LITTLER WORKPLACE POLICY INSTITUTE

INSIDER REPORT

CURRENT EVENTS MONTHLY NEWSLETTER

July 2016

INSIDER BRIEFING

In the weeks leading up to the July 4th holiday, congressional Republicans turned to a variety of legislative vehicles to try to block recent and pending regulations affecting the workplace. At the same time, the Department of Labor (DOL) and Equal Employment Opportunity Commission (EEOC) continued their efforts to finalize as much of their agendas as possible before the next Administration takes over. Yet, significant court decisions issued in June suggest it will fall to the federal government's judicial branch to determine the legacy of much of the Obama Administration's labor and employment policy.

DOL Rule Challenges

On June 7, Senators Lamar Alexander (R-TN), Chairman of the Senate Health, Education, Labor and Pensions Committee, and Ron Johnson (R-WI) introduced a resolution (S.J. Res. 34) to overturn the DOL's final overtime rule under the Congressional Review Act (CRA). Forty-four additional Senators sponsored the resolution of disapproval. Under the CRA, Congress can pass a resolution to overturn a regulation and prevent an agency from issuing a substantially similar rule. However, any such resolution is subject to veto by the President, making the legislative effort largely about messaging as long as President Obama still holds the veto pen.

The DOL's final rule lifts the salary threshold for the white collar overtime exemption from $23,660 to

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ON THE MOVE

While the U.S. Congress has been predictably stagnant this election year, state legislatures have enacted over 100 labor- and employment-related bills during the first half of 2016. At least 20 employment bills were signed into law at the state level in June alone. These new laws impose new requirements related to background checks, pregnancy accommodation and paid sick leave, among other hot legislative topics. In addition, the looming general election has spurred several ballot initiatives that seek to place the adoption of new employer obligations in the voters' hands. The following is a brief overview of some of the key measures that moved last month.

Minimum Wage

June saw a resurgence in local efforts to boost the minimum wage. Three weeks after the District of Columbia City Council voted unanimously to raise the District's minimum wage, in increments, to $15.00 an

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$47,476 per year, with automatic adjustments every three years. In a press release issued upon introduction of the CRA resolution, Sen. Alexander criticized the impact of the final rule, stating: "[w]orkers who today are mid-management or professional employees are not going to like it one bit when their employer tells them that under this new rule they're going to be punching the time-clock when they go in and out of work."

Rep. Virginia Foxx (R-NC) issued a similar resolution in the House (H.J. Res 95) on June 16. Introduction of the resolution in the lower chamber came a week after the House Education and Workforce Committee held a hearing on the overtime rule, highlighting its impact on workers, students, nonprofits, and small businesses. Earlier this year, House and Senate Republicans introduced legislation to require the department to pursue a "more balanced and responsible" approach to updating federal overtime rules.

The DOL's "persuader" rule was the target of another CRA resolution introduced in June. The final persuader rule requires employers and their advisors, including lawyers and consultants, to file public reports with the DOL under the Labor-Management Reporting and Disclosure Act (LMRDA) disclosing any advice that "indirectly persuades" employees regarding union organizing or collective bargaining. Under the prior, longstanding interpretation of the "advice" exemption, such reports were required only when an advisor made direct contact with the employer's employees, regardless of the persuasive purpose of the advice.

On June 10, Senators Jeff Flake (R-AZ) and Lamar Alexander introduced S.J. Res. 35, a resolution to permanently halt the implementation of the final persuader rule. Introduction of the Senate resolution followed the House Education and Workforce Committee's May 19 approval of a similar resolution (H.J. Res. 87) introduced by Rep. Bradley Byrne (R-AL) to block the persuader rule under the CRA. Before Congress took further action on these resolutions, a court stepped in to block the rule.

On June 27, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide injunction enjoining the persuader rule, which was set to apply to agreements and payments made on or after July 1. In rendering his decision, the judge considered: (1) the likelihood of the plaintiffs' success on the merits on the issue of the rule's unlawfulness; (2) the threat of irreparable harm to the plaintiffs if the injunction was not granted; (3) the balance between that harm and the injury that granting the injunction would inflict on the other parties; and (4) the public interest. The judge determined that the plaintiffs were likely to prevail on a number of grounds, including that the rule exceeds the DOL's authority under the LMRDA by effectively eliminating the advice exception and is therefore "defective to its core." The judge further concluded that the rule is arbitrary, capricious, and constitutes an abuse of discretion because the DOL had reversed its longstanding position of over 50 years without conducting any studies or independent analysis to support the reversal; the rule's reporting requirements are inconsistent with and undermine the attorney-client privilege and the confidentiality of the attorney-client relationship; the rule violates free speech and association rights protected by the First Amendment; the rule is void for vagueness and therefore in violation of the due process clause of the Fifth Amendment; and the rule violates the Regulatory Flexibility Act.

The injunction followed a decision issued by a Minnesota district court on June 22, denying an injunction but opining that the challenge to the persuader rule had a strong likelihood of success on the merits. Although the DOL could ultimately challenge the Texas district court's ruling in future proceedings, including at the appellate level, it was nonetheless welcome news for employers and their consultants.

