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INSIGHTS AND DIRECTION FOR EMPLOYERS

THE OGLETREE DEAKINS COMPASS TURNS 1

Hera S. Arsen, Ph.D., *Editor in Chief*

The autumn leaves are turning, football season is gathering momentum, Congress is reconvening, and at Ogletree Deakins, we are celebrating the first anniversary of *Compass* and reflecting on all that has changed in the last year.

Just as the seasons turn, today's employers continuously manage changes affecting how they conduct their businesses.

Not the least of these is the artificial intelligence and automation revolution, which we consider on page 4, reminding employers of the need to appropriately



handle digital property, and the Department

of Labor's significant overhaul of the overtime rule, which we review on page 6.

As *Compass* turns a year older, we are also considering the makeup of the modern workforce. This year, Black Women's Equal Pay Day was on August 22—signifying how far into the year African-American women must work to earn what men earned in the previous year. (Meanwhile, Equal Pay Day for women as a whole was four months prior, on April 2.)

In addition, September 15, 2019, marked the start of National Hispanic Heritage Month. With diversity and inclusion in mind, this issue of *Compass* also explores a growing movement to align inclusive practices with discrimination legislation in our hairstyle discrimination article on page 5.

We hope this issue of *Compass* will help you navigate the new terrain of the modern workplace.

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by James J. Plunkett (Washington, D.C.)

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AN INSIDE LOOK
AT KEY ISSUES
FROM CAPITOL HILL



Acosta Out, Scalia In

Alexander Acosta's resignation as Secretary of Labor became effective on July 19, 2019, and on September 26, 2019, the U.S. Senate confirmed Eugene Scalia as the new secretary of labor. Scalia, who served as solicitor of labor in the George W. Bush administration, is expected to continue apace with the U.S. Department of Labor's (DOL) current policy agenda.

EEO-1 Update

September 30, 2019, was the deadline for covered employers to submit to the Equal Employment Opportunity Commission (EEOC) Component 2 of the EEO-1 form, which includes employee pay and hours worked data, for calendar years 2017 and 2018. Meanwhile, the court ruling that reinstated the 2016 changes to the EEO-1 form is currently on appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Finally, on September 12, 2019, the EEOC published in the *Federal Register* a notice of information collection seeking approval from the Office of Management and Budget for a renewed EEO-1 Component 1 form, but not the Component 2 form that collects wage and hour data, stating that the unproven utility of the data is outweighed by the burden imposed on employers producing the data.

EEOC Nominees Confirmed

On August 1, 2019, the Senate confirmed Charlotte Burrows for a second term as a commissioner of the EEOC and Sharon Fast Gustafson as general counsel of the Commission. Burrows remains the only Democrat on the Commission. Gustafson, who is a solo practitioner, became the EEOC's first general counsel in the Trump administration. Further, President Trump nominated DOL Wage and Hour Division (WHD) Deputy Administrator Keith Sonderling to join Chair Janet Dhillon and Commissioner Victoria Lipnic as Republican members on the Commission.

NLRB Proposes Election Changes

On August 9, 2019, the National Labor Relations Board (NLRB) issued a notice of proposed rulemaking (NPRM) that proposes to: (1) replace the existing blocking charge policy with a "vote and impound" procedure that allows elections to move forward while impounding the ballots until a determination is made regarding the unfair labor practice charge; (2) provide employees with a 45-day window to petition for a secret

ballot election after the employer has voluntarily recognized the union; and (3) redefine the evidence required to prove that an employer and union in the construction industry have established a voluntary majority-supported collective bargaining relationship.

DOL Finalizes Retirement Rule

On July 29, 2019, the DOL's Employee Benefits Security Administration finalized a rule that "makes it easier for small businesses to offer retirement savings plans to their workers through Association Retirement Plans (ARPs), which would allow small businesses to band together to offer retirement plans to their employees." The rule allows certain employer groups and professional employer organizations to be considered "employers" for purposes of establishing multiple-employer defined contribution retirement plans (MEPs) under the Employee Retirement Income Security Act of 1974. The final ARP rule became effective September 30, 2019.

