Employer Update

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Employment Law Trends Assessment: What We Saw in 2019 and What We Expect in 2020

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In this month's Employer Update, we discuss many of 2019's most noteworthy developments in the employment law landscape, and the trends we expect to continue in 2020. Topics addressed below include further expansion of #MeToo-inspired laws (such as a heightened standard and enhanced available remedies for harassment claims in New York, restrictions on the use of non-disclosure and arbitration agreements, and expanded pay equity laws); new limitations in several states on the use of restrictive covenants; amendments to federal and state overtime pay requirements; legislation in new focus areas such as worker classification and biometric data privacy; and decisions the U.S. Supreme Court will issue this term on a variety of employment issues. We also offer recommendations for employers seeking to navigate these changes.

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Developments in Sexual Harassment and Discrimination Laws

By Larsa K. Ramsini

In 2019, following New York State's first public legislative hearing on sexual harassment in the workplace in 27 years, the state enacted a series of bills that substantially changed employment discrimination and harassment law. One of the most significant changes in the law was the legislature's elimination of the requirement under the New York State Human Rights Law ("NYSHRL") that conduct alleged to create a hostile work environment be "severe or pervasive." Now, the NYSHRL prohibits conduct that "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership" in a protected class, "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims." An employer may defend against such a claim by demonstrating that "a reasonable victim of discrimination" in the same protected class would consider the conduct to be no more than "petty slights or trivial inconveniences." This new "inferior terms" standard brings New York State closer to the standard under the New York City Human Rights Law ("NYCHRL"), which requires employees to show only that they were treated "less well" based on a protected characteristic. *See, e.g.*, *Williams v. N.Y. City Hous. Auth.*, 61 A.D.3d 62, 78 (1st Dep't 2009)

New York State also has eliminated the so-called *Faragher-Ellerth* defense to claims of harassment under the NYSHRL. Under Title VII, employers may defend against harassment claims where no adverse employment action was taken against the employee if the employer exercised reasonable care to prevent and correct the harassing behavior and the employee failed to take advantage of preventive or corrective opportunities provided by the employer. The NYSHRL previously allowed for the same affirmative defense, but following the 2019 legislation, now provides that an individual's failure to complain about the alleged harassment "shall not be determinative" of the employer's liability.

The recent amendments to the NYSHRL also prohibit all forms of unlawful discrimination (not just sexual harassment) against a non-employee "contractor, subcontractor, vendor, consultant or other person providing services pursuant to a contract in the workplace," or an employee of such an individual. Other states passed similar measures in 2019: Illinois now protects contractors and consultants against harassment based on any protected characteristic, and Maryland protects independent contractors against harassment and any other form of discrimination. Employers should review their anti-discrimination policies to ensure that their policies apply not just to their own employees, but also to these additional classes of protected individuals.

The New York State amendments also revised the requirements concerning a complainant's remedies, conforming the State law to New York City's law in several respects. First, New York State made punitive damages available to plaintiffs asserting "employment discrimination related to private employers," consistent with the availability of punitive damages under the NYCHRL for unlawful discriminatory practices. In addition, whereas in the past the NYSHRL provided that a court may award reasonable attorney's fees to the prevailing party in an employment discrimination suit "where sex is a basis of such discrimination," under current law a court now may award such fees to the prevailing party in *all* claims of employment discrimination, again in line with the NYCHRL. However, the NYSHRL continues to require that a prevailing employer-defendant show that a claim was "frivolous" in order to recover fees from an unsuccessful plaintiff. These changes in the law create additional economic incentives for aggrieved individuals to bring claims, and raise employers' exposure in employment discrimination litigation.

State Laws on Non-Disclosure Provisions in Settlement Agreements

By Justin M. DiGennaro

During 2019, several states enacted legislation restricting the enforcement of non-disclosure provisions in settlement agreements that resolve claims of harassment, discrimination, or retaliation. These developments will likely influence both the structuring of settlement agreements concerning these types of claims as well as the ultimate decision of whether to settle such claims in the first place. Different states have taken different approaches towards the issue.

