

The clear upshot of the *Hamilton* decision for Florida employers is that, if regularly applied by the federal district courts in Florida, it may become harder for employers to prevail at the summary judgment stage, meaning the higher litigation costs associated with trying cases before juries could be more difficult to avoid.

Two other cases are key but less dramatic in scope. In both, the Eleventh Circuit aligned itself with other circuit courts that have confronted the same legal questions. In *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269 (11th Cir. 2012), a pregnant employee who had worked for her employer for approximately 11 months made a request to take leave under the Family and Medical Leave Act ("FMLA"), with the leave to start a month later, by which time she would have worked for twelve months and become FMLA eligible. The court held that such a request is covered. As a consequence, Florida employers should be aware that FMLA retaliation liability may attach even if the employee is not FMLA eligible at the time of the request.

The final decision to be discussed, *Brush v. Sears Holding Corp.,* 466 Fed.Appx. 781 (11th Cir. 2012), involved the scope of a managerial-level employee's retaliation claim. The employee in *Brush* investigated a sexual harassment claim by an employee and complained to higher management about the investigation process. Shortly thereafter, she was fired, according to the company, because of policy violations connected with how she handled the investigation. The appellate court held that a so-called "manager rule" bars retaliation claims by supervisory employees who investigate claims of other employees and whose retaliation claims are related to a company's internal processes, rather than to specific personal complaints lodged by the manager employee that would qualify, on their own, as the activity protected by a retaliation claim. The *Brush* decision thus is helpful for Florida

employers, as it does not allow managers to claim retaliation protections based upon their performance of an investigation as a part of their job responsibilities.

Idaho

Idaho Supreme Court Reaffirms Vitality of At-Will Employment

In *Bollinger v. Fall River Rural Electric Co-op., Inc.*, 152 Idaho 632, 272 P.3d 1263 (2012), the Idaho Supreme Court held that a new at-will policy that was uniformly distributed to employees by email was sufficient to defeat a broad range of contract and tort claims brought by a former employee. In that case, the plaintiff asserted claims for (1) breach of express and implied contract, including breach of the covenant of good faith and fair dealing; (2) retaliatory discharge and wrongful termination in violation of public policy; and (3) negligent and intentional infliction of emotional distress. The trial court granted summary judgment in favor of the employer on all counts, and the Supreme Court affirmed. The plaintiff failed to produce a written contract, and her implied contract, covenant of good faith, and wrongful termination in violation of public policy claims failed because of the at-will policy and lack of evidence linking her termination to prior safety complaints. Likewise, the court concluded that "the mere termination of an at-will employee—without more—does not constitute a breach of duty sufficient to support" a negligent infliction claim or "constitute [the] extreme and outrageous behavior" necessary to sustain an intentional infliction claim.

Illinois

Definition of "Handicap" Changed to "Disability"

Effective August 2, 2012, the term "handicap" under the Illinois Human Rights Act ("IHRA") was changed to "disability." This change comports the language of Illinois' anti-discrimination statute with the federal Americans with Disabilities Act ("ADA"). While at first blush this change appears largely cosmetic, it may well be argued that it signals legislative intent to further align the state's anti-discrimination protections with federal protections under the ADA. This is significant to the extent that the ADA itself was recently amended and its protections were expanded.

Individual Liability Imposed On Officers and Agents Under the Illinois Equal Pay Act

Effective January 1, 2013, the Illinois Equal Pay Act imposes individual liability on officers and agents where an employer "knowingly and willfully" evades payment of a final award or final judgment for claims brought under the Act. This is intended to and should get the attention of CEOs. Even absent the amendment, remedies under the Illinois Equal Pay Act are quite generous and include a "back pay" recovery for the difference in wages and a penalty of $2,500. If an employer is ordered to provide back pay and refuses, a penalty of 1% per day not paid is added to the judgment. By allowing recovery against individuals under the nebulous standard of "knowingly and willfully," the leverage on a plaintiff's side just increased manifold.

Requesting Social Networking Passwords Prohibited

Effective January 1, 2013, the amendments to the Right to Privacy in the Workplace Act prohibit employers from requesting a password or other account information to access an employee's or prospective employee's social networking website. However, employers may continue to obtain information about an employee or prospective employee through online information otherwise available in the public domain. This move by the Illinois legislature is consistent with the recent activity of the National Labor Relations Board and its prosecution of unfair labor practices against union and non-union employers alike who reference employee-posted social media content (e.g., Facebook, LinkedIn, blogs, etc.) as a basis for employment actions. As per the NLRB, much of such published employee activity, even on wholly public and non-password protected forums, is protected under Section 7 of the National Labor Relations Act as "concerted activities for the purpose of collective bargaining *or other mutual aid or protection*" (emphasis added). Illinois employers are now even further restricted from relying on, in this case even accessing, certain social media content. Employers should expect this trend to continue and are well advised to consult counsel before accessing and relying on social media as a basis for employment action.

Misclassification of Independent Contractors

Governor Quinn announced a new initiative to punish employers who purposefully misidentify workers as independent contractors in an effort to diminish the impact of businesses losing work to lower bidding companies who do not follow the law. As employers well know, the tests for properly classifying individuals who perform services as "employees" or "independent contractors" are fact-specific and vary by statute. The consequences of misclassification are severe and include (depending on statute implicated) potential back taxes for failure to withhold, penalties, fines, and overtime pay to name but a few. With the new initiative and a state starved for money, these waters just became even more perilous.