The DOL is facing legal challenge to another of its recently finalized regulations. Trade groups have filed a lawsuit to block the "fiduciary" rule, which revises the regulations governing the definition of fiduciary investment advice for retirement plans to address

conflicts of interest. The U.S. Chamber of Commerce, Securities Industry and Financial Markets Association, the Financial Services Institute, and the Financial Services Roundtable are among the groups seeking to overturn the rule. The lawsuit, filed on June 1, claims that the fiduciary rule and related prohibited transaction exemptions "overstep the Department's authority, create unwarranted burdens and liabilities, undermine the interests of retirement savers, and are contrary to law." As expected, President Obama vetoed a resolution (H.J. Res. 88) passed by Congress to block the rule under the CRA. On June 22, a vote in the House to override the veto failed to garner the necessary 2/3 majority support, leaving the veto intact and returning attention to the pending litigation.

Quote of the Month

"We need equal pay for equal work. We need paid family and sick leave. We need affordable child care. We've got to raise the minimum wage… We've gotten some things done through executive actions. When we had a cooperative Congress, we got a whole lot more done. So far, a lot of Republicans in Congress have been unwilling to act on these agenda items that I just mentioned. But we just keep on looking for ways to get stuff done. They keep on waiting for this whole lame duck thing to happen. Let me tell you, it will happen as soon as I've elected a really good successor to carry on our policies."

— President Obama during the United State of Women Summit

Equal Pay & Sex Discrimination

In a series of actions in June, the Obama Administration continued its focus on equal pay and sex discrimination. The focus on equal pay has accelerated because of the upcoming elections and the importance of the issue on the campaign trail. Notably, the White House is soliciting businesses to sign an "Equal Pay Pledge." The pledge asks companies to acknowledge and applaud "the growing number of countries that have already made significant progress in closing their gender wage gap" and to commit to "conducting an annual company-wide gender pay analysis across occupations; reviewing hiring and promotion processes and procedures to reduce unconscious bias and structural barriers; and embedding equal pay efforts into broader enterprise-wide equity initiatives."

How and when the pledge will be used by the White House or others is unclear. However, it highlights the priority policymakers and perhaps voters are giving this issue. In conjunction with the Equal Pay Pledge, the White House on June 14 held a United State of Women Summit, in which President Obama gave the opening speech. The following day, the DOL hosted a "Worker Voice Summit: The Power of Women's Voices."

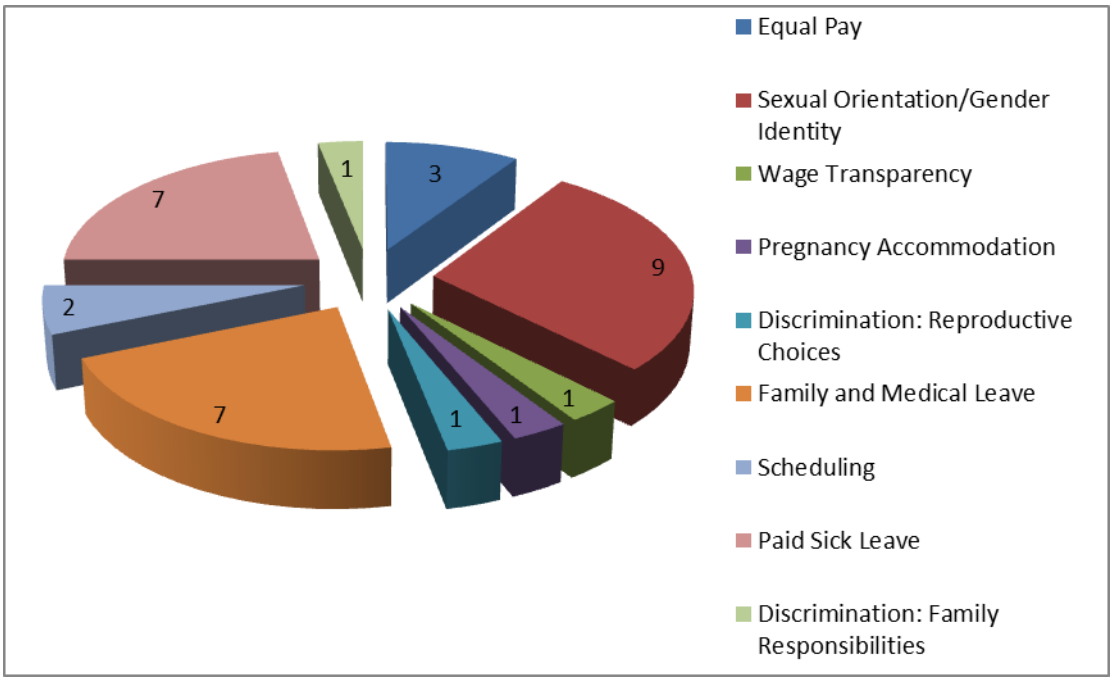
The DOL's Office of Federal Contracts Compliance Programs (OFCCP) along with the EEOC have played a key role in advancing the White House's equal pay initiatives and broader efforts to target sex discrimination. The OFCCP's publication of a final rule revising its sex discrimination guidelines is the latest in the agency's efforts. The final rule, issued on June 15, updates sex discrimination guidelines in place since 1970 "to align them with current law and legal principles and address their application to contemporary workplace practices and issues."

