BakerHostetler

Brief

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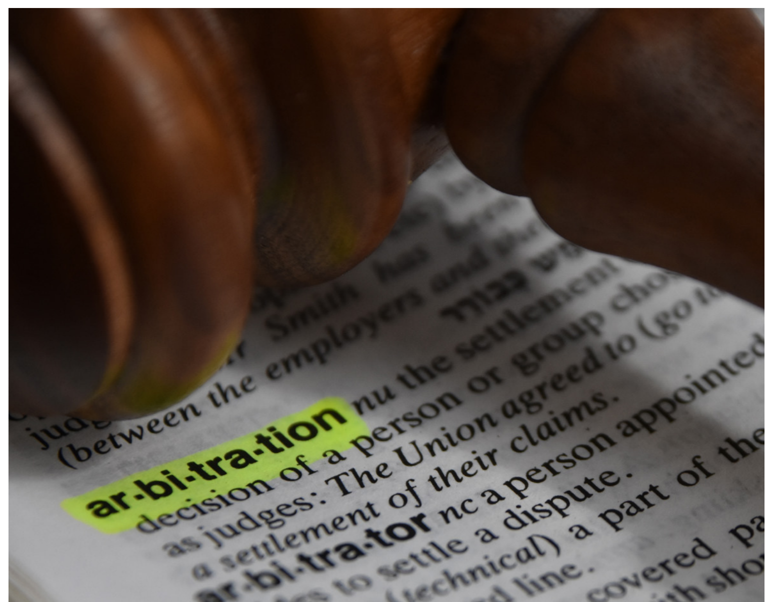

Trends

#MeToo Continues to Spur Announcements of Companies Nixing Mandatory Arbitration

In response to global protests against sexual harassment and for a more equal working environment after a *New York Times* article broke stating Google had concealed allegations of sexual misconduct of several of its executives and paid a senior vice president $90 million after such allegations against him were substantiated, Google announced that it will handle sexual harassment claims with transparency and employees will no longer be required to arbitrate sexual harassment or sexual assault claims. Google also promised a revised reporting structure, annual training, to track and report incidents of misconduct and how they are handled.

The following day, Facebook announced that it too would end mandatory arbitration for sexual harassment claims. Airbnb followed with an announcement that it would end mandatory arbitration in cases involving any kind of discrimination. eBay added its hat to the ring when it announced it too would no longer require employees to arbitrate sexual harassment claims. It is likely, with the increased attention brought by #MeToo, that companies will continue to reconsider and suspend mandatory arbitration programs for these kinds of claims.

Increased Scrutiny of "No-Poach" Restrictions

Earlier this year, Washington State Attorney General Bob Ferguson announced settlements with fast-food franchises to remove "no-poach" clauses from their franchise agreements. Some of the notable fast-food chains that have reached a settlement with Ferguson's office include Arby's, Carl's Jr., McDonald's, Jimmy John's, Cinnabon, Auntie Anne's and Buffalo Wild Wings.

On Oct. 15, 2018, Ferguson announced that his office has reached settlements with companies outside the fast-food industry to remove no-poach clauses from their franchise agreements. The companies include Valvoline, Planet Fitness and Anytime Fitness.

These companies are now legally obligated to immediately stop enforcing no-poach clauses in their franchisor-franchisee contracts and stop adding "no-poach" clauses to new franchise contracts.

This recent wave of settlements signals that Ferguson's office will continue to expand cracking down on the use of no-poach clauses into other industries to eventually reach his goal of eliminating no-poach clauses nationwide.

Religious and Medical Accommodations of Mandatory Flu Shot Requirements

It's that time of year again – flu season! This year, just as in years prior, the Centers for Disease Control and Prevention (CDC) recommends that all individuals 6 months and older receive the influenza vaccination (flu vaccine) to prevent the flu virus. The CDC also strongly recommends the flu vaccine for people at high risk of flu-related complications, including individuals aged 65 years and older, pregnant women and children younger than 2. Just last year, a record number of pediatric deaths were associated with the flu. As a result, many employers in the healthcare industry have instituted mandatory flu vaccination programs for employees. Employers with mandatory flu vaccination programs should make sure that any such program has an opt-out procedure available to employees where necessary based on an employee's medical needs or religious or spiritual beliefs.

Title VII of the Civil Rights Act of 1964 (Title VII) and applicable state and local laws require the accommodation of sincerely held religious or spiritual beliefs. Beliefs generally are considered to be religious if they address "ultimate ideas" about human existence and purpose, and they need not be "organized" religious beliefs in order to be protected. There are, however, limits

on the definition of “religion.” The Equal Employment Opportunity Commission (EEOC) guidance states that “[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not ‘religious’ beliefs protected by Title VII.” When an employer is on notice that an employee sincerely holds a religious or spiritual belief that conflicts with an employment requirement, that triggers a duty to engage in an interactive process with the employee to determine whether a reasonable accommodation can eliminate the conflict. This requires an exchange of information between the employer and employee and involves an assessment of the nature of the employer’s business, the scope of the religious limitation(s) and whether an accommodation would cause undue hardship such as significant cost or burdens on the business and other employees. For employees concerned about certain flu vaccine ingredients, there may be variations of the flu vaccine that do not contain the ingredient of concern.

Similarly, the Americans with Disabilities Act (ADA) and applicable state and local laws require the accommodation of qualified employees who have disabilities that would prevent their receipt of the flu vaccine, unless doing so would pose an undue hardship on the employer. “Disabilities” are defined as physical or mental impairments that substantially limit one or more major life activities. The definition applies to persons with a history or record of such impairments and persons who are perceived by others as having such impairments. “Qualified employees” are those who hold the necessary degrees, skills and experience for the position and who can perform the essential functions of the position, with or without an accommodation. For example, as it relates to the flu vaccine, it may not be safe for an individual with Guillain-Barre syndrome to receive the flu vaccine, whereas there is generally no duty to accommodate fear about receiving the flu vaccine. Just as with religious accommodation requests, when an employer is on notice that an employee has medical issue or disability that would prevent his or her receipt of the flu vaccine, the employer is required to engage in an interactive process with the employee to determine whether a reasonable accommodation is available that would not pose an undue hardship on the employer.

