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INSIGHTS AND DIRECTION FOR EMPLOYERS



WELCOME TO THE SPRING EDITION OF COMPASS!

Jansen A. Ellis, Editor in Chief

I hope that wherever you are, spring has sprung, and the winter doldrums have passed. Most of us have also sprung forward an hour (and lost an hour of very valuable sleep). This year's time change made me wonder—why do we spring forward? I've heard several different theories, but what's the real reason?

According to the Farmer's Almanac, Daylight Saving Time began in the United States in 1918 when Congress enacted the first daylight saving law (which also established time zones). While the idea had been conceived by others prior to 1918, the World War I effort was the real impetus for the law in the United States. At that time, coal was generally used to heat homes, and people were able to both save energy and contribute longer hours to the war effort by changing their clocks.



I hope you enjoy the spring season and the features in this issue.

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

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AN INSIDE LOOK
AT KEY ISSUES
FROM CAPITOL HILL



NLRB Returns to Traditional Independent Contractor Standard

On January 25, 2019, in *SuperShuttle DFW, Inc.*, the National Labor Relations Board (NLRB) [returned to its traditional independent contractor standard](#) based on the common law. In doing so, the Board overturned a 2014 decision that “impermissibly altered the Board’s traditional common-law test for independent contractors by severely limiting the significance of entrepreneurial opportunity to the analysis.” Of course, this decision is limited to independent contractor inquiries under the National Labor Relations Act.

OSHA Publishes Final Recordkeeping Rule

On January 25, 2019, the federal Occupational Safety and Health Administration (OSHA) published its [final changes to its 2016 injury and illness recordkeeping regulation](#). The final rule eliminates the requirement for establishments with 250 or more employees to electronically submit to OSHA each year information from OSHA Forms 300 and 301. However, these establishments will still be required to maintain these records on-site and will also be required to electronically submit information from OSHA Form 300A (Summary of Work-Related Injuries and Illnesses). The deadline to submit this form was March 2, 2019.

H-1B Rule Finalized

On January 31, 2019, United States Citizenship and Immigration Services (USCIS) [finalized its H-1B pre-registration rule](#). Effective this filing season, the new rule reverses the order by which USCIS selects H-1B petitions in the lottery and places a greater emphasis on petitions filed on behalf of candidates with advanced degrees from U.S. universities. The rule also adds an electronic pre-registration requirement for all H-1B filings that won’t be effective until at least April 2020.

Joint Employer—DOL Style

On April 1, 2019, the U.S. Department of Labor’s Wage and Hour Division unveiled its [proposal to amend its Fair Labor Standards Act \(FLSA\) regulations regarding joint-employer status](#). The DOL is proposing to streamline its FLSA joint-employer analysis by [adopting a four-part test](#). Look for this proposal to be the subject of future congressional

hearings, and, eventually, litigation. Comments will be due 60 days after publication in the *Federal Register*, which will likely place the due date around the beginning of June.

Overtime Rule Arrives

On March 22, 2019, the U.S. Department of Labor (DOL) [published its long-awaited proposal to make changes to its overtime regulations](#). Among other provisions, the proposal raises the salary level threshold to \$35,308 annually and increases the total annual compensation requirement for highly-compensated employees to \$147,414 per year. See our article on page 5 for more details.

EEO-1 Is Back!

A [recent decision by the U.S. District Court for the District of Columbia](#) to reinstate the EEOC’s [2016 changes to its EEO-1 form](#) (Component 2) has left employers wondering about their obligations to report wages and hours worked information to the EEOC. In a [filing](#) dated April 3, 2019, the EEOC informed the court “that it is able to undertake and close the collection of 2018 EEO-1 Component 2 data by September 30, 2019.” The EEOC’s submission did not change the current filing requirement of Component 1 data by May 31, 2019, and did not create any obligation to submit Component 2 (pay and hours worked) data to the EEOC. The judge has not yet ruled on this issue, so stay tuned for more updates.