The regulations detail the obligations of contractors under Executive Order 11246 to ensure nondiscrimination in employment on the basis of sex and to take affirmative action to ensure they treat

applicants and employees without regard to their sex. According to the OFCCP, the prior guidelines "failed to conform to or reflect current [T]itle VII jurisprudence or to address the needs and realities of the modern workplace" and the "historic changes to sex discrimination law, in both Federal statutes and case law, and to contractor policies and practices as a result of the nature and extent of women's participation in the labor force."

The final rule may have an even broader impact. It reflects the Obama administration's positions regarding the interpretation of multiple federal laws relating to discrimination on the basis of sex, sexual orientation, or gender identity, as set forth in regulatory and sub-regulatory actions as well as through arguments presented by government lawyers. The final rule asserts that it is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex, and that the term sex includes pregnancy, childbirth or related medical conditions; gender identity; transgender status; and sex stereotyping. It remains to be seen how the OFCCP will apply the revised guidelines in further audits and enforcement actions.

The EEOC also used the White House United State of Women Summit to release documents addressing equal pay and pregnancy discrimination. To coincide with the Summit, the EEOC released new resources on Equal Pay and the EEOC's Proposal to Collect Pay Data, Legal Rights for Pregnant Workers under Federal Law, and Helping Patients Deal with Pregnancy-Related Conditions and Restrictions at Work. In announcing the new resources, Chair Jenny Yang stated she was "pleased that the United States of Women Summit will shine a light on the challenges that many women face in the workplace. Issues of equal pay and pregnancy discrimination are central to the work we do here at [the] EEOC." Release of the information comes as the EEOC is weighing comments to its proposed changes to the EEO-1 Report to include compensation data. The EEOC's proposal to revise the EEO-1 Report was met with criticism from the employer community for, among other things, failing to create an accurate picture of



This chart shows the number of bills, ordinances, and ballot initiatives considered in June 2016 that involved topics addressed at the White House United State of Women Summit.

compensation and being overly burdensome.

Critics of the EEO-1 Report proposal in Congress turned to appropriations legislation to try to block the EEOC's proposed revisions. On June 15, Senator Lamar Alexander filed an amendment to the Fiscal Year 2017 Commerce, Justice, Science and Related Agencies Appropriations bill to block the EEOC from implementing its proposal. In a press release, Senator Alexander said, "the EEOC's new rule is likely to worsen its backlog of more than 76,000 unresolved cases, as the agency cannot handle its current complaints of discrimination and will now be sifting through the millions of pieces of new data."

Chair Yang is reported to have said that the EEOC will soon publish an updated version of the EEO-1 Report proposal. This would trigger an additional 30-day comment period, although it remains uncertain what, if any, changes the EEOC will make to its original proposal.

July 5 marks the deadline for filing public comment on the EEOC's proposed enforcement guidance on national origin discrimination. This Enforcement Guidance serves as a "reference for Commission staff investigating charges alleging national origin discrimination under Title VII, for EEOC staff conducting outreach, for EEOC lawyers bringing litigation, for employers, employees, and practitioners seeking detailed information about the EEOC's position on national origin discrimination and for employers seeking 'promising practices.'"

Supreme Court

Before beginning its summer recess, the U.S. Supreme Court issued a decision in *Encino Motorcars, L.L.C. v. Navarro* that could foretell how it approaches questions of deference to agency rulemaking. (See this month's *In Focus* article for more information). Shortly before adjourning, the Court also declined the plaintiff's petition for a writ of certiorari in *Home Care Association of America v. Weil.* The Supreme Court's denial of review of the D.C. Circuit's decision to uphold the DOL's home care rule leaves intact the regulation extending Fair Labor Standards Act minimum wage and overtime requirements to most home care workers. The Supreme Court also denied a request for a rehearing in the *Friedrichs v. California Teachers Association* case. The 4-4 decision in March following Justice Scalia's death was a victory for public employee unions because the tie meant that existing precedent allowing "agency fees" was not overturned.

With a dwindling number of days left in the legislative calendar before Congress recesses for the November elections, and the dwindling number of days left in the Obama Administration, ongoing battles between the two branches of government over workplace policy are likely to come to a head in the coming months. Yet, it may well fall to the third branch of government—the judicial branch—to determine the ultimate outcome.

– By Ilyse Schuman and Michael J. Lotito

hour by the year 2020, Mayor Muriel Bowser signed the bill, the Fair Shot Minimum Wage Amendment Act of 2016. This bill will also increase the minimum wage for tipped employees from $2.77 to $5.00 per hour over the same period. The measure is currently under mandatory review by the U.S. Congress under the D.C. Home Rule Act before it can become law.

Lawmakers in New Jersey similarly approved a bill that would raise the state's minimum wage to $15.00 per hour over a five-year period, although Governor Chris Christie has not been a proponent. If the governor vetoes the bill, advocates of a higher minimum wage have vowed to introduce a November 8 ballot initiative to achieve the same end.

Similar ballot initiatives are now in place for voters in Berkeley, California. A citizen's ballot initiative would increase Berkeley's minimum wage to $15.00 per hour on October 1, 2017, with annual increases tied to the Consumer Price Index. A separate ballot initiative would take a more measured approach to increasing the minimum wage. Under this alternative, the minimum wage would increase to $13.25 on October 1, 2017, $14.05 on October 1, 2018, and $15.00 on October 1, 2019.