H-1B Fee Proposed

On September 4, 2019, the Department of Homeland Security announced a proposed rule that would "require petitioners seeking to file H-1B cap-subject petitions to pay a \$10 fee for each registration they submit to U.S. Citizenship and Immigration Services (USCIS) for the H-1B cap selection process." According to the proposal, the fee will cover the start-up and recurring costs associated with the electronic preregistration system established earlier this year. Comments on the proposed rule were accepted through October 4, 2019.

OFCCP Proposes Religious Exemption Regs

On August 15, 2019, the Office of Federal Contract Compliance Programs (OFCCP) issued an NPRM "to provide clarity regarding the scope and application of the religious exemption" contained in section 204(c) of Executive Order (EO) 11246. According to the NPRM, these proposed changes are intended to address concerns expressed by religious organizations that may be reluctant to participate as federal contractors because of uncertainty regarding the religious exemption. Critics of the proposal maintain that it eliminates LGBTQ protections installed by EO 13672 in 2014 by President Obama. The comment period for the proposal closed on September 16, 2019.

STATE
and
INTERNATIONALR
UNDUP

CALIFORNIA

On September 18, 2019, [Governor Gavin Newsom signed Assembly Bill \(AB\) 5](#), which codifies last year's Supreme Court of California decision establishing a new test to determine whether a worker is an independent contractor or an employee. In addition to codifying the ABC test, AB 5 contains carve-outs for several industries and professions including professional services, doctors, lawyers, real estate, insurance, referral agencies, and others.



CANADA

[Canadian employers subject to federal regulation will want to take note of changes to the Canada Labour Code that came into force on September 1, 2019.](#) These reforms apply to a large number of minimum employment standards with vacation, breaks, leaves of absences, and predictive scheduling impacted, among others. Because of the far-reaching nature of the changes, they will have a significant impact on federally regulated workplaces.



ILLINOIS

[Governor J. B. Pritzker recently signed into law Senate Bill 75](#)—a sweeping piece of legislation designed to prevent harassment and discrimination in the workplace. Under the Workplace Transparency Act, employers are generally prohibited from entering into employment agreements that contain nondisclosure and/or nondisparagement clauses pertaining to harassment or discrimination claims. However, employers may include such clauses in a separation or settlement agreement if certain conditions are met.



MASSACHUSETTS

Under the [Massachusetts Paid Family and Medical Leave law](#), employers were required, by October 1, 2019, to display a poster, distribute notices, and adjust their payroll to account for new wage withholdings. The Department of Family and Medical Leave will continue to release updated guidance for employers as the 2021 deadline for worker access to benefits approaches.



MINNESOTA

In late summer, [the Minnesota Department of Labor and Industry released an update to its FAQ on the state's new wage theft law](#), including 37 new questions and answers to further clarify what is expected of employers under the statute. The new FAQ provides important guidance on several key points, while at the same time leaving other important questions unanswered.



MISSOURI

[Employers in Kansas City, Missouri, will soon be prohibited from asking applicants about their prior salary or pay histories.](#) Kansas City's ordinance, which becomes effective on October 31, 2019, is part of a growing national trend to ban salary history questions. The ordinance includes several exceptions, including allowing an employer and applicant to discuss the applicant's expectations as they relate to salary, benefits, or other compensation.



NEW JERSEY

On August 6, 2019, [Acting Governor Sheila Oliver signed the New Jersey Wage Theft Act \(WTA\) into law.](#) Proponents have touted the law as the toughest wage theft statute in the country. The WTA goes far beyond attempting to prevent and punish intentional "wage theft" by significantly expanding the liability even the best-intentioned employers will face for state wage law violations.



NEW YORK

[Governor Andrew Cuomo recently signed into law two bills aimed at increasing the obligations of entities handling computerized private data.](#) The SHIELD Act expands the requirements for notifying affected parties if a data breach occurs and sets forth a list of security measures that must be implemented to "maintain reasonable safeguards" to protect private information.