For example, the Eighth Circuit, in *Hustvet v. Allina Health System*, recently concluded that an employer did not violate the ADA and Minnesota disability laws when it fired an employee who refused to get the rubella vaccine, on the basis that the vaccine

requirement protects vulnerable patients. The former employee, an independent living skills specialist who worked with potentially vulnerable patients, had requested an exemption from her employer’s measles, mumps and rubella (MMR) vaccine requirement on the basis that she had suffered severe cases of mumps and measles (notably not rubella) and had “many allergies and chemical sensitivities.” The court rejected the former employee’s failure-to-accommodate claim, finding that she had not shown that her chemical sensitivities or allergies limited her ability to perform major life activities. The court noted that she had never been hospitalized for an allergic reaction, had not visited an allergy specialist and had not sought significant medical attention when experiencing an allergic reaction. Rather, the court stated that the former employee has “garden-variety allergies to various items that moderately impact her daily living,” which does not satisfy the disability standard under applicable law.

With the popularity of mandatory vaccination programs in the healthcare industry across the country, we are observing a spike in discrimination lawsuits based on an alleged failure to provide religious and medical accommodations with respect to flu vaccine requirements. Employers are encouraged to engage in an interactive process with employees who submit medical or religious exemption requests with respect to flu vaccine requirements and consult counsel prior to taking any adverse employment actions on the basis of an employee’s submission of an insufficient medical or religious exemption request and failure to comply with a mandatory flu vaccination program.

Trends (continued)

Trump Administration Continues to Reverse Obama Administration's Labor Policies, as Evidenced by Department of Labor Withdrawing Appeal of Persuader Rule

On November 9, 2018, the U.S. Department of Labor (DOL) withdrew its appeal of the Obama-era regulation regarding persuader activity and reporting requirements pursuant to Section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA), commonly known as the Persuader Rule. This rule, which never went into effect, was enacted in March 2016. Its stated intent was to increase employer reporting requirements regarding use of anti-union persuaders. As defined by the Rule, persuader activity was considered activity by anyone engaged to help management discourage employees from forming or joining a labor union, including lawyers hired to advise management on how to discourage union organizing activity.

The Rule was immediately challenged by the National Federation of Independent Business and other business groups, along with 10 states, on the grounds that it violated attorney-client privilege. It was stayed by a District Court in Texas on June 27, 2016, before it ever went into effect. (*National Federation of Independent Business v. Perez*, N.D. Tex. Case No. 5:16-cv-00066-C.) The DOL immediately appealed the District Court's injunction.

Following the change in administration, the Trump DOL requested a stay of the appeal while it worked to rescind the rule through the federal rulemaking process. It published its intent to rescind the rule through the Federal Register in June 2017. The rescission was effective later that summer; however, the appeal remained pending. Now, with the appeal officially withdrawn, a voluntary dismissal has been entered as of November 9, 2018, and employers can rest easy that the Persuader Rule will not go into effect.

In-Depth Analysis of Recent Developments

Department of Labor Eliminates 80/20 Rule for Tipped Workers

On Nov. 8, 2018, the Wage and Hour Division of the Department of Labor (DOL) reissued Opinion Letter FLSA2009-23, effectively eliminating the DOL's long-standing 80/20 rule, which restricted an employer's ability to take a tip credit for tipped employees who also perform non-tip-generating duties when time spent on such duties exceeds 20 percent of their total daily work time. The opinion letter had previously been issued near the end of the George W. Bush administration but was promptly withdrawn by the incoming Obama administration.

Many employers have found the 80/20 rule difficult to comply with because it requires employers, particularly in the hospitality industry, to meticulously keep track of the daily tip-generating" and non-tip-generating tasks performed by tipped employees. The complexity of the rule triggered a surge of class actions from employees claiming they performed too many non-tipped duties for their employer to properly take a tip credit.

With the reissuance of FLSA2009-23, the DOL has alleviated the burden on employers to track the time spent by tipped employees on tip-generating and non-tip-generating tasks.

Unfortunately, hospitality employers in New York are still bound by the New York Hospitality Wage Order (NY wage order), which sets a stricter standard than DOL's 80/20 rule. Under the NY wage order, an employer may not take a tip credit for any day if an employee spends at least two hours or 20 percent of the shift (whichever is less) working in a non-tipped occupation.

Origins of the 80/20 Rule

The Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees the hourly minimum wage (currently, $7.25) but treats "tipped employees" differently. Tipped employees are those who customarily and regularly receive at least $30 a month in tips. The FLSA permits employers to pay tipped employees a direct wage of $2.13 an hour and take a "credit" for the tips received by the employee to satisfy the remaining portion of the minimum wage. If the combined direct wage and total tips received by an employee are less than the minimum wage for all hours worked in a given workweek, the employer must make up the difference.

In the 1988 version of the DOL's *Internal Field Operations Handbook*, the DOL limited employers' use of a tip credit by stating that if a tipped employee spends a substantial amount of time (in excess of 20 percent) performing non-tip-generating duties, an employer cannot take a tip credit for time spent on such duties.

Since 2011, the DOL had taken the enforcement position that if a tipped employee spends more than 20 percent of his or her time on non-tip-generating tasks (even if those tasks were directly related to tip-producing duties), the employee's time spent on those non-tip-generating tasks must be paid at minimum wage rather than at the subminimum "tip credit" rate.

