WHAT TO EXPECT IN 2016

Legal Changes Affecting Employers

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In the final year of the Obama administration, employers again face changes in federal regulatory policies and agendas. Three significant changes anticipated are: (1) Department of Labor (DOL) regulations revamping white collar exemptions; (2) joint employer liability expansion; and (3) aggressive enforcement of pregnancy discrimination claims by the Equal Employment Opportunity Commission (EEOC).

Revised white collar regulations

In July 2015, the DOL published proposed regulations regarding white collar exemptions. The proposed regulations: (1) set the minimum salary required for exemption at the 40th percentile of weekly earnings for full-time salaried workers (an increase from $23,660 to $50,440 annually); (2) increase the compensation needed to exempt highly-compensated employees to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (from $100,000 to $122,148 annually); and (3) update salary levels annually based on earnings percentile or inflation. Under the proposed regulations, the DOL estimates a 50% reduction in the number of exempt employees (making them eligible for overtime pay).

The proposed regulations make no substantive revisions to the duties' tests for determining exemptions. Instead, the DOL solicited comments regarding the effectiveness of the current tests, including whether California state law (requiring 50% of an employee's time be spent exclusively on work that is the employee's primary duty) should serve as a model. The adoption of California's duties' test would be a major setback to employers, creating uncertainty in exempt designations and a heightened risk of litigation.

With final regulations anticipated in spring 2016, employers must prepare now. Even if the DOL were to reduce the percentile, employers can anticipate a significant, dramatic increase in the salary level test. We recommend employers prepare by re-evaluating exempt classifications, especially for employees earning a salary of less than $50,000 per year.

Expansion of joint employer liability

In August 2015, the National Labor Relations Board (NLRB) issued its Browning-Ferris decision, establishing a new standard for determining when two entities are a single "joint employer" over a group of workers. Previously, it was necessary that both entities exercise control over the terms and conditions of the workers' employment such that the control was both "direct and immediate."

Under the new standard, two or more otherwise unrelated employers may be joint employers if they "share or co-determine those matters governing the essential terms and conditions of employment." Reserving authority to control employment terms and conditions, even if not exercised, is now relevant to the joint employer analysis.

This type of control is typically reserved or exercised by parent companies over subsidiaries, franchisors over franchisees, leasing employers over leasing or temporary services providers, contractors over subcontractors, and, indeed, any company (including staffing agencies, professional employer organizations and their clients) that contracts with another to perform work necessary to its operations. Browning-Ferris requires the NLRB, on a case-by-case basis, to insert itself into complex business relationships wholly unrelated to labor-management relations.

Further, the NRLB created a precedent for other government agencies to rewrite historical understandings of the employment relationship. Following Browning-Ferris, a leaked internal memorandum prepared by the DOL suggests that it may hold both a franchisor and franchisee jointly liable for violations of the Occupational Safety and Health Act of 1970 (OSHA).

The memorandum instructs OSHA investigators to request the franchise agreement, business documents the franchisee must submit to the franchisor, site selection information, advertising approvals, brand standard policies, and signage and menu requirements. Materials such as advertising approvals and menu requirements are irrelevant to workplace safety and health, and exceed OSHA's authority.

Pregnancy accommodation claims

In March 2015, the U.S. Supreme Court decided a controversy surrounding an employer's policy that provided light-duty work for certain employees but not for pregnant workers. In *Young v. UPS*, the Court held that an individual pregnant worker may show disparate treatment via indirect evidence.

The employee must first show: (1) she is pregnant, (2) sought an accommodation, (3) which the employer did not grant, (4) while accommodating others "similar in their ability or inability to work." If the employer establishes legitimate, nondiscriminatory reasons for denying the request for accommodation, the employee can reach a jury by establishing that the employer's policies impose a "significant burden" on pregnant workers without a "sufficiently strong justification." The Court did not define what constitutes a "significant burden" or "sufficiently strong justification."

In June 2015, EEOC issued revised enforcement guidance to comport with the Young decision. The guidance offers little clarity regarding legal reasons to deny accommodation requests from pregnant employees. Absent clear guidance from the Court or the EEOC, we recommend employers accommodate pregnant employees as they would any other employees (e.g., for workers' compensation injuries and ADA accommodation requests).

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