The Miami Beach, Florida Commission voted in favor of an ordinance to increase the area's minimum wage to $10.31 on January 1, 2018, $11.31 on January 1, 2019, $12.31 on January 1, 2020, and $13.31 on January 1, 2021. This minimum wage increase would apply to all workers employed in the City of Miami Beach and those covered by the federal minimum wage. This minimum wage hike will no doubt face legal challenge, however, as Florida law precludes localities from adopting minimum wages higher than that set by state or federal law.

On the opposite coast, Oregon issued final regulations to clarify its new tiered minimum wage approach. The City of Los Angeles also adopted rules and regulations, effective July 1, 2016, implementing its minimum wage ordinance.

Paid Sick Leave

Another area that has kept employers scrambling to revise their policies is paid sick leave. While no state in June enacted a paid sick leave law, a handful of major cities moved such measures forward.

On June 22, the Chicago City Council unanimously passed an ordinance that would allow workers in the City to accrue up to 40 hours of paid sick leave annually. Chicago Mayor Rahm Emanuel praised the Council's passage of the Chicago Minimum Wage and Paid Sick Leave Ordinance, and is expected to sign it into law. This new sick leave ordinance is slated to take effect on July 1, 2017. The Council's passage of this sick leave measure comes just weeks after Minneapolis became the first major Midwestern city to adopt paid sick and safe leave requirements. Not to be outdone by its twin city, St. Paul, Minnesota released draft recommendations that private sector employers within city limits allow their employees to accrue an hour of paid sick and safe time for every 30 hours worked. The Council is expected to consider the measure later this summer.

The lives of California employers become more complicated in June. On June 2, Los Angeles adopted an ordinance that will allow employees to accrue and use up to 48 hours of sick leave per year. This is double the leave to which employees are entitled under state law. This law became effective on July 1, 2016.

Five days later, voters in a special election approved changes to San Francisco's paid leave law, and the adoption of a "new" paid leave measure in San Diego.

San Diego's Earned Sick Leave and Minimum Wage ordinance, which will allow most employees to earn an hour of sick leave per 30 hours worked, is expected to take effect soon. The changes to San Francisco's ordinance, which are designed to better align the City's law with other paid sick leave measures, will become operative on January 1, 2017.

Meanwhile, a November 8, 2016, ballot initiative introduced in Berkeley, California, would similarly allow employees to accrue an hour of paid sick leave for every 30 hours worked.

Pregnancy Accommodation

Measures increasing an employer's duty to accommodate an employee's pregnancy or pregnancy-related condition continue to gain ground. On June 1, 2016, Colorado enacted the Pregnant Workers Fairness Act, which amends the state's anti-discrimination statute to boost accommodation requirements and retaliation protections for pregnant employees. Among other provisions, the law mandates that an employer "shall" provide reasonable accommodations for any "health conditions related to pregnancy or the physical recovery from childbirth." The Act—which takes effect on August 10, 2016—includes anti-retaliation and notice-posting obligations.

Scheduling

An issue that had dropped off the radar after initially failing to gain traction has made a re-appearance in the District of Columbia. A D.C. Council Committee advanced a bill that would require retail and food service employers to provide employees with advance notice of their work schedules. Under the bill, if an employer makes last-minute changes to a work schedule resulting in fewer or no hours, the employee would be entitled to at least four hours' worth of pay or pay for the scheduled shift, whichever is less. The bill would also require employers to offer available hours to current employees before hiring additional workers or subcontractors.

Voters in San Jose, California will get to decide on November 8 whether employers in the city will need to offer qualified part-time employees more hours before hiring additional employees. The Opportunity to Work Ordinance would not require employers to offer an existing employee additional hours if doing so would trigger time-and-a-half or other premium pay requirements for that employee. The Ordinance also provides for a 12-month "hardship" exemption from its requirements if the employer can show it has tried in good faith to comply with the Ordinance, and "full and immediate compliance would be impracticable, impossible or futile." The San Jose City Council approved this ballot initiative on June 28.

In other work scheduling-related news, New Hampshire's governor signed SB 416 into law, which prohibits employers from retaliating against any employee because the employee requested a flexible schedule. Notably, the bill does not *require* any employer to accommodate a flexible work schedule or to create a cause of action for failure to provide a flexible work schedule at an employee's request.

Background Checks

Connecticut is the latest state to enact a ban-the-box law, preventing employers from asking about a job applicant's criminal history on the initial job application. The law, which takes effect on January 1, 2017, permits such inquiries if an employer is obligated under state or federal law to ask about an applicant's criminal history for the position, or if the position requires a security, fidelity, or equivalent bond.

A bill in California (AB 1843) that has cleared the State Assembly would clarify California's ban-the-box law to prohibit an employer from asking an applicant to disclose any information regarding juvenile court actions or detentions.

While not as popular in recent months, bills seeking to limit employer inquiries into an applicant's *credit* history continue to advance. Barring limited circumstances, private employers in Philadelphia may no longer require applicants or employees to provide their credit history for employment purposes. Philadelphia's Fair Practices Ordinance: Protections Against Unlawful Discrimination, exempts certain employers, including financial institutions, from its restrictions.