Effective October 11, 2019, New York law prohibits provisions in settlement agreements that prevent the disclosure of the "underlying facts and circumstances" of not only a sexual harassment claim (as was the case under prior New York law passed in 2018), but also any type of harassment or discrimination claim, "unless the condition of confidentiality is the plaintiff's preference." To satisfy the "plaintiff's preference" exception, a claimant must receive 21 days to consider the settlement agreement and 7 days to revoke the agreement after executing. Unlike the requirements for securing a valid release of age discrimination claims under the federal Older Workers Benefit Protection Act, New York law does not allow employees to waive the 21-day consideration period by signing the agreement before expiration of the 21-day period.

Illinois enacted a similar law, effective January 1, 2020, which prohibits provisions in settlement agreements that purport to interfere with an employee's ability to make "truthful statements or disclosures regarding unlawful employment practices under federal or Illinois law." As in New York, employers may include a non-disclosure provision in a settlement agreement if doing so is the claimant's documented preference and the employer satisfies certain additional requirements. These requirements include a 21-day consideration period (which the employee may waive) and 7-day revocation period, notice to the claimant of his or her right to seek counsel, and consideration for the non-disclosure provision. Additionally, the release of claims in the settlement agreement must apply only to claims arising before the execution date.

Other states have enacted non-disclosure legislation focused exclusively on instances in which the claimant has initiated administrative or civil proceedings concerning certain types of claims. For example, effective January 1, 2019, California law prohibits provisions in settlement agreements that prevent the disclosure of factual information relating to sexual harassment, sex discrimination, or retaliation claims in an administrative or civil proceeding. But California law permits the inclusion in a settlement agreement of "a provision that shields the identity of the claimant and all facts that could lead to the discovery of his or her identity" if the inclusion is at the "request of the claimant."

New Jersey enacted arguably the most aggressive approach, deeming any provision in a settlement agreement "which has the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment" unenforceable against a current or former employee. The New Jersey law, which went into effect on March 18, 2019, contains no exceptions to this prohibition, meaning that there are no circumstances under which an employer can require an employee not to disclose such details. However, non-disclosure provisions are still enforceable against employers (*i.e.*, if confidentiality is the employee's preference), but become unenforceable against employers as well "if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable." Applicable settlement agreements must include a "bold, prominently placed notice" that any non-disclosure provision is unenforceable against the employer under such circumstances.

In light of these developments, employers should review and update their template settlement agreements to comply with the new patchwork of laws now in effect.

Developments in Connection with Pay Equity/Salary History Ban Laws

By Thomas McCarthy

In our 2019 Trends Assessment, we highlighted a number of state and local governments that had enacted legislation placing limitations on an employer's ability to request and/or consider the prior salary history of job applicants. Proponents of such legislation argue that banning reliance on salary history in determining compensation for new employees prevents employers from perpetuating historical pay differentials.

These restrictions during the hiring process can lead to complications for employers with locations in multiple states. Employers should either to revise their standard application form to instruct applicants in the applicable states to skip questions relating to salary history, or use different forms for each jurisdiction. Employers with decentralized hiring practices also may encounter difficulties ensuring that information and guidance with respect to the new laws are filtered down to any person conducting interviews. Private equity firms and other companies engaged in merger and acquisition activity also should monitor salary history bans. Regulators and commentators have taken varying positions on the question whether employees hired following a sale of assets are "applicants" for employment under the various state or local laws. As a prophylactic measure, companies hiring employees upon consummation of an acquisition of assets of a business may wish to consider implementing information screens to separate those who receive individualized compensation data during the due diligence process from those responsible for making offers of employment to the seller's employees.

The number of employers that will have to grapple with these issues has increased in recent years. As of the date of this article, 17 states have enacted some form of salary history ban, with 7 that went into effect in 2019 – Alabama, Connecticut, Hawaii, Illinois, Maine, North Carolina, and Washington – and Colorado's law is set to go into effect January 1, 2021.