Employee Notice Requirement for FMLA Leave Evaluated by the Seventh Circuit

In two companion cases this year, the Seventh Circuit considered whether employees provided sufficient notice to their respective employers of their need for FMLA leave.

In *Nicholson v. Pulte Homes Corp.*, 690 F.3d 819 (7th Cir. 2012), the court held that casual comments made to a supervisor about an employee's father's diagnosis with cancer and the possibility that he may need chemotherapy did not constitute adequate notice of the employee's need for FMLA leave. Rather, the employee simply indicated that she might need time off in the future, leaving the issue open-ended. Likewise, where the employee communicated that she drove her mother to medical appointments on her days off and could not work outside her normal business hours because of her responsibilities to care for her mother, the employee did not put her employer on notice that she would need time off work.

However, the Seventh Circuit came to a different conclusion in *Pagel v. TIN Inc.*, 2012 U.S. App. LEXIS 16548 (7th Cir. 2012), where the employer had knowledge of the employee's own serious health condition. In that case, the employee was ordered to undergo a two-day stress test that revealed a blockage in a portion of his heart and was admitted to the hospital for an angioplasty and stent placement. His supervisor admitted that he was aware of the employee's chest pain and that he was admitted to the hospital. When it came to the employee's own health condition, the court concluded, "it is difficult for us to imagine a scenario where [the employee's] notice of hospitalization did not include an implicit demand for leave."

These two cases highlight a company's obligations to evaluate an employee's eligibility for FMLA leave after learning about a serious health condition of either the employee or the employee's family member. In *Nicholson*, the court concluded that because the leave was needed to care for a family member, there is an onus on the employee to advise her employer that she would need to take time off work to act as a caregiver. On the other hand, in *Pagel*, the court held that where the employee requires hospitalization for his or her own medical condition, notice of hospitalization is sufficient to warn the employer of the employee's eligibility for FMLA leave. In light of the court's analysis in these two decisions, employers should ensure that their supervisors are trained (or retrained) to offer information on FMLA leave to employees who reveal either the employee's or a family member's serious medical condition and that employees are not required to refer specifically to the FMLA to qualify for leave under the law.

Seventh Circuit Allows Individual Liability Under Section 1981 on "Cat's Paw" Theory

In *Smith v. Bray*, No. 11-1935 (7th Cir. May 24, 2012), the Seventh Circuit held, for the first time, that a manager could be held individually liable for Section 1981 claims under the "cat's paw" theory, which permits liability against an employer if the plaintiff can show that a coworker with discriminatory or retaliatory animus intentionally caused the decision-maker to make an adverse employment decision. The decision affords a plaintiff powerful leverage and employers can expect this new power to be wielded with regularity. All managerial and supervisory training on anti-discrimination should include the potential for individual liability as a regular and repeated part of the training. In our experience, nothing ensures audience participation and commands attention at such training sessions like the prospect of potential individual liability.

Employers May Be Held Liable for Inaccurate Reference Information

In *Jane Doe-3 v. McLean County Unit Dist. 5 Bd. of Directors*, Nos. 112479, 112501 (Ill. Aug. 9, 2012), the parents of school children who were sexually abused by a teacher sued his prior school district for negligence after learning it provided an inaccurate reference. The prior school district provided the new school a recommendation letter endorsing the teacher even though it allegedly knew that the teacher had sexually abused students in the past. The Illinois Supreme Court concluded that, if true, the school district negligently provided incorrect information that caused harm and therefore could be sued for negligence. This case warns employers that employment references are a proverbial "double-edge sword" that can result in both defamation claims from former employees and also negligence claims from future employers. As a result, companies must be careful to provide only accurate and verifiable information when providing employment references. A strict policy of providing only name, dates of employment, and last position held, along with a statement that it is company policy not to provide any additional information, is often the best and safest course of action.

Employers Cautioned on Investigating Employees and Former Employees

In *Lawlor v. N. Am. Corp. of Ill.*, No. 112530 (Ill. Oct. 18, 2012), the plaintiff's former employer hired a private investigator to determine whether Lawlor violated a non-compete agreement by soliciting clients while she was still employed with the company. During the investigation, the investigator provided Lawlor's date of birth, social security number and other personal information to obtain her private home and cell phone records. The employee then added claims of intrusion upon seclusion to her pending lawsuit for outstanding commissions. For the first time, the Illinois Supreme Court recognized the tort of intrusion upon seclusion and, on the merits, found that the employer could be

held liable for the private investigator's actions even though there was no direct evidence that the employer knew how the phone records were acquired.

Prevailing Wage Notifications Required

Effective January 1, 2013, a public body or other entity must notify contractors and subcontractors of changes in prevailing wage rates. The notification will be met by including in the contract that the prevailing rate is established by the Illinois Department of Labor and available on the IDOL website.

Unemployment Insurance Changes

Effective January 1, 2013, the Unemployment Insurance Act revisions clean up obsolete language and address the following: (1) employers will be charged for benefits that were incorrectly paid if the amount was the result of the employer failing to timely respond to information requests from the state unemployment agency and the employer has established a pattern of failing to timely respond; (2) employers must report to the state directory the names of all employees rehired after having been separated for at least 60 days; and (3) individuals who fraudulently obtain unemployment benefits will incur monetary penalties of up to 15% of the amount fraudulently obtained.