Paycheck Fairness Act Passes House

On March 27, 2019, the U.S. House of Representatives passed the Paycheck Fairness Act (PFA). Among other provisions, the PFA would amend the Equal Pay Act of 1963 by replacing the “factor other than sex” defense with a “bona fide factor” defense that must be “job-related” and “consistent with business necessity”; would provide for uncapped compensatory and punitive damages; would require the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs to develop mechanisms for the collection of employee compensation data from employers; and would enact prohibitions on the use of, or inquiry into, applicants’ pay history. Next stop for the PFA will be the U.S. Senate, where its chances of passage are slim.

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and
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ARIZONA

The Arizona legislature recently [passed a bill amending Arizona Revised Statutes Section 12-1574](#) to change how writs of garnishments can be issued and served on garnishees, including employers. [House Bill 2230](#) was signed by Governor Doug Ducey on March 22, 2019.



CALIFORNIA

The California Court of Appeal recently [ruled that a retail employer's call-in scheduling policy—in which employees were required to call the employer in advance of a shift to find out if they needed to show up for work—triggered the reporting time pay obligation](#) set forth in the California Industrial Welfare Commission's Wage Orders. The ruling significantly broadens the scope of California's reporting time pay requirement and expands the types of circumstances in which it will be found to apply.



FRANCE

A select panel of the French data protection authority, CNIL, which has the power to impose sanctions, recently [fined a major technological services provider €50 million following its failure to comply with the obligations provided for in the General Data Protection Regulation \(GDPR\)](#). The provider did not adhere to transparency and information obligations and it did not set up a legal database for processing personal data collected for advertising purposes.



ILLINOIS

On February 19, 2019, Governor J.B. Pritzker signed into law a [measure that will increase the state minimum wage from \\$8.25 per hour to \\$15.00 per hour over the next six years](#). The measure also includes stiffer penalties for employers that fail to comply with the law. The penalties increase to triple the amount of unpaid wages plus five percent interest for every month in which the wages remain unpaid.



LOUISIANA

The Louisiana Fourth Circuit Court of Appeal recently [upheld a noncompetition agreement](#), rejecting the defendant's arguments that (1) the agreement's use of a flexible addendum to list numerous parishes/counties did not satisfy the requirements of Louisiana's noncompetition statute (La. R.S. 23:921), (2) the inclusion of the company's "subsidiaries" and "affiliates" rendered the agreement overbroad, and (3) the severability clause was ineffective.



MASSACHUSETTS

The Massachusetts Supreme Judicial Court recently [addressed for the first time whether an employer's failure to grant an employee's lateral transfer request could support an employment discrimination claim](#). The court held that an employer's denial of a lateral transfer request may constitute an adverse employment action where the denial results in a deprivation of opportunities for additional compensation or benefits.



MICHIGAN

On February 19, 2019, the Michigan Court of Appeals [issued a ruling in *Eplee v. City of Lansing*](#), clarifying that the Michigan Medical Marihuana Act (MMMA) does not create "an independent *right* protecting the medical use of marijuana in all circumstances, nor does it create a protected class for users of medical marijuana."



NEW JERSEY

On March 18, 2019, Governor Phil Murphy [signed into law Senate Bill 121](#), which amends the New Jersey Law Against Discrimination in two important respects, effective immediately. First, it renders unenforceable nondisclosure provisions in settlement agreements that resolve discrimination-related claims. Second, the new law purports to bar or prevent enforcement of arbitration agreements.



NEW YORK

The New York City Council recently [passed two bills addressing lactation rooms for breastfeeding mothers](#). Int. No. 879-A requires employers with four or more employees to provide lactation room accommodations for breastfeeding individuals. Int. No. 905-A requires covered employers to implement written lactation room accommodation policies to be distributed to all employees. The bills went into effect on March 18, 2019.