As a result, plaintiffs' attorneys have used the DOL's enforcement position as the basis for lawsuits – often collective actions – alleging that the tipped employees in question engage in non-tipped work for more than 20 percent of their work time and therefore are entitled to the full minimum wage for time spent performing these duties.

With the issuance of FLSA2009-23, the DOL has now abandoned the 80/20 rule in favor of a more practical approach for employers.

The Elimination of the 80/20 Rule

The DOL's opinion acknowledges that the 80/20 rule has created confusion and been applied inconsistently over the years. In the opinion letter, the DOL stated, "We do not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the act are met." As a result, whether or not an employer can take a tip credit for time spent by an employee on a non-tip-generating task is no longer determined by the *amount* of time spent by the employee on that task.

Instead, the opinion letter explains that the DOL seeks to provide employers with guidance to determine which duties are related and unrelated to a tip-producing occupation so that they can take necessary steps to comply with the FLSA. Specifically, the DOL states that duties listed as "core or supplemental for the appropriate tip-producing occupation" in the Occupational Information Network (O*NET) Tasks section are those "directly related to the tip-producing duties of that occupation." The DOL explains that no limitation may be placed on the number of these duties that may be performed, whether or not they involve direct customer service, as long as they are *performed contemporaneously with tip-generating duties or for a reasonable time immediately before or after* the employee performs tip-generating duties.

For example, in the report for food servers, O*NET includes the following tasks on the list of relevant job duties:

- Cleaning and setting up tables.
- Rolling silverware.
- Sweeping and mopping floors.
- Filling salt, pepper, sugar and condiment containers.

As explained in the opinion letter, employers can take a tip credit for servers who perform such tasks, even if they spend more than 20 percent of their time doing so, as long as these tasks are performed either contemporaneously with tip-generating duties or for a reasonable time immediately before or after.

The DOL opinion letter also explains that "employers may not take a tip credit for time spent performing any tasks not contained in the O*NET task list." However, the DOL noted that some tasks "not listed in O*NET may be subject to the *de minimis* rule."

This new standard should make it easier for employers to comply with the FLSA and properly apply the tip credit. Employers should, however, thoroughly understand the duties listed on the O*NET list to ensure they are using a tip credit for the appropriate types of tasks.

Key Takeaways

Although employers no longer need to vigilantly track the amount of time tipped employees spend on non-tip-generating tasks, they should become very familiar with O*NET's Tasks section to ensure the tip credit is being taken against the appropriate types of job duties. More important, employers should continue to monitor state laws, which tend to be stricter than the federal standards. Hospitality employers in New York are still required to follow the 80/20 rule contained in the NY wage order.

SEC Office of the Whistleblower Reports Record-Breaking Year

The Securities and Exchange Commission (SEC) Office of the Whistleblower issued its annual report for fiscal year 2018, reporting that it paid more in whistleblower awards this year – more than $168 million – than it had in all prior years combined. These awards included the two largest awards made by the program to date: almost $54 million to two individuals and a total of $83 million shared by three individuals. The volume of whistleblower tips received by the office was similarly unprecedented; the commission reported that it received more whistleblower tips in FY2018 than it had in any prior year since the inception of the program.

The commission noted that the volume of whistleblower tips increased in the months following the Supreme Court's decision in *Digital Realty*. There the Supreme Court ruled that to qualify for the enhanced whistleblower protections against retaliation provided under the Dodd-Frank Act, an employee must report potential securities law violations to the SEC. Prior to *Digital Realty*, several circuit courts (including New York's Second Circuit) had found eligibility for employees who reported suspected violations internally within their companies. As the SEC noted in its report, the observed uptick in reports to the SEC may be attributable, at least in part, to this ruling.

The annual report also referenced the proposed amendments to the whistleblower rules, which were published in the *Federal Register* on July 20, 2018, and open for public comment through Sept. 18, 2018. Among other things, the proposed rules would conform the definition of "whistleblower" in Rule 21F-2 to the holding in *Digital Realty*, establishing a uniform definition of "whistleblower" for purposes of the statute. The proposed rules would also provide the commission with additional discretion in determining the amount of an award, including the ability to decrease the amount of the award in cases where sanctions may reach $100 million or more, if it determines the payout would otherwise exceed the amount reasonably necessary to reward the whistleblower and incentivize other whistleblowers. The latter proposal has drawn objections from the National Whistleblower Center and others, who oppose what they characterize as a "cap" on whistleblower awards.

Regardless of whether we see any cabining at the upper limits of awards, the rapid growth of the whistleblower program seems poised to continue. The increasing size and number of whistleblower awards will continue to attract publicity, while the enhanced anti-retaliation protections of reporting to the commission provide additional incentive for potential whistleblowers.

Takeaways: Employers should continue to prioritize their compliance and internal reporting programs and ensure that they have processes and systems in place to address whistleblower issues and minimize retaliation complaints.

How to Avoid a Holiday Party Faux Pas (and the #MeToo Effect)

This is the second holiday season with a #MeToo presence, but arguably, the movement has far more power and momentum during this holiday season than it did last year, when the movement had just begun and was more focused on sexual assault. According to a recent survey, only 65 percent of companies are holding holiday parties this year, which is the lowest percentage since 2009, when the drop likely was attributable to the economic crash. Experts report that this year's decrease in holiday parties is not attributed to economic reasons, as many companies are reporting healthy financials. Instead, this one presumably is a direct result of #MeToo.