Massachusetts

Massachusetts Criminal Offender Record Information Requirements

The final phase of the revised Massachusetts Criminal Offender Record Information ("CORI") law took effect on May 4, 2012. As a result of these changes to the state's background checking law, all employers, rather than just employers of vulnerable populations, now have access to CORI information, upon registration with the Massachusetts Department of Criminal Justice Information Service. In connection with the increased access to information, employers are required to follow more stringent procedures, including the requirement that they obtain a written acknowledgment and verify the identity of the individual subject to the CORI check. Employers also are required to inform applicants before making an adverse decision on the basis of CORI information and to give the applicant a copy of the report before questioning the applicant about its contents. The law provides a safe harbor for employers who obtain information from the state database and who make an employment decision within 90 days of obtaining the CORI. Finally, the law includes record retention requirements, dissemination limits and an obligation to create a CORI policy.

An Act Relative to Gender Identity

On July 1, 2012, "An Act Relative to Gender Identity" (also known as the "Transgender Equal Rights Law") took effect in Massachusetts. The law amended state anti-discrimination statutes, including Mass. Gen. Law c. 151B, to prohibit discrimination on the basis of "gender identity." The law defines "gender identity" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." Under the law, employees may show gender-related identity by providing evidence of medical history, care or treatment for a gender-related identity, consistent and uniform assertion of gender-related identity or any other evidence that the gender identity is "sincerely held, as part of a person's core identity." The law applies to all Massachusetts employers with six or more employees, and prohibits discrimination against transgender employees with respect to the terms and conditions of employment.

First Circuit Court of Appeals Upholds Statutorily Mandated Treble Damages

The First Circuit Court of Appeals recently reviewed—and upheld—the Massachusetts Wage Payment law's mandatory treble damages provision. In *Matamoros v. Starbucks Corp*., 699 F.3d 129 (1st Cir. 2012), a class action case based on alleged violation of the Massachusetts Tips Act, the defendants argued that the mandatory nature of the treble damages provision violated due process by requiring the automatic imposition of punitive damages without a finding of reprehensibility. The First Circuit Court of Appeals first found that the Tips Act, which precludes the sharing of tips among non-wait staff employees, was properly applied to tips shared among baristas and shift supervisors, because shift supervisors are not "wait staff" within the meaning of the Tips Act. The court further found that since the Massachusetts legislature characterized the treble damages as "liquidated damages" they were not punitive in nature, but rather compensation for damages that would otherwise be too difficult to calculate. The court thus held that the treble damages provision was constitutional and properly applied to the portion of damages incurred by the Starbucks wait staff after it was added to the Massachusetts Wage Act.

An Act Establishing a Temporary Worker's Right to Know

Effective January 31, 2013, staffing agencies in Massachusetts have significant increased obligations to provide information, as well as new limitations on how temporary employees must be treated. First, staffing agencies must provide detailed, written information to employees (except professional employees under the Fair Labor Standards Act or secretaries or administrative assistants, as defined in the statute) about (1) the name, address and telephone number of the staffing agency or agent facilitating the placement, its workers' compensation carrier, the worksite employer and Department of Labor Standards; (2) a description of the position and whether it requires special training, equipment or other costs; (3) the designated pay day, the hourly rate and whether it is overtime eligible; (4) the starting time, ending time and expected duration of the assignment; (5) whether meals are provided and the costs of any such meals; and (6) whether transportation is provided and the cost of such transportation. The new law also limits the fees that a staffing agency or worksite employer can charge to an employee and prohibits fees for (a) the costs of registering with the staffing agency; (b) a criminal offender record information request; (c) the provision of a drug screen, exceeding the actual cost; (d) the provision of a bank card, debit card, or similar form of payment, exceeding the actual cost; (e) any good or service, unless the employee agrees that it is voluntary and the agency does not profit from the fee; (f) any good or service that would cause the employee to earn less than minimum wage; and (g) transportation costs, other than at cost and if not required. Under the law, a staffing agency is likewise required to reimburse workers' travel costs if they are sent to a work site and no work is available on any particular day. The new law also prohibits the distribution of fraudulent or misleading information, the use of a name not registered with the Department of Labor Standards, the assignment of a worker by force, fraud or for illegal purposes, and the refusal to return personal belongings or excessive fees or charges to an employee. Finally, the law requires that staffing agencies post a notice of rights under the law and the name and telephone number of the Department of Labor Standards.

New Jersey

Throughout 2012, the New Jersey legislature proposed numerous bills on a wide range of subjects affecting employers, including the reintroduction of the Healthy Workplace Act, making workplace bullying and harassment unlawful (A3249). Other proposals involved providing protected leave to victims of domestic abuse (S2177, A2919), prohibiting employers from requiring job applicants to

disclose criminal records (S1054, A2300), increasing penalties for misclassifying employees as independent contractors (A3581), and authorizing the establishment of alternative workers' compensation programs through collective bargaining (S2201). Most of the employment related legislation is still pending, but a few bills should be before the Governor early in 2013.