Wage Theft

Both of Rhode Island's legislative chambers approved bills targeting so-called "wage theft." Companion legislation (SB 2475, HB 7628) would increase potential remedies and fines for an employer's failure to comply with the state's wage payment statute. An employer found in violation of the wage payment law who does not pay the applicable wages and fines within 30 days of a final decision could have its business license revoked. Under the bill, aggrieved employees could also bring a civil action for injunctive relief and/or actual damages within three years after the alleged violation.

Another Rhode Island bill would prevent unauthorized deductions from an employee's paycheck. This measure (HB 7254) would prohibit employers from deducting or withholding pay without written or electronic consent from the employee. Besides other possible penalties, employers could be subject to damages equal to triple the amount of unlawfully withheld or deducted funds.

New Jersey also considered a handful of wage-related bills in June. Assembly Bill 862, which cleared a House Committee, would require employers owing employees for unpaid wages to pay the employee the amount owed plus liquidated damages equal to 200% of that amount, exclusive of any costs or fees.

A New Jersey Senate Committee passed a measure (SB 1396), which would also strengthen enforcement procedures and criminal sanctions against employers that fail to pay wages, compensation or benefits to their employees. The penalties are slightly lower in this bill—wages owed plus liquidated damages equal to 100% of that amount. However, the employer would also be subject to a fine of $500 plus a 20% penalty of the wages owed for a first offense, and increased penalties for subsequent offenses.

Yet another bill (SB 2343) introduced in New Jersey would require employers to notify employees of how to file a claim for underpaid or unpaid wages and obtain a signed statement that the employee has received notification.

What's Next?

With four more months to go before the November elections, there is still time left for some jurisdictions to file and approve employment-related ballot initiatives, although time has run out for most states. The handful of states still in session will continue to move bills, although the majority have or soon will recess for the summer months. We will continue to monitor those states and cities that remain active through the remainder of 2016.

– By Ilyse Schuman and Tessa Gelbman

GLOBAL REPORT

The following is a roundup of labor and employment news from around the globe:

Asia/Pacific

Australia – Big Data

The Office of the Australian Information Commissioner (OAIC) issued draft guidance on the use of "big data" and Australian privacy law. The purpose of the document—*Guide to big data and the Australian Privacy Principles*—is to inform organizations covered by the Privacy Act 1988 about the Australian Privacy Principles (APPs) and how they apply to big data. The 25-page document describes what constitutes big data, discusses the APPs—including the management of personal information—and sets forth how to use Australia's Privacy Management Framework in the big data context. Although the guidance is not legally binding, the OAIC states it will refer to the guidance "when undertaking its functions under the Privacy Act."

Australia – Minimum Wage

Australia's minimum wage is set to increase by 2.4% beginning July 1, 2016. Under the Fair Work Act 2009, the country's Fair Work Commission's Expert Panel is charged with conducting an annual minimum wage review and determining any rate changes. As a result of the 2015-2016 minimum wage review, the national wage is set at $672.70 per week, or $17.70 per hour. This rate is calculated by dividing the weekly rate by 38, on the basis of the 38-hour week for a full-time employee. This new weekly rate represents an increase of $15.80 per week, or 41 cents per hour.

Central America

Costa Rica. Costa Rica raised its minimum wage, effective July 1, 2016. In June, the country's National Wages Council ("Consejo Nacional de Salarios") approved a 0.5% minimum wage increase for all private sector employees. An even greater minimum wage increase (2%) will apply to domestic workers.

North America

Canada – Flexible Work Arrangements

The Canadian government issued a position paper and seeks public input on the use of flexible work arrangements. The purpose of the paper is to "help gather the views and perspectives of workers, unions, employers, employer organizations, advocacy groups, academics and other experts, the provinces and territories and the Canadian public on flexible work arrangements. It also invites feedback on what tools and methods should be used to ensure that a right to request flexible work arrangements, and any related initiatives, are effectively implemented." The paper addresses different types of flexible work arrangements, the rights of employees to request such arrangements, and how to effectively implement these arrangements.

Canada – Pension Plan Investment

The government launched a consultation (akin to a request for information in the United States) to solicit comments on whether the country's 30% rule for pension plan investment should be retained, relaxed, or eliminated entirely. The rule restricts federally-regulated pension plans from holding more than 30% of the voting shares of a company. By preventing pension plans from acquiring controlling stakes in the business, the rule's intent is to limit plans "to a more passive role and to reduce the risk of exposure to business failure." According to the consultation, the rule has certain tax policy implications as well. The consultation explains the history of the 30% rule, describes recent developments related to the rule, and poses specific questions for public input to help the government assess the rule's continued usefulness. Interested parties have until September 16, 2016 to submit comments.

Canada – Genetic Discrimination

The Canadian Parliament is considering a bill that would amend the Canada Labour Code to prohibit requiring an individual to take a genetic test or provide the results of such a test as a condition of receiving goods or services, or entering into an employment contract. Bill S-201, the Genetic Non-Discrimination Act, would also amend the Canadian Human Rights Act to prohibit discrimination on the ground of genetic characteristics. The Senate passed this bill earlier this year; the measure is now in the House of Commons.

