5 KEY TAKEAWAYS

Employment Law Update: What You Need to Know Now and Next

On November 30, Counsel Brodie Erwin and Associate Sarah Spangenburg presented "Employment Law Update: What You Need to Know Now and Next" during Kilpatrick's Raleigh In-House Counsel Summit. The presentation provided insight into recent significant legal developments impacting the relationship employers have with their employees coupled with best practice tips for navigating these changes. It also provided a look forward at several future issues that employers can proactively start preparing for now.

Here are five employment law takeaways for you to know now and next:

1

Pay Attention to Your Confidentiality and Non-disparagement Provisions: Under the NLRB's 2023 ruling in *McLaren Macomb*, confidentiality and non-disparagement provisions in severance agreements can be unlawful if the terms have a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Going forward, businesses need to make sure they revise their agreements to carve out these rights for employees and ensure their agreements are enforceable.

2

Remember the Intersection Between Disability and Leave Laws: The intersection between disability and leave laws has long posed a complex problem employers must navigate. The intersection recently got a little busier with the passage of The Pregnant Workers Fairness Act in June 2023. The PWFA protects employees and applicants of covered employers who have known limitations related to pregnancy, childbirth, and related medical conditions. The PWFA gives applicable pregnant workers the right to reasonable accommodations, similar to the ADA, which can include periods of unpaid leave that extend past the expiration of FMLA entitlement. Employers will do to brush up on all of the various disability and leave laws that they must consider when an employee presents with a medical or other leave issue. When employees need time off because of a medical or disability-related issue, it is important to remember that they may have rights under all these laws at the same time.

3

Ensure Compliance with New Salary and Pay Transparency Laws:

- These laws require providing applicants and/or employees the salary-wage range (or other compensation/benefits) for a role: (1) in job postings; (2) at some point during the application/employment relationship; or (3) upon reasonable request.

- These laws currently exist in 15 jurisdictions, including California, New York, Washington, Connecticut, Rhode Island, and Nevada.

4

Prepare for Future Changes to FLSA Exemption Standard: In September 2023, the Department of Labor issued a Notice of Proposed Rulemaking that set out to accomplish four items: (1) Increase the minimum weekly salary level to qualify for an executive/administrative/professional exemption from $684 per week to $1,059 per week (or $55,068 per year); (2) Increase the highly-compensated employee exemption total annual compensation requirement to the "annualized weekly earnings of the 85th percentile of full-time salaried workers nationally…." (or $143,988 per year); (3) Implement automatic updates to the earnings thresholds every three years; and (4) Apply the standard salary level for EAP exemptions to Puerto Rico, Guam, the U.S. Virgin Islands, and the Northern Mariana Islands. The comment period for the rule closed on November 7, 2023, and we are waiting for a final rule. In the meantime, employers should strategize for how to treat exempt employees who are above the current threshold but will be below the new threshold, as well as reviewing job duties and descriptions to ensure that employees are properly classified as exempt.

5

Draft Restrictive Covenants for Success: Drafting valid and enforceable noncompetes and other restrictive covenants has only gotten more difficult in the wake of the growing national opinion disfavoring their use. The Federal Trade Commission is expected to vote in April 2024 on the final version of its proposal to ban noncompete agreements in employment contracts on a nationwide basis. The NLRB has also issued a memo explaining its stance that overbroad non-compete agreements are unlawful because they chill employees from exercising their rights under Section 7 of the National Labor Relations Act. However, restrictive covenants still play a critical role in safeguarding the legitimate business interests of employers. When drafting non-competes, employers should remember to not get greedy with their provisions and aim for the most expansive restrictive provision or widest geographic territory. Instead, restrictions should be narrowly tailored to only go so far as to protect the specific needs of a particular employer.

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