OHIO

The Supreme Court of Ohio recently confirmed that public employees in their probationary periods may not have the same protections regarding employment termination that tenured civil servants enjoy. In [Miracle v. Ohio Dept. of Veterans Servs.](#), the court held that state law does not express a clear public policy to support probationary public employees bringing wrongful discharge claims against their employers.



OREGON

A new Oregon law will require employers to notify their employees when they (the employers) are contacted by a federal agency that intends to audit, among other things, employer records and employment eligibility documentation. [Senate Bill \(SB\) 370](#) was enacted on June 6, 2019, but does not become operative until January 1, 2020.



VIRGINIA

Earlier this year, [Governor Ralph Northam approved an amendment and reenactment of Virginia Code § 8.01-413.1.](#) The amendment requires employers to produce certain employment documents upon receipt of a written request from a current or former employee or employee's attorney and awards possible damages to the employee if the employer fails to do so within the prescribed timeframe. The amendment went into effect on July 1, 2019.



WASHINGTON

As of July 28, 2019, [Washington employers with 15 or more employees are required to provide reasonable break time for employees to express breast milk.](#) Break time must be provided for up to two years after the child's birth. The employer must provide a private location, other than a bathroom, for the employee to express milk; if no private space is available, the employer must work with the employee to find a convenient location to accommodate her needs.



AI IN THE WORKPLACE: KEY CONSIDERATIONS FOR EMPLOYERS

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PERSPECTIVES

Artificial intelligence (AI), defined very simply, involves machines performing tasks in a way that is intelligent. More and more organizations are using or expanding their use of AI tools and other advanced technologies in the workplace. For example, AI is becoming increasingly prevalent in talent acquisition and recruiting. Additionally, AI tools are powering many of the increasingly common employee self-service tools that allow for quicker, more efficient answers to common employee relations questions. Moreover, a number of city, state, and federal regulations have been proposed or enacted with a goal of eliminating potential discrimination and increasing transparency related to AI.

Despite AI's proven potential for enhancing efficiency and decision-making, it has raised a host of legal issues for employers. As AI expands into modern workplaces, employers may want to consider the following questions to ensure legal and regulatory compliance from a labor and employment perspective.



Is data being collected, stored, or transmitted through AI technology?

Various international, federal, and state rules and the common law govern the collection, storage, and movement of data, as well as privacy rights.



Is the technology affecting employment-related decision-making?

The information used to structure an AI algorithm could be unintentionally biased, which could potentially lead to discrimination claims by employees and/or applicants. Employers can evaluate AI-related employment discrimination risks by, for example, understanding the data used to build out and/or train the AI at issue and regularly auditing decisions made through the use of AI.



Is AI technology changing employees' terms and conditions of employment?

The use of AI may lead to changed working conditions, from minor workflow alterations to more significant changes like the displacement of employees through layoffs or reductions in force. These changes may implicate a collective bargaining process in the context of a unionized workforce.



How is the use of AI communicated to the workforce?

As employees are often concerned about what technological developments will mean for their jobs, communication, timing, and information sources are important considerations for human resources professionals.



Is AI technology changing the physical working environment?

Depending on the nature and function of the technology at issue, various federal and state workplace safety laws, such as the Occupational Safety and Health Act, may be implicated.

Jenn Betts and Ruthie Goodboe are the hosts of Ogletree Deakins' "Tech-Tuned Workplace" podcast series. You can learn more about AI in this podcast episode: [Tech-Tuned Workplace, Episode 2: Artificial Intelligence and Its Impact on the Workplace](#), or visit our [podcast page](#) to access all Ogletree Deakins podcasts.

NAVIGATIONAL TOOLS



HAIRSTYLE ANTIDISCRIMINATION LAWS: The Beginning of a National Trend?

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Signaling a growing movement to align culturally inclusive practices with legal protections, California recently became the first state to *expressly* ban discrimination based on hairstyle and hair texture associated with a person's race. The declaratory section of the law provides the state legislature's justification for the expanded definition. The legislature asserts that, historically, traits associated with Black and/or African American people such as dark skin, kinky and curly hair, and other traits were perceived as a "badge of inferiority." Furthermore, "professionalism" has been "closely linked to European features and mannerisms," requiring those who do not fall within "Eurocentric norms" to change their appearances. The legislature concludes that "[w]orkplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group."