In Focus

The Implications of *Encino Motorcars, LLC v. Navarro*

On June 20, 2016, the U.S. Supreme Court vacated the Ninth Circuit's decision that car dealership service advisers are eligible to receive overtime compensation. The ruling in *Encino Motorcars, LLC v. Navarro* has much broader significance than whether such service advisers fall within an exception to the Fair Labor Standards Act (FLSA) overtime requirements. Its import lies in the Court's failure to give deference to the Department of Labor's 2011 rule.

In a 6-2 decision authored by Justice Kennedy, the Court noted: "[o]ne of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." With a number of DOL regulations under challenge in the courts—and more expected to come—this language takes on added significance. It provides insight into how the Supreme Court may view regulatory challenges before it and, thus, merits close attention by employers grappling with a litany of regulatory changes impacting their workplaces.

The text of the FLSA statutory subsection at issue provides that the overtime provisions of the FLSA shall not apply to:

> "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." §213(b)(10)(A).

Congress authorized the DOL to promulgate necessary rules, regulations, or orders with respect to this provision. The question presented in the *Encino Motorcars* case was whether this exemption should be interpreted to include service advisors.

In 1970, the DOL issued a regulation that defined "salesman" to mean "an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the vehicles . . . which the establishment is primarily engaged in selling." The 1970 regulation excluded service advisors who sell repair and maintenance services but not vehicles, from the exemption. In 1974, Congress amended the statutory exemption to adopt the current text. In 1978, the DOL issued an opinion letter departing from its previous position and stating that service advisors could be exempt; in 1987, the agency affirmed this interpretation in its Field Operations Handbook. In 2008, the DOL issued a notice of proposed rulemaking proposing to revise its regulations to accord with existing practice by interpreting the exemption in §213(b)(10)(A) to cover service advisors.

However, in 2011, the DOL reversed course and issued a final rule that followed the original 1970 regulation and interpreted the term "salesman" to mean only an employee who sells vehicles. Service advisor employees of the petitioner automobile dealership filed suit in the Central District of California alleging that the dealership violated the FLSA by failing to pay them overtime. The district court granted the dealership's motion to dismiss, but the Ninth Circuit reversed in relevant part. Deferring under *Chevron U. S. A. Inc. v. Natural Resources Defense Council*, Inc., 467 U. S. 837, to the

interpretation set forth in the 2011 regulation, the Ninth Circuit held that service advisors are not covered by the FLSA §213(b)(10)(A) exemption.

In vacating and remanding the decision to the Ninth Circuit, The Supreme Court noted that the DOL "gave little explanation for its decision to abandon its decades-old practice of treating service advisors as exempt under §213(b)(10)(A)" and that the Department "was also less than precise when it issued its final rule." In analyzing what deference, if any, the courts must give to the Department's 2011interpretation, the Supreme Court reiterated that "the interpretation receives deference if the statute is ambiguous and if the agency's interpretation is reasonable." In the first step of the two-step *Chevron* analysis, a court must determine whether Congress has "directly spoken to the precise question at issue." If not, then at the second step the court must defer to the agency's interpretation if it is "reasonable."

On the second step, the Court stated that "one of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions. The agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" But where the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law. Moreover, agencies "are free to change their existing policies as long as they provide a reasoned explanation for the change."

Here, the DOL's 2011 regulation was issued without the required "reasoned explanation" for the change in its long-standing interpretation. The fact that the industry relied for decades on the Department's previous position was particularly troubling for the Court. Accordingly, "the explanation fell short of the agency's duty to explain why it deemed it necessary to overrule its previous position." The Court observed that the Department has said almost nothing when it came to explaining the "good reasons" for the new policy. According, the Court concluded that the 2011 regulation did not merit *Chevron* deference.

The *Encino Motors* case serves as a guidepost for how the Court will review challenges to other regulations. Deference to agency action will by no means be automatic and the agencies must article a "good reason" for their interpretations. Where the Department's regulation upends a long-standing interpretation upon which stakeholders have relied for years, it appears that the Court will be particularly concerned. This may bode well for legal challenges to the persuader rule, where the DOL's reinterpretation of the "advice exemption" to the Labor-Management Reporting and Disclosure Act reversed a decades-old position. One district court in Texas has already enjoined the DOL from enforcing the persuader rule. If this or other challenges to the persuader rule make their way to the High Court, many will be looking to the *Encino* decision.

However, before adjourning for the summer recess, the Supreme Court denied a request to review the challenge to DOL's home care rule, leaving in place the DC Circuit's decision to uphold the rulemaking. Nonetheless, the *Encino* case and the Supreme Court's direction that the Department must provide a "good reason" for its interpretation is indeed significant in the battle over existing and future rulemaking impacting employers and employees.