New Notice Requirement

On September 21, 2012, Governor Christie signed into law a bill (P.L. 2012, c. 57) which requires employers with 50 or more employees to post and distribute a notice of their right to be free from gender-based pay discrimination in the workplace, and to obtain employees' acknowledgment of receipt of the notice. The notice appeared for comment and review in the January 7, 2013 issue of the *New Jersey Register*, and is expected to be officially adopted by the Department of Labor and Workforce Development within three to six months. Employers must post and distribute a copy of the notice to all employees within 30 days after official adoption.

Proposed Social Networking Privacy Bill

A bill (A2878) prohibiting employers from seeking or requiring current or prospective employees to disclose their usernames or passwords for personal social networking sites, such as Facebook and Twitter, will likely reach Governor Christie in the upcoming weeks. Previously passed by both the Assembly and Senate, the Assembly had a second reading of the current bill to concur with recent minor Senate amendments.

Proposed Lilly Ledbetter Bill

On October 11, 2012, the Assembly read on concurrence Governor Christie's conditional veto to A2650, which would track the federal "Lilly Ledbetter Fair Pay Act of 2009," as well as the New Jersey Supreme Court's holding in *Alexander v. Seton Hall University*, 204 N.J. 219 (2010). The original bill potentially allowed employees to recover back pay for periods exceeding the New Jersey Law Against Discrimination ("LAD") two year statute of limitations. Governor Christie recommended that the bill be amended to explicitly limit the amount of back pay an employee can recover to two years, and thus mirror the provisions of Lilly Ledbetter and *Alexander*.

Proposed Minimum Wage Increase

On December 3, 2012, Governor Christie received a bill (A2162) seeking to increase the New Jersey minimum wage from $7.25 to $8.50, effective March 1, 2013. The bill also calls for automatic future annual adjustments linked to the Consumer Price Index (CPI). The Governor vetoed the bill and the New Jersey legislature is threatening to address the issue through a constitutional amendment (SCR1/ACR168) to increase the minimum wage to $8.25 per hour.

Cowher v. Carson & Roberts

2012 N.J. Super LEXIS 55 (App. Div. Apr. 18, 2012): The Appellate Division held that under LAD an employee could sue based on anti-Semitic slurs that his superiors directed at him even though he was not actually Jewish. As discrimination claims based on perceived disability are explicitly recognized under LAD, the Appellate Division explained that "there is no reasoned basis to hold that the LAD protects those who are perceived to be members of one class of persons enumerated by the act and does not protect those who are perceived to be members of a different class, as to which the LAD offers its protections in equal measure."

A.D.P. v. ExxonMobil Research and Engineering Co.

No. A-4806-10T4 (App. Div. Oct. 26, 2012): The Appellate Division held that the company's requirement that an employee submit to random alcohol testing because she voluntarily disclosed that she was an alcoholic was facially discriminatory and constituted direct evidence of discrimination. The court found significant proof that employees who were not identified as alcoholics were not subject to the same policy, thus "demonstrating hostility toward members of the employee's class," and rejected the company's affirmative defenses of business necessity and safety.

In Re: Enterprise Rent-A-Car Wage & Hour Employment Practices Litigation

2012 U.S. App. LEXIS 13228 (3d Cir. June 28, 2012): The Third Circuit held that a parent company was not a joint employer with its subsidiaries to which it provided shared administrative services and support. In affirming the lower court, the Third Circuit set forth the new "Enterprise" test for determining joint employer status under the FLSA, which considers whether the alleged employer has the (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments and set conditions of employment, including compensation, benefits and hours; (3) authority to implement day-to-day supervision, including discipline; and (4) control of employee records, including payroll, insurance and taxes.

Longo v. Pleasure Productions

On October 22, 2012, the New Jersey Supreme Court heard oral arguments on whether a punitive damages award against an employer can stand given the trial court's failure to instruct the jury that active participation or willful indifference of upper management is a prerequisite to awarding such damages.

New York

The most significant news in New York labor & employment law was amendments to the wage deduction law that became effective in November 2012 (the "Amendments"). The Amendments to Section 193 of New York's Labor Law ("Section 193") expand the scope of deductions that employers lawfully may take from their employees' wages. They also add wage deduction-related procedures.

Historically, Section 193 prohibited employers from taking deductions from employees' wages unless they were "for the benefit of the employee." More recently, the New York State Department of Labor ("NYSDOL") interpreted the scope of lawful deductions as still more restrictive. Specifically, the NYSDOL additionally required that, to be lawful, the wage deduction had to be "similar" to Section 193's list of lawful deductions – a short, narrow list of categories such as insurance premiums, pension and health benefits and labor organization payments. Indeed, the NYSDOL's interpretation of Section 193 was so narrow that even an employee's voluntary, written consent to a deduction not similar to the Section 193 list did not make it lawful.

The Amendments to Section 193 permit employers to take wage deductions for a host of reasons that were previously deemed to be prohibited. The enumerated list of now permissible wage deductions is expanded to include:

1. insurance premiums and prepaid legal plans;
2. pension or health and welfare benefits;

3. contributions to a bona fide charitable organization;
4. purchases made at events sponsored by a bona fide charitable organization affiliated with the employer where at least twenty percent of the profits from such event are being contributed to a bona fide charitable organization;
5. United States bonds;
6. dues or assessments to a labor organization;
7. discounted parking or discounted passes, tokens, fare cards, vouchers, or other items that entitle the employee to use mass transit;
8. fitness center, health club, and/or gym membership dues;
9. cafeteria and vending machine purchases made at the employer's place of business and purchases made at gift shops operated by the employer, where the employer is a hospital, college, or university;
10. pharmacy purchases made at the employer's place of business;
11. tuition, room, board, and fees for pre-school, nursery, primary, secondary, and/or post-secondary educational institutions;
12. day care, before-school and after-school care expenses;
13. payments for housing provided at no more than market rates by non-profit hospitals or affiliates thereof; and
14. similar payments for the benefit of the employee.

