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News & Types: Employment, Labor & Benefits Update

Employment, Labor & Benefits Update - August 2017

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Practices: Employment, Labor & Benefits

SAVE THE DATE: SEPTEMBER 28, 2017 - ANNUAL SEMINAR

On Thursday, September 28, 2017, the Employment, Labor and Benefits group will hold its annual seminar at the Doubletree Hotel, 75 West Algonquin Road, Arlington Heights, Illinois. Registration begins at 8:00 a.m. The program, which will run from 8:30 a.m. to 11:45 a.m., has been submitted for 2.5 hours HRCI and MCLE general recertification credit.

The program will include panel discussions on the Trump Administration's impact on various employment and employee benefit laws, the significant increase in employee fraud and embezzlement, and protecting your company's confidential information or trade secrets from improper disclosure or theft. Please visit our events page to register.

NEW CALIFORNIA REGULATIONS TO PROTECT TRANSGENDER EMPLOYEES

By Chaelin Shin (Summer Associate)

Starting from July 1, 2017, new regulations have come into effect in California regarding protection for transgender persons in the workplace. It is not new for California to have laws prohibiting discrimination against transgender employees. However, the new regulations under the California Fair Employment and Housing Act (FEHA) have broadened the scope of protection.

To begin with, there were significant changes to the definitions. For example, "gender identity" now means "each person's internal understanding of their gender, or the perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender." A new word, "transitioning," was also added, which is defined as "a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures." These updated definitions formed the basis of improved protections for transgender employees. The protections are now geared more towards respecting employees' choices and preferences.

First, employers are now required to provide "facilities that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth." These facilities include, but are not

limited to, restrooms, showers, and locker rooms. Employers are also required to use gender-neutral signage for these facilities. This is compliant with the new California law that was effective March 1, 2017, which required all single-user restrooms to have gender-neutral signage and to be accessible to all types of gender, regardless of whether the restrooms are in a business establishment, place of public accommodation, or government agency.

Second, employers cannot force an employee to adhere to "any physical appearance, grooming or dress standard which is inconsistent with an individual's gender identity or gender expression, unless the employer can establish business necessity." Also an employer should respect the choice of name or pronoun that an employee prefers to be called by, and identify the person with that name or pronoun.

Lastly, in general, employers may not ask questions that "identify an individual on the basis of sex, including gender, gender identity, or gender expression," or ask these questions as a condition of employment. However, there are few exceptions where employers are allowed to talk with employees over these issues. For instance, an employee can voluntarily bring up the issue or the employer might ask for information in order to provide adequate facilities.

Therefore, it is recommended for employers to read through the new definitions and regulations thoroughly, which can be found at 2 CCR §§ 11030-1, 11034. Employers should understand that employees' choices are determinative and strive to provide safe and comfortable workplaces for their employees.

NEW I-9 FORM
By Alan M. Kaplan

The United States Citizenship and Immigration Service ("USCIS") released a new I-9 Form and a new Handbook for Employers on July 17, 2017. Companies must use the new form starting on September 18, 2017. Although the changes are minor, the USCIS will penalize companies who do not use the new form. Companies may download the new form from the USCIS website. In the new form, the Office of Special Counsel for Immigration-Related Unfair Employment Practices to its new name, Immigrant and Employee Rights Section. In addition, the USCIS removed the words "the end of" from the phrase "the first day of employment," added the Consular Report of Birth Abroad to List C, and combined all the certifications of report of birth issued by the Department of State. The List C documents, except the Social Security card, are renumbered.

Proper use of the I-9 Form is very important, especially since the USCIS is increasing its enforcement efforts. Recently, the USCIS audited one of the Firm's clients. The audit revealed a number of employees with non-conforming Social Security Numbers and errors the company made in the completion of I-9 Forms. Therefore, the Firm recommends an internal audit of the I-9 Forms and correcting errors. Although many human resource professionals believe they know how to correct errors on I-9 Forms, we recommend that our clients contact the Firm's immigration lawyers to learn how the USCIS requires companies to make and document the corrections.