#MeToo, however, does not have to (and should not) prevent employers from celebrating the holiday season. Employers need to be vigilant against #MeToo scaring them into isolating employees from each other and discouraging interaction between males and females, and a holiday party is a perfect opportunity for employees to mingle, bond and get exposure to individuals they typically do not otherwise spend time with. Instead of canceling a party, employers need to be clear about expectations around behavior – both interpersonally and, oftentimes more importantly, related to alcohol. Frequently, when events take place off-site and involve alcohol, employees forget they are employees and at a work event. Employers should take this time of year to remind employees that alcohol should be enjoyed in moderation, and that, even when off site, employer sponsored parties are subject to employer codes of conduct, including their anti-harassment policies, and behavior contrary to such policies will not be tolerated.

Employers may also consider making other changes to holiday parties, such as including spouses, holding the party on-site, holding a luncheon, limiting alcohol only to beer and wine or shortening the length of the party. Another tactic employers may want to employ is incorporating more activities that give employees the opportunity to do something other than drink, such as photo booths, games and auctions. Above all and as always, it is imperative that management set an example of proper behavior.

Update on #MeToo – Social Pressures on U.S Businesses in Response to #MeToo

Earlier this year, we saw the #MeToo movement spur action by Congress and state governments to enact legislation enhancing protection for victims of sexual harassment.

For example, in December 2017, Congress introduced legislation, known as the Ending Forced Arbitration of Sexual Harassment Act, proposing to prohibit employers from using arbitration as a means to resolve sexual harassment disputes. Since its introduction, the legislation has gained the support of every attorney general in the U.S.

Congress has continued its efforts to curtail the use of arbitration for sexual harassment claims. In October, Jerrold Nadler (R-N.Y.) and Bobby Scott (D-Va.) introduced in the House the Restoring Justice for Workers Act. The proposed legislation has the backing of 58 Democratic co-sponsors and looks a lot different than some earlier bills.

The groundbreaking aspect of the Restoring Justice for Workers Act is that it would prohibit companies from requiring employees to sign arbitration agreements for *any* type of dispute, not just sexual harassment claims. Specifically, as proposed, the new law would prohibit *any* predispute agreement requiring arbitration of employment disputes and would also prohibit post-dispute agreements to arbitrate unless the agreement is obtained without coercion or condition of employment-related benefit or privilege.

The new bill also forbids retaliation against employees who refuse to arbitrate employment claims and would amend the National Labor Relations Act (NLRA) to ban agreements that restrict an employee's right to bring class or collective actions involving employment claims. This would effectively reverse *Epic Systems*.

2019 Essential Handbook Updates

The past year has been filled with many changes in employment laws, particularly on state and local levels, and many of these changes require (or prohibit) specific language in employment policies.

Federal Changes

Although federal legislative developments were slow in 2018, some important federal changes that require that employers update their handbooks.

Earlier this year, National Labor Relations Board (NLRB) General Counsel issued a memorandum about the NLRB's new approach to cases charging that employee work rules or employment policies unlawfully interfere with employees' rights under the National Labor Relations Act (NLRA). While the NLRB's memo generally provides employers with a bit more flexibility in their employment policies, employers (or their legal counsel) should be aware of the three categories the NLRB created to classify employment policies: (1) rules that are generally lawful to maintain, (2) rules warranting individualized scrutiny and (3) rules that are unlawful to maintain.

In addition, in August 2017, the EEOC filed a lawsuit against a leading cosmetics company in the U.S. District Court for the Eastern District of Pennsylvania, alleging that the company's parental leave policies provided fewer parental leave benefits to male employees as compared to female employees in violation of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.

The case arose after the company offered only two weeks of child-bonding leave to a new father after rejecting his request for the six weeks of child-bonding leave it offered to new mothers. The lawsuit sought relief for not only the single affected male employee but also for other male employees who were denied equal parental leave benefits because of their sex. The EEOC sought back pay, compensatory damages, punitive damages and injunctive relief. In July 2018, the EEOC and the company settled the lawsuit for a $1.1 million payment to a class of more than 200 male employees and entered into a consent decree that required the company to stop treating fathers in a discriminatory manner.

This case is a mandate for employers that provide paid parental leave to female employees for child-bonding (as compared to leave provided as a result of pregnancy-related physical or medical conditions) to also provide the exact same child-bonding leave to male employees. It also dictates that employers that distinguish between primary and secondary caregiver leave in their parental leave policies in an attempt to promote gender neutrality need to stop doing so if the distinction results in differential treatment of male and female employees with respect to child-bonding leave. Employers nationwide should ensure that their parental leave policies are in line with the EEOC's guidance on this topic.

State and Local Changes

State and local lawmakers surely picked up the slack with respect to employment law developments in 2018. Many new state and local laws enacted in 2018 have already taken effect; many others take effect in 2019. These developments cover a variety of topics, including legally protected time off (i.e., paid family leave and sick leave) and other accommodations, sexual harassment prohibitions in light of the #MeToo movement, transgender discrimination protections, pay equity, and medicinal and recreational marijuana use.

Just a few examples of state/local changes follow.

- New York Paid Family Leave Law requirements: This law went into effect on Jan. 1, 2018, and requires private employers to give eligible employees leave and partial payment to bond with a new child, care for a close relative who is seriously ill, or help relieve pressure when certain family members are called to active military service. Effective Jan. 1, 2019, the leave amount increases from eight to 10 weeks, and the required pay during leave increases from 50 to 55 percent of the employee's average weekly wage (or the state average weekly wage, whichever is less). New York employers should ensure that any related changes are made in their policy handbooks.
- Westchester County Local Law 10623: Effective April 10, 2019, employers in Westchester, New York, will be required to allow eligible employees to earn one hour of paid sick time for every 30 hours worked, up to 40 hours per year. Other jurisdictions nationwide have similar sick leave laws that are scheduled to go into effect at some point during 2019 (e.g., San Antonio, Texas, and Michigan). Many other sick leave laws went into effect or were amended in 2018 (e.g., New York City's Earned Safe and Sick Time Act and New Jersey's Paid Sick Leave Act). Employers should ensure that all such sick leave laws are properly addressed in their policy handbooks and that the minimum policy requirements are being met.
- As of Oct. 15, 2018, New York City employers with four or more employees are now required to engage in a "cooperative dialogue" with a person who may be entitled to a workplace accommodation based on legally protected reasons, such as religion, disability, pregnancy, childbirth or related medical conditions, or for the needs of a victim of domestic violence, sex offenses or stalking. The cooperative dialogue resembles the "interactive process" that

most employers are familiar with under the Americans with Disabilities Act, but as noted above, the New York City law applies to more than disability-related accommodations and, importantly, requires employers to document the cooperative dialogue process. Employers should update their reasonable accommodation policies in accordance with any such applicable state or local laws.