The Amendments to Section 193 also, and for the first time, specifically permit an employer to deduct wages to recover (a) overpayments of wages that are due to clerical error by the employer and (b) advances of salary or wages made by the employer to the employee. However, in order to do so, the employer must comply with regulations promulgated by the Commissioner of the NYSDOL.

As noted, the Amendments to Section 193 also add wage deduction-related procedures. First, the employer must provide its employees with advance written notice of the terms and conditions of the payment, and the details of the manner in which the deduction will be made. Second, any "substantial changes" to deduction amounts by the employer must also be accompanied by written notice from the employer to the employee prior to implementing the change. Lastly, as a record-keeping requirement, employers must keep all written authorizations for the employee's entire period of employment plus an additional six years.

Finally, the New York State legislature's ambitious overhaul of Section 193 may be ephemeral. The Amendments to Section 193 have a three-year sunset provision. Thus, the Amendments may expire on November 6, 2015, leaving New York with the pre-Amendment Section 193.

North Carolina

Unrelated Tort Claims Not Subject To Arbitration Clause

The Court of Appeals found that an arbitration clause limited to the termination of an employee cannot be used to compel arbitration of non-termination claims pertaining to the employee's hiring or the sale of the business. In *Fontana v. Southwest Anesthesiology Consultants, P.A.*, 2012 WL 2890811 (N.C. App. 2012), the plaintiff's employment contract provided for termination for cause and without cause and that, "[I]f the parties are unable to resolve the dispute regarding termination of Employee . . . all such disputes . . . shall be settled by binding arbitration." When plaintiff was fired, he sued for breach of his employment contract and a number of tort claims, such as fraud and negligent misrepresentation. The trial court denied a motion to compel arbitration by the defendant. The Court of Appeals found the breach of contract claim was related to the plaintiff's termination and therefore arbitrable. However, the court found that the other tort claims were not subject to the arbitration clause because they pertained to his hiring and the sale of the business and not his termination. This decision underscores the need for employers to carefully craft arbitration provisions so that they capture all anticipated disputes and meet all legal requirements.

North Carolina House Approves Overhaul of Unemployment Insurance System

Overhauling North Carolina's unemployment insurance system has been billed as the top line item for the North Carolina legislature in 2013. The focus is on how the legislature plans to repay the nearly $2.6 billion the state borrowed from the federal government during the recession to pay jobless benefits when state unemployment taxes could not keep up with the demand for benefits. Federal law requires North Carolina to set aside more than $2 billion by 2019 to borrow interest-free in the future. On February 4, 2013, the State House voted in favor of a bill that reduces the maximum weekly benefit and raises state unemployment insurances taxes in order to repay the debt within the next three years.

For the business community, the bill is viewed favorably even though it requires slightly higher unemployment insurance taxes for employers. Specifically, until the debt is paid, employers' unemployment insurance taxes will rise by $21 per employee per year.

However, it is the 9.2 percent of unemployed North Carolinians who will be hit the hardest. The proposed changes would permanently reduce maximum weekly benefits for unemployed workers from $535 a week to $350. Additionally, the maximum number of benefits weeks would fall from the current 26 weeks to 20 weeks, and as few as 12 weeks in periods of low unemployment. Most "good cause" exceptions to receive benefits even when a person leaves their job voluntarily also would be deleted.

The Republican Senate is expected to approve the bill and the proposed changes will take effect July 1, 2013.

Oregon

State Minimum Wage Increased

Effective January 1, 2013, Oregon's minimum wage increased to $8.95 per hour.

Mini-COBRA Obligations Expanded

Oregon has amended its mini-COBRA notice requirements in situations in which an insurer has terminated coverage of a covered person or qualified beneficiary without providing replacement coverage. As under prior law, the insurer must provide written notice no later than 10 days after receiving notice of a qualifying event. Under the amendment, the notice must include information prescribed by the Director of the Department of Consumer and Business Services.

Discrimination Against the Unemployed Prohibited

The Oregon legislature passed a law prohibiting employers from posting job vacancy ads seeking only applicants who are currently employed. The Bureau of Labor and Industries has the exclusive right to pursue violations, which can result in a fine of up to $1,000 per violation.

Independent Contractor Determinations

Consistent with the trend across the country in 2012, the Oregon Court of Appeals issued three opinions addressing the meaning of the term "independent contractor." These cases in the unemployment tax context highlight the highly individualized inquiry necessary to assess whether individuals can be properly classified as independent contractors rather than employees.

Initially, in *Avanti Press, Inc. v. Emp't Dep't Tax Section,* 248 Or. App. 450, 274 P.3d 190 (2012), the court concluded that a product sales representative in the greeting card and gift industry was correctly classified as an independent contractor. The court found determinative that the sales rep set her own schedule, worked out of a home office, provided her own office equipment, used her own vehicle, and was paid purely on a commission basis. The court reached this determination even though Avanti set the prices and targets of sales, trained the sales rep on sales policies, provided purchase order forms, allowed her to use its trade mark on her business cards, and reserved the right to terminate her services at any time.