Some state and local legislators are picking up the mantle of providing protection for workers in this area. Here's an overview of hairstyle discrimination laws across the country.

FEDERAL LAW

- Title VII of the Civil Rights Act of 1964 does not expressly prohibit personal appearance discrimination.
- According to the Equal Employment Opportunity Commission, race discrimination may include unfavorable treatment because of personal characteristics associated with race, such as hair texture, skin color, facial hair, facial features, and other physical traits.
- The 11th Circuit Court of Appeals (Florida, Georgia, Alabama) held that Title VII extends only to immutable traits of race. Mutable, or changeable, characteristics, such as hairstyle and facial hair, even if associated culturally with a protected class, are not protected characteristics.
- The Supreme Court of the United States declined to hear an appeal of the 11th Circuit case.

STATE LAWS

- **CALIFORNIA:** Effective January 2020, the [Create a Respectful and Open Workplace for Natural Hair \(CROWN\) Act](#) expands the definition of race to include traits historically associated with race, including hair texture and protective hairstyles (braids, dreadlocks, twists, etc.)
- **NEW YORK:** [S.6209A](#) prohibits racial discrimination based on "natural hair or hairstyles." The measure adds "traits historically associated with race, including but not limited to hair texture and protective hairstyles" to its coverage.

LOCAL LAWS

- **NEW YORK CITY:** The New York City Commission on Human Rights's guidance states that the New York City Human Rights Law "protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities" including "the right to maintain . . . locs, cornrows, twists, braids, Bantu knots, fades, [or] Afros."

The following jurisdictions have laws interpreted to protect characteristics associated with race:

- CHICAGO, ILLINOIS
- DISTRICT OF COLUMBIA
- MADISON, WISCONSIN

STATE BILLS

- **NEW JERSEY:** A New Jersey [bill](#), if signed, would provide greater protection for individual hairstyles and prohibit discrimination on the basis of hair.
- **MICHIGAN:** [HB 4811](#) would include hair texture and protective hairstyles as "traits historically associated with race."





ON THE RADAR



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OVERTIME FINAL RULE GOES INTO EFFECT ON JANUARY 1, 2020: ARE YOU READY?

On September 24, 2019, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) announced the new final overtime rule. In its final part 541 rule, the WHD changed the salary level test for exempt executive, administrative, and professional employees of section 13(a)(1) of the Fair Labor Standards Act (FLSA)—commonly referred to as the “white collar” or “EAP” exemption. The DOL also increased the total annual compensation test for highly compensated employees. The DOL estimates, in 2020, as a result of this change, 1.2 million currently exempt employees who earn at least \$455 per week (the old salary level) but less than the “new standard salary level of \$684 per week will, without some intervening action by their employers, gain overtime eligibility.” In addition, the DOL “estimates that an additional 2.2 million white collar workers who are currently nonexempt because they do not satisfy the EAP duties tests and currently earn at least \$455 per week, but less than \$684 per week, will have their overtime-eligible status strengthened in 2020 because these employees will now fail both the salary level and duties tests.”

In the *Federal Register*, the DOL stated its intent to update these thresholds more regularly in the future. These new thresholds for exemption from both the overtime and minimum wage provisions of the FLSA go into effect on **January 1, 2020**. As the effective date quickly approaches, here are the key points to the new rule to keep in mind.



MINIMUM SALARY

The final rule calls for an increase in the minimum salary for the executive, administrative, and professional exemptions from \$455 per week—\$23,660 annually—to \$684 per week, which annualizes to \$35,568. The WHD tied the new minimum salary level to the 20th percentile of full-time salaried workers in the lowest-wage Census Region and/or in the retail industry nationally using current data.



DUTIES TEST

The DOL did not make any substantive changes with regard to the duties tests, which are intended to gauge the exempt nature of employees' duties.



BONUSES AND PAYMENTS

For the first time, employers will be able to use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level, as long as those payments are made annually or on a more frequent basis.