- New York's Sexual Harassment Law: Effective Oct. 9, 2018, employers are required to issue policies that comply with the new state legal requirements. The policy should include (among other things): a comprehensive definition of "sexual harassment"; examples of sexual harassment; information regarding reporting sexual harassment both internally and to the New York State Division of Human Rights, the Equal Employment Opportunity Commission and local agencies; available remedies; a complaint form for employees to report sexual harassment; and an anti-retaliation provision. These requirements should certainly be included in any 2019 handbook updates that apply to New York employees. This will likely be a big area for change in other jurisdictions in light of the ongoing #MeToo movement.

- Massachusetts Statute 2016, c. 177, which took effect July 1, 2018, includes several components to boost fairness in hiring and compensation. Among other things, it prohibits employers from preventing workers from disclosing or discussing salary information about their earnings or those of their colleagues. Although we have been advising our clients for years not to prohibit workers from disclosing or discussing salary information about their earnings or those of their colleagues, in certain states such as Massachusetts, the law now expressly addresses this topic. Employers should ensure that they do not have written policies prohibiting such discussion among employees.

- Legalization of medicinal and/or recreational marijuana use: With medicinal and/or recreational marijuana use now legal in more than half of the states in the U.S., other states, including Michigan, Missouri and Utah, are following suit in the coming weeks and in 2019. Although federal and state laws conflict concerning marijuana usage, employers in states where marijuana use is permitted should review and update their drug and alcohol policies. Employers may still be able to prohibit the use of marijuana within the workplace, but they should generally distinguish between the use of marijuana for medical purposes and recreational purposes, outline the disciplinary process to be followed if an employee possesses or uses recreational marijuana while at work, and explain how and to what extent they will accommodate an employee who is medically permitted to use marijuana – the requirements of which all vary by state.

More of the same is likely coming down the pike as 2019 unfolds – more state family leave law requirements, more state/local sick leave laws, more accommodations laws, and certainly more policies arising out of the #MeToo movement (i.e., state/local sexual harassment and pay equity protections). We also anticipate continued marijuana legalization for both recreational and medicinal use. In addition, we foresee the need for more remote work policies to account for the growing number of remote workers. All of these will continue to impact policies and procedures as 2019 unfolds. Employers should ensure legal compliance with all of their written employment policies.

Pregnancy Bias Suits On the Rise

Employers are likely well aware that pregnancy discrimination is prohibited by federal law (and, in most places, including New York, state and local law). And yet, pregnancy bias suits continue to be an issue for employers. In fact, a recent analysis shows that such filings show a rising trend, and have increased by almost double since 2015. The data further shows that retail employers were the hardest hit this year with 14 of the 54 cases filed being filed against retail employers. Just this last month alone, four more were filed against retail employers. The cases filed recently focus on an employer's failure to provide accommodations to pregnant employees. This focus was further highlighted by a multi-million dollar settlement finalized this month against one women's retailer for claims of systemic discrimination against pregnant employees and failing to accommodate such employees. The settlement also included change to policies, mandatory training and periodic reporting to the EEOC.

The Pregnancy Discrimination Act, at the federal level, requires that a pregnant employee be treated like any other employee who is temporarily disabled. Having a robust policy is important, but it's toothless if staff is not properly trained on how to implement the policy. Managers must be trained to consider accommodations for pregnant employees. This is especially true for employees (like those in retail or hospitality) who do more manual labor (e.g., lifting boxes, working on their feet, pulling or pushing heavy objects, etc.). Accommodations to consider are things like an alternative assignment, light duty, more frequent breaks, lifting restrictions, a stool or chair rather than requiring constant standing, or even a disability leave. Notably, under New York law, pregnancy-related conditions are to be treated as disabilities, but there is no requirement that a pregnancy-related condition meet a definition of a "disability" in order for an employer to be required to accommodate. For instance, if an employee has a more frequent need to use the restroom while pregnant, she is not required to show that she has a disability that so causes more frequent use of the restroom in order for the employer to be required to provide more frequent breaks.

Just because a normal non-pregnant employee would not be granted these privileges, does not mean that they are not proper accommodations for someone who is pregnant, and like all accommodations, the employer and employee should engage in the interactive process in order to determine the best accommodation for each employee.

Employers should use these recent cases as reminders for them to reevaluate their policies, training, and practice and ensure that pregnant employees are being properly accommodated.

Case Updates

SCOTUS Postpones its Decision on LGBT Employee Rights

Although the Supreme Court was set on November 30 and December 7 to determine whether to hear three different cases related to whether Title VII's prohibition of discrimination on the basis of sex protects LGBT employees, the Court announced prior to its December 7 conference that that decision would be rescheduled, but did. It immediately set a date. The Court just set January 4, 2019 as the date to consider whether to hear these cases. Although New York state and local law already protection LGBT employees from discrimination, the determination that federal law protects against this discrimination would further underscore those laws and provide another avenue for employees to seek remedies against this kind of discrimination.