In light of *Avanti*, it appeared that businesses might have a clearer interpretation of who is eligible for independent contractor status. However, two subsequent cases have confused the issue.

In *Whitsett v. Emp't Dep't, No. A148769* (Or. Ct. App. Aug. 15, 2012), the court concluded that an occasional handyman, who was paid intermittently to repair broken fixtures at a laundromat owner's request, should have been classified as an employee. Although the court acknowledged that the handyman assumed the "risk of loss" and had the "authority to hire other persons," it concluded that he did not meet any of the other statutory requirements to qualify as an independent contractor. Contrary to *Avanti*, the court determined that the handyman's practice of working out of his kitchen and accepting calls on his personal phone number did not meet the threshold for "maintaining a business location." Additionally, the court concluded that the handyman did not "engage in business advertising, solicitation or other marketing efforts," and, even though he did provide his own tools, did not "make any significant investments in his business" because he did not have a license or certificate for his trade.

Similarly, in *Compressed Pattern, LLC v. Emp't Dep't Tax Section*, 253 Or. App. 254, __ P.3d __ (2012), the court held that a drafter who provided services for an architectural design firm was an employee. After being laid off from his internship with a prior employer, Compressed Pattern retained him to provide drafting services on a project basis. The drafter set his own hours, worked out of his prior employer's office space using their equipment (at no cost to him) and provided services to other companies. Applying the same analysis as *Whitsett*, the court concluded that the drafter did not "maintain" a business location because he used the space and equipment of his former employer for free. In addition, although the drafter had incurred the expense of obtaining an architectural license, the court concluded that he did not need the license to perform drafting services and therefore did not meet the requirement for making "a significant investment in his business."

Although these narrowly parsed cases leave independent contractor determinations in Oregon muddled, it is clear that the Employment Department and the courts are strictly construing the statutory definition, and those decisions hinge on factors that often are not within the defendant-company's control (e.g., whether individuals market their business and apply for appropriate licensing or where they perform their services). The key determining facts that appear to have set *Avanti* apart was that she worked out of a home office designated for business (as opposed to a kitchen or free office space) and actively solicited other work using her own business cards (albeit with her client's trade marks). With this in mind, companies who contract for services in Oregon should carefully consider whether an individual who performs work for the business is appropriately classified as an independent contractor and may want to establish certain contracting protocols and warranties that address the factors relevant to independent contractor status.

Pennsylvania

Contractors Required to Verify Employment Eligibility

Beginning January 1, 2013, contractors and subcontractors on Pennsylvania public works projects must verify the employment eligibility of new hires through the federal E-Verify program. The contractors and subcontractors must submit to the agency that awarded the contract a signed verification form certifying that they have verified or will verify the employment eligibility of new employees using the Department of Homeland Security's E-Verify program.

The Pennsylvania Department of General Services is charged with enforcing the law, and it can conduct complaint-based or random audits. The penalty for failure to verify employment eligibility the first time is a warning letter, which is also posted on the Internet. For a second violation, the penalty is 30 days debarment from public works, which increases to debarment for six to 12 months for subsequent violations. In the case of a willful violation, a court can order debarment for three years. If a contractor or subcontractor fails to submit the required verification form, it is subject to a civil penalty of $250 to $1000.

Pennsylvania Uniform Interstate Depositions and Discovery Act

In October 2012, Pennsylvania joined an increasing number of states that have enacted the Uniform Interstate Depositions and Discovery Act. This law provides a more efficient process for obtaining deposition testimony and discovery materials from individuals or businesses in Pennsylvania for a lawsuit pending in another state.

Under the uniform law enacted in Pennsylvania, lawyers and litigants can present a subpoena from another state court to the prothonotary in the county of Pennsylvania where the person or entity named

in the subpoena resides, works or regularly transacts business in person. The prothonotary will in turn issue a subpoena to be served on the individual or entity from whom the deposition testimony or documents are sought. The law requires that the prothonotary promptly issue the subpoena in accordance with its standard procedure.

Mechanics' Liens for Unpaid Contributions to Union Employees' Benefit Plans

The Pennsylvania Superior Court has held that trustees of union employees' benefit plans can file mechanics' liens against a property owner to recover unpaid contributions to those plans. *See Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott's Development Company*, 41 A.3d 16 (Pa. Super. 2012) (en banc). In *Scott's Development*, trustees of the union benefit plans asserted that a contractor owed contributions to the plans under collective bargaining agreements between the contractor and the unions. The trustees further asserted, and the Superior Court agreed, that the unions came within the definition of a "subcontractor" under Pennsylvania's Mechanics' Lien Law, such that their trustees could file mechanics' lien claims. Under that law, only a "contractor" or "subcontractor" is permitted to file a lien claim against a property owner for debts due by the owner to the contractor or by the contractor to any of his subcontractors for labor or materials furnished during a project. Liberally construing the law's definition of "subcontractor," the Superior Court found that the unions had the necessary contracts with the contractor and furnished labor for the construction of an improvement. Therefore, it allowed the mechanics' lien claims to proceed. On November 28, 2012, the Supreme Court of Pennsylvania granted a petition for allowance of appeal, and that appeal is currently pending.