CALIFORNIA SUPREME COURT CLARIFIES CALIFORNIA'S DAY OF REST RULE
By Jiwon Julianna Yhee

Recently, in Mendoza v. Nordstrom, Inc., the California Supreme Court resolved certain unsettled questions with respect to California's Day of Rest rule, which is codified at Labor Code §§ 550-558.1. The Day of Rest rule guarantees employees "one day's rest in seven" and prohibits an employer from "caus[ing] his employees to work more than six days in seven," but the rule does not apply "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." Although this rule has been part of California's labor law for quite some time, California employers have had relatively little guidance on what the rule requires, and, therefore, how employers can comply with the rule. That is, until Mendoza.

In Mendoza, the plaintiff, an employee of Nordstrom, brought suit against Nordstrom in state court alleging, among other things, that Nordstrom had violated the Day of Rest rule. The plaintiff alleged that, on several occasions, he was asked by a supervisor or a coworker to fill in for another employee, which meant that the plaintiff had to work for more than six consecutive days. Some, but not all, of the plaintiff's shifts lasted six hours or less. The plaintiff alleged that these practices were violations of California's Day of Rest rule, and that he was not an employee exempted from the rule, i.e. employee not working 30 hours in any week or six hours in any one day. Nordstrom removed the case to federal district court, which granted summary judgment to Nordstrom on the Day of Rest claims. Mendoza appealed, and the Ninth Circuit asked the California Supreme Court to answer three questions with respect to the Day of Rest rule.

The Ninth Circuit's first question was whether the day of rest required under the rule was calculated by the work week or if it applied on a rolling basis to any seven-consecutive-day period. Under the workweek interpretation, the calendar is divided into seven-day blocks, and the employer does not violate the Day of Rest rule as long as it allows its employees to take a day of rest at least one day in each one-week block. Under the rolling interpretation, the employer must allow any employee who has worked the preceding six days in a row a day or rest on the seventh day. The difference in the two different approaches can be illustrated as follows:

	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Week 1	WORK	REST	WORK	WORK	WORK	WORK	WORK
Week 2	WORK	WORK	WORK	WORK	REST	WORK	WORK

Assuming that an employer has an employee scheduled to work like the above, the employer does not violate the Day of Rest rule if the workweek interpretation applies, but violates the rule if the rolling interpretation applies. The plaintiff in Mendoza argued for the rolling interpretation, while Nordstrom stated that the workweek interpretation was the correct one. The California Supreme Court agreed with Nordstrom on this issue.

The Ninth Circuit's second question was whether the exemption from the Day of Rest rule for workers employed six hours per day applied so long as an employee worked six hours or less on at least one day of the applicable workweek or whether it only applied when an employee worked no more than six hours on each and every day of the week. This question was important because Nordstrom argued that, because the plaintiff had worked six or less hours at least one day of the week, the plaintiff was exempted from the rule's application. The California Supreme Court stated that an employee can only be exempt from the rule if the employee worked six hours or less each and every day of the week. The Court reasoned that allowing the exemption to

apply to employees who work six hours or less on at least one day of the workweek would lead to an absurd result wherein employers would be free to force employees to work every day without rest ad infinitum as long as one of the days worked was six hours or less.

Finally, the Ninth Circuit asked the California Supreme Court what it meant for an employer to "cause" an employee to go without a day of rest. According to Nordstrom, unless an employer requires, forces, or coerces an employee to work on a day of rest, it has not caused the employee to work. The plaintiff, on the other hand, argued that whenever an employer allows, suffers, or permits an employee to work on a day of rest, it has caused the employee to go without a day of rest. The California Supreme Court disagreed with both the plaintiff's and Nordstrom's interpretations, stating that, under the Day of Rest rule, an employer is obligated to apprise its employees of their entitlement to a day or rest and to maintain "absolute neutrality" as to the exercise of that right. However, an employer will not be punished simply because an employee independently chooses to work on the day of rest and the employer passively allows the employee to do so.