A Reminder: Addiction Can Be a Disability

A recent case in Michigan federal court is heading to a jury trial after an employer lost a summary judgment motion aimed at dismissing a former employee's Family and Medical Leave Act (FMLA) retaliation and interference claims and disability discrimination claims under federal and state laws. The case also serves as a reminder to employers that, in some cases, an employee's drug addiction can constitute a disability under discrimination laws.

In *Rumph v. Randazzo Mech. Heating & Cooling, Inc.*, an account manager at an HVAC installation and repair company with a history of drug addiction was terminated just days after she had returned to work from FMLA leave. Prior to her termination, she was assigned to a new supervisor due to a company restructuring. She alleges that a supervisor was copied on an email exchange with the company's benefits coordinator about getting the employee's Suboxone (an opioid addiction treatment drug) prescription filled and that the supervisor stated that she could not "fathom what type of prescription would cost that much." The plaintiff claims she disclosed to her manager that she had a previous opioid addiction, depression, anxiety and ADHD and that she needed to see her doctor monthly. The plaintiff further alleges that, as a result, the company's CFO learned of her previous addiction and changed his attitude toward her. Soon afterward, she took FMLA leave to care for her dying mother. After she returned to work, she missed two days of work and was told that her job was being eliminated.

She sued, claiming that she was fired based on her history of opioid abuse and that her employer was also aware of her depression, anxiety and ADHD at the time of her termination. In addition to bringing claims of disability discrimination under the Americans with Disabilities Act (ADA) and state law, she alleged FMLA interference and retaliation.

The employer moved for summary judgment on the employee's claims, but the court denied it. On her disability discrimination claims, the court found that the employee had established that her medical ailments were disabilities, that she was qualified for the job and that her employer was aware of her disabilities. On the FMLA interference claim, the court held there was a genuine dispute as to whether the employee was reinstated to her prior position, because she was terminated just days after she returned to work. According to the court, a jury could reject the employer's explanation that it fired the employee because she missed two days of work soon after returning from FMLA leave, and the company's nondiscriminatory reasons for her termination could be seen as pretext. On the FMLA retaliation claim, the court found that the employee's termination was an adverse action and that the temporal proximity of her termination just days after returning from FMLA leave evidenced a causal connection to her FMLA leave. As a result of this decision, the case is headed to a jury trial in February 2019.

Like the plaintiff in this case, former drug addicts may be protected under the ADA because the addiction may be considered a substantially limiting impairment. However, the ADA does not protect former casual drug users or employees who are "currently engaging" in the illegal use of drugs, whether casually or based on an addiction, if the employer acts on the basis of the illegal drug use.

As more states are passing laws legalizing marijuana use (which in some cases include anti-discrimination provisions) and as a result of the growing opioid crisis, more employers are having to address employment issues involving employee drug use. Employers should develop and update workplace policies and procedures to prepare for such situations, and human resources and management personnel should receive best-practices training for handling these types of situations.

Reminders

Wage and Hour Issues Employers Should Consider When the Snow Falls

Winter is upon us in the tri-state area, we've already been hit with quite a snowstorm and we're undoubtedly due for more as we head further into our coldest season. Although many employers have policies addressing inclement weather, some do not, and there are a few weather-related wage and hour issues that often get overlooked. Before having to shovel yourself out of a pile of something other than snow, familiarize yourself with some of your key obligations to employees during severe snowfall.

Many states, including New York and some surrounding states, have "reporting pay" obligations. In New York, for example, if a non-hospitality industry employer requests or permits a nonexempt employee to report for work on any given day, the employer must pay the employee for a minimum of four hours of work or for the employee's entire shift, whichever is less, at no less than the standard minimum wage. The employer must pay reporting pay regardless of whether the employee performs any work.

In New York, hospitality industry employers are also required to pay nonexempt employees reporting pay for at least three hours for one shift or the number of hours scheduled in a regular shift, whichever is less; for at least six hours for two shifts that total six hours or less, or the number of hours scheduled in a regular shift, whichever is less; and for at least six hours for three shifts totaling eight hours or less, or the number of hours scheduled in a regular shift, whichever is less. It is, therefore, imperative to know what your state's and industry's reporting pay requirements are and ensure that they are followed in the event that your employees are sent home early due to a snowstorm.

In addition, for those nonexempt employees who may be called in or placed on call to help with weather-related emergencies (e.g., maintenance employees or replacement staff to cover for other employees who cannot make it into work), it is equally important to be aware of the applicable federal and state laws that address working time, such as on-call time and the difference between "waiting to be engaged" and "engaged to be waiting." Generally, if an employee has to wait at a particular place or it is fairly certain that the employee will be called in, that employee must typically be paid to be waiting. If, however, that employee may use his or her time productively for his or her own reasons he or she is typically not deemed to be on working time and need not be paid.

Also, certain retail and fast food employers now need to keep New York City's Fair Workweek Law in mind when changing nonexempt workers' schedules at the last minute due to snow. Absent some very specific exemptions under the law, since late November 2017, certain retail and fast food employers have been required to provide employees with schedule change premiums for schedule changes with less than 14 days' notice. In fact, the DCA has found violations of the law when employers have chosen to send employees home early during some pretty terrible snowstorms without paying the required schedule day premiums – even when the employers thought they fell within one of the law's exemptions during a blizzard that led to the Governor's declaration of a state of emergency, an issuance of a travel advisory, MTA New York City Transit's Department of Subways operation under its cold weather plan, and winter storm conditions that were deemed dangerous. It is crucial, therefore, to pay any applicable schedule change premiums, unless you or your counsel is certain that one of the Fair Workweek Law's nuanced exemptions apply to the particular situation at hand.