Fluctuating Workweek Calculation of Overtime Not Permitted Under PA Law

In August 2012, a federal district court held that the fluctuating workweek method of calculating overtime under the federal Fair Labor Standards Act (FLSA) is not available under Pennsylvania law. *See Foster v. Kraft Foods Global, Inc*., No. 09-453, 285 F.R.D. 343 (W.D. Pa. Aug. 27, 2012). Under the fluctuating workweek method, an employer that pays a fixed salary intended to cover all hours worked is required to pay a non-exempt employee only additional half time (*i.e.,* one half of the employee's regular rate for hours worked in excess of 40 per week, instead of the usual time and one half for overtime). Payment of only half time under the fluctuating workweek is supported by regulations and case law under the FLSA. However, the regulations under the Pennsylvania Minimum Wage Act, which include overtime pay requirements, do not contain a similar provision. Therefore, the court held that payment of overtime hours at one half of an employee's regular rate under the fluctuating workweek method is not permitted under the Pennsylvania Minimum Wage Act regulations.

South Carolina

In *Milliken & Co. v. Morin*, __ S.C. __, 731 S.E.2d 288 (2012), the South Carolina Supreme Court determined the standards of scrutiny that apply to invention assignments, holdover clauses, and confidentiality clauses. While South Carolina strictly construes non-compete agreements against employers, the Supreme Court declined to apply the same standard to other restrictive covenants. Instead, the Supreme Court held that invention assignments, holdover clauses, and confidentiality clauses must be (1) reasonable; (2) no greater than necessary to protect an employer's legitimate interests; and (3) not so harsh as to impede the employee's ability to earn a living.

Weighing these factors, the court upheld Milliken's three-year confidentiality agreement because it covered information that was (1) important, (2) non-public, and (3) learned in the scope of

employment. This case signals a shift in South Carolina law that allows employers greater protection from the courts in their efforts to protect confidential information and stave off unfair competition.

Team IA, Inc. v. Lucas, 395 S.C. 237, 717 S.E.2d 103 (Ct.App. 2011)

Lucas worked for Team IA, then resigned and opened a competing company performing similar services. Team IA brought suit for breach of contract, breach of duty of loyalty, tortious interference with business relations, and nine other causes of action. Lucas moved for partial summary judgment that his nonsolicitation and noncompete agreements were unenforceable and overbroad. The agreement stated that he could not compete or solicit within the continental United States. The agreement further stated that if a court found that region to be too broad, then the agreement applied to South Carolina, North Carolina, Georgia, and Alabama. The trial court granted Lucas's motion finding the agreements overbroad because Team IA didn't even have clients in 3 of the 4 listed states and because the nonsolicitation prohibited Lucas from accepting work from Team IA clients he had not actually solicited.

On appeal, the court found the general continental U.S. provision to be too broad, and after pointing out that courts should not "blue pencil" existing contracts, the court ruled that the four-state restriction was not facially invalid, the parties were not seeking "blue penciling," nor were they seeking to subsequently modify an agreement.

After finding the four-state restriction facially valid, the court ruled that questions of material fact existed and held summary judgment inappropriate.

This case indicates that employers may have a way around the "all or nothing" approach to geographic restrictions, but it remains to be seen if and how the Supreme Court rules.

Texas

Texas Courts a Little More Friendly Towards Jury Waivers

Two 2012 Texas court opinions illustrate the increasingly friendly disposition of Texas courts towards jury waivers in the employment context. In *In re Frank Kent Motor Co.*, 361 S.W.3d 628 (Tex. 2012), the Texas Supreme Court held that an employer's policy of requiring at-will employees to sign jury waivers on threat of termination did not render the executed jury waivers unenforceable. Although the court noted that coerced jury waivers are unenforceable, an employer has a right to terminate an employee for any reason. A threat to terminate an employee for not signing the jury waiver is not unlawful and, therefore, simply an expression of a legal right, *i.e.*, not coercion.

In *Bullock v. Am. Heart Ass'n*, 360 S.W.3d 661 (Tex. App.—Dallas 2012, pet. denied), the Dallas Court of Appeals held that the trial court properly struck a former employee's jury demand. The jury waiver executed by the former employee was enforceable based on the fact that it was: 1) in a separate paragraph; 2) in boldface type; 3) introduced by underlined heading; 4) not excessively verbose; and 5) reviewable for a period of two weeks.

No Right of Privacy for Facebook Posts

In *Sumien v. CareFlite*, No. 02-12-00039-CV, 2012 WL 2579525 (Tex. App.—Fort Worth July 5, 2012, no pet.), and *Roberts v. CareFlite*, No. 02-12-00105-CV, 2012 WL 4662962 (Tex. App.—Fort Worth Oct. 4, 2012, no pet.), the Fort Worth Court of Appeals dismissed the claims of two emergency medical technicians (EMTs) against their former employer for viewing their Facebook posts. The

EMTs had posted on their Facebook pages that they would like to restrain their patients and give them a "boot to the head." After CareFlite received complaints regarding the posts, it terminated the EMTs. Their lawsuit alleged "intrusion upon seclusion," a privacy tort in Texas. The court was unpersuaded by the EMTs' attempts at arguing that viewing the Facebook posts was an invasion of privacy. The court noted that the Facebook posts can be viewed by third parties and whether or not the EMTs had intended their employer to be able to see the posts or misunderstood the privacy settings, the employer had done nothing to unlawfully intrude into their private lives.