– By Ilyse Schuman and Michael J. Lotito

OUTLOOK

JULY

Comments Due on EEOC's Proposed National Origin Discrimination Enforcement Guidance
Tuesday, July 5, 2016
The U.S. Equal Employment Opportunity Commission has issued draft enforcement guidance addressing national origin discrimination under Title VII of the Civil Rights Act of 1964. The EEOC's enforcement guidance sets forth official agency policy and explains how the laws and regulations apply to specific workplace situations. The EEOC is soliciting public input on this guidance. Read more»

EEOC's Adjusted Penalty for Violation of Notice Posting Requirements Takes Effect
Tuesday, July 5, 2016
The Equal Employment Opportunity has issued a final rule adjusting for inflation the civil monetary penalty for violations of the notice-posting requirements in Title VII of the Civil Rights act of 1964, the Americans with Disabilities Act, and the Genetic Information Non-Discrimination Act. According to the rule, failure to comply with the notice-posting requirement is punishable by a fine of not more than $525 for each separate offense. Read more»

HHS Final Rule Governing Non-Discrimination in Health Plans – Effective Date
Monday, July 18, 2016
The U.S. Department of Health and Human Services (HHS) has issued a final rule implementing Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs and activities. The final rule clarifies and codifies existing nondiscrimination requirements and sets forth new standards to implement Section 1557, particularly with respect to the prohibition of discrimination on the basis of sex in health programs other than those provided by educational institutions and the prohibition of various forms of discrimination in health programs administered by the HHS and entities established under Title I of the ACA. Read more»

Meeting of the Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities
Wednesday, July 20 – Thursday, July 21, 2016
The Advisory Committee on Increasing Competitive Integrated Employment for Individuals with Disabilities will hold a two-day public meeting to study and prepare findings, conclusions and recommendations for Congress and the Secretary of Labor on (1) ways to increase employment opportunities for individuals with intellectual or developmental disabilities or other individuals with significant disabilities in competitive, integrated employment; (2) the use of the certificate program carried out under section 14(c) of the Fair Labor Standards Act of 1938 (29 U.S.C. 214(c)); and (3) ways to improve oversight of the use of such certificates. Read more»

Comments Due on Proposed Rule Governing Incentive-Based Compensation Arrangements
Friday, July 22, 2016
Various federal agencies charged with implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) are seeking comment on a joint proposed rule to implement section 956 of the Dodd-Frank Act. Section 956 generally requires that the agencies jointly issue regulations or guidelines: (1) prohibiting incentive-based payment arrangements that the agencies determine encourage inappropriate risks by certain financial institutions by providing excessive compensation or that could lead to material financial loss; and (2) requiring those financial institutions to disclose information concerning incentive-based compensation arrangements to the appropriate federal regulator. Read more»

AUGUST

Increased DOL Federal Civil Penalties Take Effect
Monday, August 1, 2016
The U.S. Department of Labor issued an interim final rule to adjust the amounts of civil penalties assessed or enforced in its regulations. Notably, the rule implements the requirement, as set forth in the two-year bipartisan budget President Obama signed on November 2, 2015, that OSHA raise its citation penalties for the first time in 25 years. The new penalty levels are effective no later than August 1, 2016. Comments on the interim final rule are due by August 15, 2016. Read more»

PBGC Interim Final Rule Governing Adjustment of Civil Penalties Takes Effect
Monday, August 1, 2016
The Pension Benefit Guaranty Corporation is amending its regulations to adjust the penalties provided for in sections 4071 and 4302 of the Employee Retirement Income Security Act of 1974. In essence, plan sponsors that fail to provide required notices and other information required by ERISA will face steeper fines. The maximum amount for noncompliance with the Section 4071 requirements will increase from $1,100 per day to $2,063 per day. The penalties assessed under Section 4302 will increase from $110 to $275 per day. Read more»

DHS and DOL Interim Final Rule Providing Penalty Catch-Up Adjustments for Violations of the H-2B Temporary Nonagricultural Worker Program Takes Effect
Monday, August 1, 2016
The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) jointly issued an interim final rule to adjust the amounts of civil monetary penalties assessed or enforced in connection with the employment of temporary nonimmigrant workers under the H-2B program. This interim final rule takes effect on August 1, 2016. The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the Inflation Adjustment Act. Read more»

Comments Due on IRS Proposed Rule Governing Certified Professional Employer Organizations
Thursday, August 4, 2016
The IRS has proposed regulations relating to certified professional employer organizations (CPEOs). The Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 requires the IRS to establish a voluntary certification program for professional employer organizations. The proposed regulations also propose to adopt, by cross-reference, the text of temporary regulations published the same day in the Federal Register, which relate to the requirements for applying for, receiving, and maintaining certification as a CPEO. These proposed regulations will affect persons who apply to be treated as CPEOs and who are certified by the IRS as meeting the applicable requirements. In certain instances, the proposed regulations will also affect the federal employment tax liabilities and other obligations of customers of the CPEO. Read more»

Comments Due on PBGC Proposed Rule Governing Mergers and Transfers Between Multiemployer Plans
Friday, August 5, 2016
The Pension Benefit Guaranty Corporation has issued a proposed rule to amends its regulations governing mergers and transfers between multiemployer plans to implement section 121 of the Multiemployer Pension Reform Act of 2014. The proposed rule would also reorganize and update the existing regulation. Read more»