An employer's obligations during snowstorms aren't limited to nonexempt employees. As for exempt employees, even if the business closes due to weather conditions, federal law prohibits employers from reducing an exempt employee's pay when he or she is ready, willing and able to work but no work is available. Because of this, the U.S. Department of Labor has taken the position that employers that close because of weather conditions must nevertheless pay exempt employees their regular salaries for any shutdown that lasts less than one full week.

Notably, however, the law does not prohibit an employer from requiring employees (including exempt employees) to work from home (where their job duties permit remote work) or to use accrued vacation time or other paid time off to cover any missed work due to a snowstorm. This should be addressed in a written policy. Even if addressed in your policies, however, certain exempt employees will not be able to work from home or that they will not have any vacation or paid time off remaining when a snowstorm hits. In that case, an exempt employee (unlike a nonexempt employee) must still must be paid his or her regular salary when the company is closed because of weather for less than a week.

Consider these wage and hour obligations when the next snowfall hits. They can save your snow day.

2019 Wage and Hour Law Update for Hospitality Industry Employers in New York

Effective Dec. 31, 2018, important changes are coming to New York's wage and hour laws covering private employers in the hotel and restaurant industries. These changes may require employers to, among other things, change their pay rates and update their employment posters and other documentation.

Increased Minimum Wage for Nonexempt Employees

Nonexempt employees are those who are not exempt from the minimum wage and overtime requirements of federal and state wage and hour laws, and they make up the majority of the hospitality industry's workforce.

On Dec. 31, 2018, New York's minimum wage for nonexempt non-tipped employees in the hospitality industry increases as shown in the first table to the right.

For fast-food employees, New York's minimum wage increases as shown in the second table to the right.

Location	Regular Minimum Wage
NYC – Large Business (>10 employees)	$15.00
NYC – Small Business (<10 employees)	$13.50
Nassau, Suffolk and Westchester Counties	$12.00
Greater New York State	$11.10

Location	Regular Minimum Wage
NYC	$15.00
Outside NYC	$12.75

Increased Tip Credit

A tipped employee is an employee who regularly receives more than $30 per month in tips. Effective Dec. 31, like any other nonexempt employee, a tipped employee must earn the minimum wage listed in the first table. However, unlike other nonexempt employees, tips paid by customers can be counted toward the minimum wage as a "tip credit." The tip credit is subtracted from the minimum wage, resulting in a lower hourly wage for tipped employees (cash wage). The cash wage is the minimum amount that employers are permitted to pay tipped employees.

And effective Dec. 31, the tip credits that employers may take against the wages of tipped employees are being increased. However, the amount of tip credit permitted in New York's hospitality industry depends on the employee's position. For food service workers (employees primarily engaged in serving food or beverages who regularly receive tips, such as wait staff, bartenders, captains, bussers), see the third table to the right.

For service employees (non-food service workers, such as coat check attendants, bathroom attendants), the maximum tip credit increases as as shown in the last table to the right.

No tip credit is permitted for fast-food employees.

Location	Cash Wage	Tip Credit
NYC – Large Business (>10 employees)	$10.00	$5.00
NYC – Small Business (<10 employees)	$9.00	$4.50
Nassau, Suffolk and Westchester Counties	$8.00	$4.00
Greater New York State	$7.50	$3.60

Location	Cash Wage	Tip Credit
NYC – Large Business (>10 employees)	$12.50	$2.50
NYC – Small Business (<10 employees)	$11.25	$2.25
Nassau, Suffolk and Westchester Counties	$10.00	$2.00
Greater New York State	$9.25	$1.85

Increased Overtime Rates for Tipped Employees

Employers must pay overtime to all nonexempt employees (including tipped employees) for all hours worked in excess 40 in a workweek. A tipped employee's overtime rate is calculated by multiplying the employee's regular rate of pay by 1.5 and then subtracting the tip credit. So, naturally, New York's increased minimum wage and tip credit also increase the overtime rate for tipped employees.

Increased Spread of Hours Pay

New York's increased minimum wage also increases the spread of hours pay rate to the relevant minimum wage. The spread of hours is the length of time between the beginning and end of an employee's workday. This includes the time worked, time off for meals and intervals off duty. For example, if an employee works from 1 to 4 p.m. and 6 p.m. to midnight, he or she only worked nine hours, but there is an 11-hour spread.

On each day when an employee's spread of hours exceeds 10, the employer must pay the employee one additional hour of pay at the applicable minimum wage rate, regardless of the employee's regular rate of pay. So, again, because the minimum wage rate increases as of Dec. 31, 2018, so does the spread of hours pay.

Increased Uniform Maintenance Pay

In the hospitality industry, employers must purchase or reimburse employees for required uniforms. Employers are also responsible for the costs associated with maintaining required uniforms. If an employer does not maintain employee uniforms, it must (unless it falls within the specific exemptions defined by applicable law) provide uniform-maintenance pay in addition to regular wages to cover employee costs associated with cleaning their required uniforms.

Effective Dec. 31, 2018, the *weekly* uniform maintenance pay is based on the number of hours worked, where employees who work over 30 hours per week are paid at the High rate, employees who work more than 20 hours but fewer than 30 hours are paid the medium rate, and employees who work 20 hours or less are paid the low rate for work performed as shown below.

Location	High	Medium	Low
NYC – Large Business (>10 employees)	$18.65	$14.75	$8.90
NYC – Small Business (<10 employees)	$16.80	$13.30	$8.05
Nassau, Suffolk and Westchester Counties	$14.95	$11.80	$7.15
Greater New York State	$13.80	$10.90	$6.60

Meal and Lodging Credit

Meals and/or lodging provided by a hospitality industry employer to an employee may be considered part of the wages paid to the employee, subject to applicable meal and lodging credit limitations. When an employer takes a meal and/or lodging credit against the wages of an employee, the employer may not charge the employee any additional money for the meal(s) and/or lodging.