Cause of Action Against Workers' Compensation Insurance Providers Eliminated

In *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012), the Texas Supreme Court eliminated a worker's right to assert a common law claim for breach of the duty of good faith and fair dealing against the workers' compensation carrier. The court originally allowed the cause of action to exist outside the workers' compensation dispute resolution system because of: 1) the disparity of bargaining power between the insurer and the worker; 2) the exclusive control that the insurer exercised over processing claims; and 3) arbitrary decisions by the insurer in refusing to pay or delaying payment on valid claims that leave injured workers without immediate recourse. After the Texas legislature added safeguards to the workers' compensation system and substantially remedied the deficiencies that led the court to recognize the cause of action, the court decided that a judicially imposed cause of action is no longer necessary. The revised workers' compensation statute allows for expedited claims, quicker payments to injured workers, and provides the Office of Injured Employee Counsel to assist injured workers.

Washington

Washington State Minimum Wage Increased to $9.19 per Hour

Effective January 1, 2013, Washington's minimum wage increased to $9.19 per hour. Pursuant to RCW 49.46.020, the Washington State Department of Labor and Industries calculates a cost-of-living adjustment to the minimum wage each year based on the federal Consumer Price Index for Urban Wage Earners and Clerical Workers, which measures the average change in prices on a fixed group of goods and services people purchase for day-to-day living. Washington currently has the highest state minimum wage rate.

Washington Decriminalizes Marijuana

Washington voters passed Initiative 502 (I-502), which decriminalizes certain marijuana-related activities, including permitting adults 21 and older to use marijuana and possess up to one ounce of marijuana. The law became effective on December 6, 2012. Smoking marijuana in public or driving under the influence are illegal, similar to laws regarding alcohol. I-502 conflicts directly with the federal Controlled Substances Act, which lists marijuana as a Schedule I narcotic. President Obama announced that going after recreational users in Washington and Colorado (which also legalized marijuana) is not a top priority, but there is no other federal guidance. For multi-state employers, Washington's and Colorado's laws represent a dramatic departure from other state laws.

Despite these conflicts and the perceived impact of decriminalization, the effect on employers may not be significant. I-502 is silent regarding the workplace, and employers remain free to enforce drug-free workplace and zero-tolerance policies, as well as test for illegal drugs, including marijuana. While no court has addressed I-502's impact on the workplace, in *Roe v. Teletech Customer Care Management*, 171 Wn.2d 736 (2011), the Washington Supreme Court confirmed that employers are free to

discipline and discharge employees for lawful off-duty medical marijuana use despite a state law permitting such use. We expect that the result would be the same for recreational users who suffer adverse employment actions. Given the law change and widespread public confusion, employers should update their policies to clarify the organization's position on marijuana, including the requirement to not possess, use, or be under the influence of illegal drugs or alcohol in the workplace, as well as the potential consequence of a positive drug test for off-duty use. The policies should specifically reference illegal drugs under federal, state, or local law, and possibly list marijuana specifically. Employers who test for drugs should make clear that the presence of any amount of illegal drugs, including marijuana under federal law, is prohibited. For multi-state employers, it is particularly important to update the policy and ensure human resources understands the law and the company's policies regarding marijuana.

Washington Voters Approve Same Sex Marriage

Washington voters passed Referendum 74, which approved the Marriage Equality Act signed into law in February 2012. The law will not cause significant changes for employers, but rather builds upon the 2009 "everything but marriage" law that treated state registered domestic partners the same as married spouses under Washington law. The Marriage Equality Act, which became effective December 6, 2012, legalizes same sex marriage and will convert many domestic partnerships to marriages. Employers should consider the benefits implications and whether to recognize domestic partnerships only in the limited situations where they continue to be permitted (e.g., where one partner is age 62 or older).

Washington Supreme Court Finds Breaks Count as Hours Worked

In *Washington State Nurses Ass'n v. Sacred Heart Medical Center*, --- Wn.2d --- (Oct. 25, 2012), the Washington Supreme Court held that where employees missed breaks required by law (WAC 296-126-092, which requires a 10-minute break for every four hours worked), missed time is added to the work day as "hours worked." This can result in statutory overtime payments even if employees are only at the workplace for 40 hours in a workweek.

Payments Under a Stock Cancellation Agreement Are Not Wages

In *Arzola v. Name Intelligence, Inc.*, --- Wn. App. --- (Nov. 26, 2012), the Court of Appeals addressed the meaning of "wages" under RCW 49.52. The employer promised employees a grant of shares in the company under certain circumstances. When the company entered into an agreement to sell the business, it accelerated the share grant to employees, but then also entered into stock cancellation right agreements under which the employees agreed to give up their shares in exchange for payments in the future (at the same time the company would receive payments from the buyer). When employees were not timely paid, they sought remedies under RCW 49.52 for double damages and wrongful withholding of wages. The Court of Appeals found that the payments were not wages, as the consideration the employee provided was surrendering an interest in stock, not services or labor. The court did not address whether grants of stock themselves are wages.

2013 US Labor and Employment Horizon

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