OHIO

In the recent decision in *McDaniel v. Wilkie*, the U.S. District Court for the Northern District of Ohio [considered whether telecommuting constitutes a reasonable accommodation](#) under the Americans with Disabilities Act. According to the court, the telecommuting arrangement that the employee requested was not a reasonable accommodation because the employee was not able to satisfactorily perform her duties within that accommodation request.



SOUTH CAROLINA

The South Carolina Court of Appeals recently [held that a company's termination of an employee for using company devices, on company time, to oppose a local building project that the company had a financial stake in was valid](#) and did not violate public policy. The holding (1) illustrates the benefits of a written company policy regarding the use (including personal use) of company devices/technology and (2) provides an example of a valid termination that did not violate South Carolina public policy.



TEXAS

On February 28, 2019, the Texas State Senate Committee on State Affairs advanced a bill that prevents cities and counties from adopting local ordinances related to employment leave. [Senate Bill 15](#) is now eligible to be taken up by the full Senate and is expected to pass when it comes up for consideration.



TOP TIPS FOR EFFECTIVE INVESTIGATORY INTERVIEWS

by Bernard J. (Bud) Bobber (Milwaukee)

Employers often need to conduct investigatory interviews with employees, and doing these interviews effectively is critical to getting all the facts required to make good decisions. In this article, Milwaukee shareholder Bud Bobber provides practical tips and considerations to help interviewers be more effective. To listen to podcasts on this topic, click [here](#) and [here](#).

PERSPECTIVES

Before the Investigatory Interview

The goal of every investigatory interview is to get to the truth, and careful planning can help reach that goal. A thoughtfully planned interview can include these steps:

- Be circumspect when notifying the employee about the interview so as to not bring attention to it with fellow employees. Consider not scheduling the interview too far in advance because the employee may coordinate his or her story with others in advance of the interview.
- Schedule the interview at a time that works well for the employee. For example, hourly employees may be short-spoken in an interview held after hours so they can get done quickly. Also consider conducting interviews during the workday while employees are on paid time.
- Choose a conducive place for the interview. The employee will be more comfortable in a professional setting not in view of his or her coworkers. Make the interview room comfortable and not overly formal.

Beginning the Investigatory Interview

At the outset of the interview, the interviewer should develop a rapport with the employee, set the appropriate tone, and go over some basic points that will lead to obtaining thorough information. Consider these steps:

- Facilitate communication by thanking the employee for his or her time. Perhaps ask the employee how everything is going for him or her.
- Tell the employee why he or she is there, without providing specific details about the investigation, as that could limit the information that the employee may provide.
- Review these points and get the employee's commitment to them:
 - ▶ It is crucial that the employee give truthful answers.
 - ▶ The employee should not withhold information—his or her answers must be complete.
 - ▶ The employee must let the interviewer know if he or she does not understand a question.
- Remind the employee that he or she is protected from retaliation or backlash for participating in the investigation in good faith.

Concluding the Investigatory Interview

Create a checklist of steps to take when concluding the interview. Once you have completed the substantive portion of the interview, go through that checklist.

- Ask the employee:
 - ▶ At the beginning of the interview, you committed to give truthful and complete answers; were your answers truthful and complete?
 - ▶ Do you have notes, text messages, or anything else related to this subject?
 - ▶ Have you talked with anyone else about this?
 - ▶ Is there anything else you would like to add?
- If applicable, remind the employee to keep things confidential. Note, though, that rules about confidentiality vary based on the type of investigation, whether the workplace is unionized, and the employee's status as a manager or supervisor. Some employees may have the right to speak with union representatives or counsel. Don't have a blanket policy that all things are confidential in all circumstances.
- If you plan to prepare a written statement, tell the employee that the interviewer will be doing so and that the employee will be asked to sign off on its accuracy. Prepare the statement as soon after the interview as possible.
- Remind the employee that he or she will not be retaliated against for participating in the investigation, and that he or she should not engage in activities that can be viewed as retaliation against others who are involved in or the subject of the investigation.