The California Supreme Court's ruling in Mendoza is good news for employers, as employers can now more readily determine whether or not their employee schedules conform with California's Day of Rest rule. However, employers would do well to re-examine their current employee schedules to make sure that the schedules comply with the Supreme Court's interpretation of the Day of Rest rule in Mendoza. Additionally, employers should revisit the practices of its managers in scheduling employees' workweek, including, but not limited to, asking employees to fill in for co-workers, as the managers' actions could be construed as "causing" employees to go without a day of rest.

PROPOSED AMENDMENT TO EQUAL PAY ACT WOULD PROHIBIT EMPLOYERS FROM ASKING ABOUT SALARY HISTORIES

By Nancy E. Sasamoto

In an effort to close the wage gap between men and women, the Illinois Senate is considering amending the Illinois Equal Pay Act ("EPA"). The amendment, known as Senate Bill 0981, would, in part, make it unlawful for an employer to seek the wage or salary history of any job applicant. If enacted, Illinois would be only the second state to adopt such a law. Massachusetts currently is the only state that prohibits employers from asking applicants about their current or past salary, although several states are considering similar measures and some cities, like New York City, have passed similar measure.

The Equal Pay Act of 2003 prohibits employers from discriminating between employees on the basis of sex by paying wages to an employee at a rate less than the rate at which the employer pays wages to another employee. It has been reported that women in Illinois only make 80 cents for every dollar paid to their male counterparts.

The amendment's supporters assert that asking an applicant, or the applicant's current or prior employer, about his or her prior salary, benefits or other compensation, serves to perpetuate past discrimination. As amended, the EPA would also unlawful for an employer to require an employee to sign a contract or waiver that would prohibit the employee from disclosing or discussing information about the employee's wages or to screen job applicants based on their wage or salary history.

The EPA currently provides that if an employee is paid by his or her employer less than the wage to which he or she is entitled, the employee may recover in a civil action the entire amount of any underpayment together with interest, and the costs and reasonable attorney's fees. Employers who violate the EPA can also be subject to civil penalties ranging from $500 to $5,000 for each violation for each employee, depending on the size of the employer and whether it is a first offense.

The amendment makes additional remedies available, including compensatory damages if the employee demonstrates that the employer acted with malice or reckless indifference, punitive damages as may be appropriate, and injunctive relief. If the employer unlawfully asks about salary history or violates other provisions of the amendment, the employee may also recover "special damages" not to exceed $10,000.

Opponents of the bill argue that the amendment will be burdensome for employers and will lead to increased litigation. Many employers believe that salary history is a relevant measure of someone's past performance. Nevertheless, the fact that the House passed the proposed amendment April by a vote of 91-24 is a good indicator of the strong support for the amendment.

SUBSTANTIVE CHANGES TO LABOR & EMPLOYMENT LAWS - BE CAREFUL WHAT YOU ASK FOR
By Alan M. Kaplan

On July 19, 2017, the Appropriations Committee of the House of Representatives voted to cut the budget of the National Labor Relations Board ("Board") by 9%. Management may be happy for many reasons, including the alleged waste by federal agencies, to decrease the federal deficit, and because the Board is perceived as pro-union.

However, management should be careful what it wishes wish for. On Saturday evening, July 22, 2017, union pickets walked in front of a new hotel in downtown Chicago carrying picket signs. The picket signs did not identify the name of the employer with whom the union was having a dispute. Was the union having a dispute with the hotel or a construction subcontractor? In addition, the picket signs did not identify the reason for the picketing. Was the union picketing because of the company's unfair labor practices, or because the company was not paying the area standard wages? Were the pickets obstructing ingress into and egress out of the hotel? If so, what steps could the hotel take to stop the picketing?

The Board provides the solution. Management wants and needs the Board to stop unions from unlawful picketing activities. The hotel or the construction subcontractor may file an unfair labor practice against a union engaged in unlawful picketing. The Board may have a special unit of investigators and attorneys to investigate and resolve unlawful picketing issues within days. These efforts include filing a temporary restraining order in federal court, which could lead to a permanent injunction. Merely making budget cuts may sound good, but management needs to understand the role of government agencies to enforce the laws for the benefit of all stakeholders – unions, employees and companies.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.