Effective Dec. 31, restaurants and all-year hotels may credit the following amounts *per meal* against the wages of food service workers, service employees and other non-service workers.

Location	Food Service	Service	Other
NYC – Large Business (>10 employees)	$3.60	$4.15	$5.15
NYC – Small Business (<10 employees)	$3.35	$3.75	$4.65
Nassau, Suffolk and Westchester Counties	$3.05	$3.35	$4.15
Greater New York State	$2.90	$3.10	$3.80

Effective Dec. 31, restaurants may also credit the following against employee wages for lodging for food service workers, service employees and other non-service workers.

Location	Food Service	Service	Other
NYC – Large Business (>10 employees)	$2.15/day $13.85/week	$2.90/day $18.85/week	$3.65/day $23.35/week
NYC – Small Business (<10 employees)	$2.00/day $12.80/week	$2.65/day $16.95	$3.30/day $21.00/week
Nassau, Suffolk and Westchester Counties	$1.85/day $11.75/week	$2.35/day $15.05/week	$2.95/day $18.65/week
Greater New York State	$1.75/day $11.10/week	$2.15/day $13.95/week	$2.70/day $17.25/week

Effective Dec. 31, all-year hotels may credit the following against employee wages *per hour* for lodging:

Location	Food Service	Service	Other
NYC – Large Business (>10 employees)	$0.50	$0.60	$0.75
NYC – Small Business (<10 employees)	$0.45	$0.55	$0.70
Nassau, Suffolk and Westchester Counties	$0.45	$0.45	$0.60
Greater New York State	$0.40	$0.45	$0.55

Meal and lodging credits in resort hotels also increase as of Dec. 31.

Increased Minimum Salary for Exempt Employees

Exempt employees are exempt from the overtime requirements of federal and state wage and hour laws; therefore, such employees are not entitled to overtime pay. Exempt employees are classified as such if their job duties and responsibilities fit within the exemptions set forth under applicable laws and they are paid on a salaried basis. In the hospitality industry, high-level management positions are the most common exempt positions, although not all managers are exempt, and some nonmanagement positions can be exempt, depending on the employee's duties.

On Dec. 31, 2018, the minimum salary for an employee to qualify for the executive or administrative exemptions to overtime increase *per week* as shown in the table at right, inclusive of board, lodging, or other allowance and facilities.

Location	Minimum Weekly Salary for Exemption
NYC – Large Business (>10 employees)	$1,125.00
NYC – Small Business (<10 employees)	$1,012.50
Nassau, Suffolk and Westchester Counties	$900.00
Greater New York State	$832.00

Keep a Lookout

The NLRB Is Dragging Its Feet on Reforming the Election Rule

Despite indications earlier this year that changes to the NLRB election rules would be coming quickly, and despite pressure from business groups to make such changes, the NLRB's efforts to make changes to those election rules appear to have stalled.

The NLRB's fall 2018 regulatory agenda, released Oct. 17, 2018, mentions plans to update its rules on union elections, which has been hotly anticipated by the business community. However, those plans are mentioned only in the NLRB's "long-term" agenda, much to the dismay of the business community.

By way of background, the NLRB issued a request for information on the union election issue in December 2017, asking whether the Board should scrap an Obama-era rule that allows workers to get to an election in a shorter period of time after filing a petition. Specifically, the Board invited comments on the following three questions:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule Be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations. If the Board should make changes to the prior Representation Election Regulations, what should be changed?

The business community anticipated that changes to the rule would be forthcoming slightly after the submission period for comments ended in February 2018, but the comment period was extended more than once, and as of the date of this article, the Board has taken no steps to enact changes.

During one of the extended periods for comment, Board General Counsel Peter Robb submitted comments to the NLRB in April 2018 on the election rule. He has suggested a 12-day waiting period (rather than the current eight-day period) between petitions and elections, and he also suggested that regional directors be able to delay election hearings by up to six days (rather than the current three days).

In addition to the General Counsel, numerous business groups, labor groups, and Democrats and Republicans from the Senate and the House have provided comments to the Board on how best to reform the election rule.

That the issue was included only on the long-term agenda indicates that it has been deprioritized, perhaps to allow the NLRB to focus on addressing the joint-employer issue instead. Given the agency's small size and the time required for issuing a new rule, the Board is unlikely to move on reforming election procedures until mid-2019.

Bloomberg reported recently that former NLRB chair Wilma Liebman agreed that including the union elections rule in the long-term category could mean agency leaders have "determined it isn't a priority." Notably, the request for comments was issued before President Trump appointed NLRB Chair John Ring, who has not signaled much interest in making changes to the election rules.

Although the current election procedures (c. 2015) have not had a significant impact on the rates of successful union organizing attempts, they remain controversial because they arguably do away with much of the due process involved in litigating election-related issues and lead to elections so quickly that employers barely have a chance to communicate with their employees about the election. In any case, it does not appear that changes will be coming anytime soon.

Key Contacts

Amy Traub – Editor
atraub@bakerlaw.com
T +1.212.589.4248

Amanda Van Hoose Garofalo
agarofalo@bakerlaw.com
T +1.212.589.4610

Fanny A. Ferdman
fferdman@bakerlaw.com
T +1.212.589.4283

Saima Z. Sheikh
ssheikh@bakerlaw.com
T +1.212.589.4243

Shawn N. Butte
sbutte@bakerlaw.com
T +1.212.589.4676

Paul Rosenberg
T +1.212.589.4299
prosenberg@bakerlaw.com

Tracy Cole
T +1.212.589.4228
tcole@bakerlaw.com

Charles M. Guzak – Contributor
T +1.202.861.1514
cguzak@bakerlaw.com

bakerlaw.com

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