NAVIGATIONAL TOOLS



IT'S ABOUT (OVER) TIME: THE DOL'S NEW PART 541 OVERTIME RULE

by Alfred B. Robinson, Jr. (Washington, D.C.)

On March 7, 2019, the U.S. Department of Labor (DOL) unveiled its new overtime proposal in a [notice of proposed rulemaking](#) (NPRM), which would update the salary thresholds according to which workers are entitled to overtime compensation. Under the proposal, the new salary level will increase from \$455 per week (which amounts to \$23,660 annually) to \$679 per week (which amounts to \$35,308 annually). If the proposal becomes final, this would be the first increase to the salary level since 2004. The NPRM is significant both for what it proposes as well as for what it does not propose to accomplish. Below is a chart outlining key provisions of the 2019 NPRM.

2019 NPRM: What It *Does*

- ⌚ Rescinds the [2016 final rule](#)
- ⌚ Increases the standard salary level to \$679 per week or \$35,308 per year for exempt executive, administrative, professional, and computer employees
- ⌚ Increases the total compensation amount for highly compensated employees (HCE) to \$147,414 per year, "of which at least \$679 must be paid weekly on a salary or fee basis"
- ⌚ Allows nondiscretionary bonus and incentive payments, including commissions, to satisfy up to 10 percent of the standard salary level test proposed as \$679 per week/\$35,308 per year
- ⌚ Establishes a more generous timeframe in which these nondiscretionary payments must be made to an annual or more frequent basis
- ⌚ Establishes a standard salary level test of \$455 per week for the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, or the U.S. Virgin Islands and \$380 per week for American Samoa
- ⌚ Provides that the salary basis requirement would not apply to employees in the motion picture producing industry who make at least \$1,036 per week
- ⌚ Expresses intent to update the standard salary level test and total annual compensation thresholds every four years through notice and comment procedures

2019 NPRM: What It *Does Not Do*

- ⌚ Does not propose changes to the standard duties tests for the executive, administrative, professional, outside sales, or computer employee exemptions
- ⌚ Does not include a provision that automatically would increase the standard salary level test or total compensation for highly compensated employees on some regular or other periodic basis
- ⌚ Does not allow nondiscretionary bonus or incentive payments to count towards meeting the total annual compensation amount for highly compensated employees

This NPRM is another chapter in the long-running saga to update the Part 541 overtime exemptions. It has been almost two years since the last administration issued its [final rule](#) to increase the standard salary level test by almost doubling it—which a [federal court enjoined](#). The NPRM has a 60-day comment period from the date of publication in the *Federal Register*, and the Labor Department is intent on completing the rulemaking by the end of 2019. Stay tuned for further updates on our [Wage and Hour blog](#).



IN THE RADAR



DIGGING INTO DATA: ELECTRONIC DISCOVERY IN THE DIGITAL AGE

by Courtney D. Beasley (Indianapolis)

Today's employers deal with an ever-increasing volume and variety of data to better compete and grow their businesses. This brings with it the challenge of managing, preserving, collecting, reviewing, and producing that data in litigation. Law departments have had to evolve to deal with these challenges, which has led to the rise of the legal operations function. Companies face a host of considerations in deciding which aspects of these challenges to handle internally and how best to manage them.



To learn about those considerations, I interviewed [Tom Lidbury](#), who leads Ogletree Deakins' [eDiscovery and Records Retention Practice Group](#). I asked Tom about steps companies can take to create an effective eDiscovery strategy and what the future may hold in this growing area.

Courtney

How can companies better control eDiscovery costs?

Tom

It starts with information governance. Companies can control future discovery costs by reviewing their many enterprise systems and databases to assess and improve their compliance with their records retention schedule, such as by tweaking retention period triggers to match a field available in the database or vice versa. This facilitates better compliance with the schedule and thus reduces volumes of unneeded data. Also, they can configure databases so that they are better able to apply targeted legal holds. This avoids excessively broad preservation when litigation arises. From that foundation, employers can better manage discovery compliance. Important decisions include which functions to handle in-house, which software to use to do so, and which functions to outsource and to whom.