HCE EXEMPTION

The total compensation requirement to qualify for the highly compensated employee (HCE) exemption will increase from \$100,000 per year to \$107,432 per year, which is based on the 80th percentile of earnings for full-time salaried workers in the United States without regard to regional differences.

ALONG THE ROAD

STATS AND TRENDS

In a tight U.S. labor market, with the unemployment rate low (3.5 percent in September 2019) and demand for skilled workers high, the quality of employee benefits—tangible and intangible—has become a pivotal factor in employee recruitment and retention. While competitive compensation and benefits arrangements remain important to applicants and employees, social elements associated with work—corporate culture, employee engagement, opportunity for personal growth, job satisfaction, work-life balance, and overall happiness—are increasingly a key differentiator separating employers that attract the most dynamic, creative, productive workforces from those that do not.

A FEW ILLUSTRATIVE STATISTICS FOLLOW.

1. A recent survey conducted by The Harris Poll on behalf of CareerBuilder, an online employment website, revealed that 32 percent of employees planned to change jobs this year.

2. Employees in the CareerBuilder survey said that other than salary, benefits (75 percent), and commute time (59 percent) were the most important factors they would consider when applying for jobs.



3. When asked about perks and fringe benefits, 42 percent of the surveyed employees reported that half-day Fridays would make them more willing to remain at or join a company.

4. According to new research from Hibob, a people management platform, 69 percent of candidates will reconsider an offer if current employees do not seem happy in their roles. Hibob's study also found that 64 percent of new hires would be less likely to stay at a job after a negative onboarding experience.



5. In the Hibob survey, 56 percent of the employees ranked opportunities for growth as more important than salary. Only 25 percent reported that they had left their previous roles because they felt underpaid.



6. Significantly, 77 percent of the employees interviewed in Hibob's research felt that corporate culture was extremely important.

77%

7. More than a quarter of the employees surveyed by CareerBuilder (29 percent) reported regularly searching for jobs while employed, and 78 percent said that even though they were not actively looking for a new position, they would be open to one if the right opportunity presented itself.



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Additional Information

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October

Oct 2	Tampa	Managing a Workforce in 2020
Oct 10	Birmingham	Alabama's Pay Equity Law: What You Need to Know
Oct 10	Nashville	Employee Benefit Mistakes You Will Make This Year (If You Are Not Prepared)
Oct 10	Scottsdale, AZ	California Employment Law Update
Oct 11	Scottsdale, AZ	Managing a Workforce in 2020
Oct 15	Nashville	Employment Law Briefing
Oct 16	Seattle	Managing a Workforce in 2020
Oct 16	Overland Park, KS	Managing a Workforce in 2020
Oct 17	La Jolla	Managing a Workforce in 2020
Oct 17	St. Louis	Managing a Workforce in 2020
Oct 18	Costa Mesa	Managing a Workforce in 2020
Oct 18	Austin	17th Annual Labor and Employment Law Update
Oct 22	Los Angeles	Managing a Workforce in 2020
Oct 23	Chicago	Employment Law Briefing
Oct 23	Sacramento	Managing a Workforce in 2020
Oct 24	Oak Brook, IL	Employment Law Briefing
Oct 24	Birmingham, MI	Employment Law Briefing
Oct 24	Denver	ODWIN Wine Pop-Up
Oct 25	Atlanta	Paying the Piper: Current Pay Equity, Classification, and Overtime Issues for Employers
Oct 29	San Francisco	Managing a Workforce in 2020
Oct 30-31	Kohler, WI	Managing a Workforce in 2020

November

Nov 6	Houston	Employment Law Briefing
Nov 7	Rosemont, IL	Dealing With Insolvent or Failing Subcontractors
Nov 8	Englewood, CO	Managing a Workforce in 2020
Nov 12	Dallas	Employment Law Briefing
Nov 13	Fort Worth	Employment Law Briefing
Nov 13-17	New Orleans	Corporate Labor and Employment Counsel Exclusive

December

Dec 4-6	New Orleans	Workplace Safety Symposium
Dec 4-6	Nashville	Labor Law Solutions
Dec 5	Indianapolis	Reel Ethics