Comments Due on Proposed Rule Governing Expatriate Health Plans
Tuesday, August 9, 2016
Federal agencies charged with implementing portions of the Affordable Care Act have issued proposed regulations on the rules for expatriate health plans, expatriate health plan issuers, and qualified expatriates under the Expatriate Health Coverage Clarification Act of 2014 (EHCCA). The proposed regulations also propose standards for travel insurance and supplemental health insurance coverage to be considered excepted benefits and revisions to the definition of short-term, limited duration insurance for purposes of the exclusion from the definition of individual health insurance coverage. These proposed regulations affect expatriates with health coverage under expatriate health plans and sponsors, issuers and administrators of expatriate health plans, individuals with and plan sponsors of travel insurance and supplemental health insurance coverage, and individuals with short-term, limited-duration insurance. In addition, the proposal seeks to amend a reference in the final regulations relating to prohibitions on lifetime and annual dollar limits and proposes to require that a notice be provided in connection with hospital indemnity and other fixed indemnity insurance in the group health insurance market for it to be considered excepted benefits. Read more»

Portions of OSHA Tracking of Workplace Injuries and Illnesses Rule Take Effect
Wednesday, August 10, 2016
OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulations to clarify the rights of employees and their representatives to access the injury and illness records. The portions of the final rule that (1) require employers to inform employees of their right to report work-related injuries and illnesses free from retaliation; (2) clarify the existing implicit requirement that an employer's procedure for reporting work-related injuries and illnesses must be reasonable and not deter or discourage employees from reporting; and (3) prohibit employers from retaliating against employees for reporting work-related injuries or illnesses, take effect on August 10, 2016. The remaining sections of the rule take effect on January 1, 2017. Read more»

Final OFCCP Rule Revising Sex Discrimination Guidelines Takes Effect
Monday, August 15, 2016
The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has published a final rule revising its sex discrimination guidelines for federal contractors and subcontractors. Covered contractors must comply with Executive Order 11246, which governs nondiscrimination in employment on the basis of sex, and requires contractors to take affirmative action to ensure that applicants and employees are treated without regard to their sex. The OFCCP's guidelines with respect to these requirements have not been amended since 1970. Read more»

Comments Due on DOL Interim Final Rule Providing for Federal Civil Penalties Catch-Up Adjustments
Monday, August 15, 2016
The U.S. Department of Labor issued an interim final rule to adjust the amounts of civil penalties assessed or enforced in its regulations. Notably, the rule implements the requirement, as set forth in the two-year bipartisan budget President Obama signed on November 2, 2015, that OSHA raise its citation penalties for the first time in 25 years. While the new penalty levels are effective no later than August 1, 2016, the agency is accepting comments on the interim final rule until August 15, 2016. Read more»

Comments Due on DHS and DOL Interim Final Rule Providing Penalty Catch-Up Adjustments for Violations of the H-2B Temporary Nonagricultural Worker Program

Monday, August 15, 2016

The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) jointly issued an interim final rule to adjust the amounts of civil monetary penalties assessed or enforced in connection with the employment of temporary nonimmigrant workers under the H-2B program. The increased penalty levels will apply to all penalties assessed after the effective date, August 1, 2016, for associated violations that occurred after November 2, 2015. Comments on this interim final rule are due by August 15, 2016. Read more»

DECEMBER

Final DOL White Collar Exemption Overtime Rule Takes Effect

Thursday, December 1, 2016

The DOL's final rule raises the salary and compensation levels needed for Executive, Administrative and Professional workers to be exempt from the Fair Labor Standards Act's overtime exemptions. The final rule sets the standard salary level at the 40th percentile of earnings of full-time salaried workers in the lowest-wage census region ($913 per week; $47,476 annually for a full-year worker); sets the total annual compensation requirement for highly compensated employees subject to a minimal duties test to the annual equivalent of the 90th percentile of full-time salaried workers nationally ($134,004); and establishes a mechanism for automatically updating the salary and compensation levels every three years to maintain the levels at the above percentiles and to ensure that they continue to provide useful and effective tests for exemption. The rule also amends the salary basis test to allow employers to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the new standard salary level. Read more»

JANUARY

Final OSHA Rule Governing Tracking of Workplace Injuries and Illnesses Takes Effect

Sunday, January 1, 2017

OSHA has issued a final rule to revise its Recording and Reporting Occupational Injuries and Illnesses regulation. The final rule requires employers in certain industries to electronically submit to OSHA injury and illness data. The final rule also amends OSHA's recordkeeping regulation to update requirements on how employers inform employees to report work-related injuries and illnesses to their employer, and amends existing recordkeeping regulation to clarify the rights of employees and their representatives to access the injury and illness records. The reporting requirements take effect on January 1, 2017. Read more»

EEOC Final Wellness Rule under GINA Becomes Applicable

Sunday, January 1, 2017

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 as they relate to employer-sponsored wellness programs. This rule addresses the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. Read more»

EEOC Final Wellness Rule under ADA Becomes Applicable

Sunday, January 1, 2017

The Equal Employment Opportunity Commission (EEOC) has issued a final rule amending regulations and interpretive guidance implementing Title I of the Americans with Disabilities Act (ADA) to provide guidance on the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical examinations. This rule applies to all wellness programs that include disability-related inquiries and/or medical examinations whether they are offered only to employees enrolled in an employer-sponsored group health plan, offered to all employees regardless of whether they are enrolled in such a plan, or offered as a benefit of employment by employers that do not sponsor a group health plan or group health insurance. While the rule's effective date is July 18, 2016, it becomes applicable on January 1, 2017. Read more»

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