It often makes sense to outsource the "right" side functions of data processing and review. For example, large law firms handle an enormous volume of discovery and may be able to leverage better software pricing than even large companies. Even some "left" side functions, like issuing and managing legal holds, are candidates for outsourcing now that good software and web-based solutions for these functions exist.

Courtney

What is a common mistake you see companies make when dealing with eDiscovery issues?

Tom

Outcomes are usually better when discovery efforts are front-loaded. This leads to fewer preservation challenges and better strategic decisions about how to frame the case.

The use of keywords at the point of collection or later is not optimal because it is easy for opponents to challenge them and demand more and more and more. Predictive coding can be one solution—the technology's continuous active learning is extremely powerful for culling large datasets—since it requires little disclosure of process and is very difficult to challenge.

Courtney

Tell us briefly about some of the salient rules in the Federal Rules of Civil Procedure that pertain to eDiscovery.

Tom

Rule 1, of course, calls for the "just, speedy and inexpensive" determination of cases. Together with the new emphasis on "proportionality" in Rule 26, companies have good support when faced with tortuous discovery, especially discovery that goes to marginally important subject matter.

Courtney

Can you tell us about two areas of interest that are hot right now?

Tom

Paired with the rise of the in-house legal operations function, in-house has been the rise of outside discovery counsel. Companies are partnering with dedicated outside discovery counsel to bring consistency, quality, and efficiency to their discovery process across their entire litigation docket. Discovery counsel partner with the company and its various outside law firms to manage the discovery process and allow those other law firms to focus on their areas of substantive expertise.



ALONG THE ROAD

ROAD

STATS
AND
TRENDS

Focus on Safety, Health, and Wellness

- 1.** The U.S. Department of Labor's (DOL) Bureau of Labor Statistics has begun to examine 25 years of workplace safety and health data collected from 1992 through 2016 via the DOL's Survey of Occupational Injuries and Illnesses. The data indicates that workers are experiencing fewer injuries and fatalities on the job than they were 25 years ago.



(Source: Bureau of Labor Statistics, U.S. Department of Labor)

- 2.** "From 1992 to 2016, there were a total of 139,151 fatal occupational injuries in the United States. In 1992, there were 6,217 fatal occupational injuries. In 2016, there were 5,190. This is a decrease of approximately 17 percent over 25 years."

(Source: Bureau of Labor Statistics, U.S. Department of Labor)

- 3.** "Nonfatal injury and illness cases that involved one or more days away from work, or a job transfer or restriction, made up roughly half of all nonfatal injuries in private industry in 2016. The remaining cases were those where workers did not miss any work and were not restricted or transferred. The proportion of job transfer or restriction cases, where the worker is on restricted duty or transferred to another job as a result of the injury, has grown over the past 25 years."



(Source: Bureau of Labor Statistics, U.S. Department of Labor)

- 4.** A 2018 study of work-life balance conducted by the Organisation for Economic Co-operation and Development (OECD) found that 11.4 percent of U.S. employees worked very long hours. The study calculated the percentage of workers in a given country "working very long hours" (defined by the study as 50 hours or more per week) and examined "time devoted to leisure and personal care," which included time spent eating and sleeping, in order to evaluate work-life balance.



(Source: OECD Better Life Index)

- 5.** According to the OECD study, the typical American worker spends 40 percent of the day dedicated to his or her job.

(Source: OECD Better Life Index)

- 6.** The OECD study indicates that the Netherlands has the best work-life balance in the world. Only 0.5 percent of Dutch employees regularly work very long hours and, on average, Dutch employees spend 16 hours per day devoted to leisure and personal care.



(Source: OECD Better Life Index)

- 7.** OECD emphasizes that "an important aspect of work-life balance is the amount of time a person spends at work. Evidence suggests that long work hours may impair personal health, jeopardise safety and increase stress."

(Source: OECD Better Life Index)

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