Two states, New York and New Jersey, had salary history ban legislation go into effect in the first few days of the new decade. New York State bill S6549/A5308B, which went into effect January 6, 2020, modified the New York Labor Law to prohibit employers from (i) relying on a job applicant's wage or salary history in determining whether to offer employment to that individual or in deciding the salary to offer; (ii) requesting or requiring an applicant's or current employee's salary history as a condition to being interviewed or as a condition of promotion; (iii) seeking an applicant's or employee's wage history from a current or former employer other than to verify a voluntary disclosure of salary history by the applicant or employee; or (iv) retaliating against an applicant or current employee based on his or her refusal to provide his or her salary history. This brings all of New York State in line with similar bans that were already in place in New York City and Albany, Suffolk, and Westchester counties.

As of January 1, 2020, employers in New Jersey are no longer permitted to screen job applicants based on their salary history, require that an applicant's salary history satisfy any particular minimum or maximum criteria, or consider an applicant's refusal to volunteer compensation information in making an employment decision. Employers in New Jersey are, however, permitted to verify and consider salary history voluntarily provided by the applicant, and to request that an applicant provide the employer with written authorization to confirm salary history after the employer has made an offer of employment with an overall compensation package.

The proliferation of salary history bans is not the only development in pay equity legislation. On October 8, 2019, New York's newly revised pay equity law went into effect. Whereas New York Labor Law Section 194 previously prohibited *only pay differentials based on sex*, the amended statute now prohibits pay differentials based on *any protected class status*. Section 194 had already served as an attractive, alternative cause of action for plaintiffs alleging sex-based pay discrimination because, among other reasons, it does not require plaintiffs to show discriminatory intent on the part of the employer to

state a claim, and provides for liquidated damages in some circumstances. As such, New York employers should expect to see Section 194 claims asserted as alternative causes of action in most pay discrimination lawsuits. To avoid such claims, employers may consider conducting internal, privileged reviews of their compensation data to identify and address any pay differentials that may give rise to a cause of action across a variety of protected classifications – not just sex.

The revisions to Section 194 also decreased the evidentiary burden placed on plaintiffs to state a claim. Whereas the statute previously prohibited pay differentials between employees performing "equal work," the revised statute also prohibits pay differentials between employees performing "substantially similar work." Much like the expanded scope of protected classes under the Section 194, this change could complicate employers' attempts to monitor pay disparities, as employers may have to consider a wider range of potential comparators for each individual employee in performing their analysis. As such, employers may wish to review their job descriptions and performance review procedures to ensure that any bona fide factors to explain wage differentials are well-documented.

Developments in Connection with Agreements to Arbitrate Employment Disputes

By Quinn E. Christie

In the wake of the #MeToo movement, lawmakers have been pushing to restrict the use of mandatory arbitration programs in the workplace, notwithstanding the Federal Arbitration Act's ("FAA") well-established policy favoring enforcement of arbitration agreements according to their terms. Over the last few years, several state legislatures have sought to impose penalties on employers who condition employment on an employee's assent to arbitration, and have sought to limit the terms or invalidate such mandatory arbitration programs. These statutes, however, frequently have faced federal preemption challenges, and in some cases have already been found toothless in light of the FAA.

In 2018, New York's legislature passed C.P.L.R. § 7515, which sought to render "null and void" agreements compelling arbitration of sexual harassment claims. But in 2019, in *Latif v. Morgan Stanley*, the U.S. District Court for the Southern District of New York granted Morgan Stanley's motion to compel arbitration of Latif's sexual harassment claims, holding that a state law prohibiting arbitration of a particular claim is displaced by the FAA.[1] After this decision, New York's legislature still sought to expand the statute to render "null and void" agreements calling for mandatory arbitration of *any claim of discrimination*.[2]

California's legislature also recently passed Assembly Bill 51 ("AB 51"), which imposes civil liability, including money damages, injunctive relief, and attorneys' fees, against an employer for discriminating against or withholding any employment related benefit from an employee who refuses to sign a mandatory arbitration agreement.[3] AB 51 further makes it a criminal misdemeanor for an employer to condition receipt of any employment related benefit on an employee's consent to an arbitration agreement.[4] AB 51 was supposed to take effect on January 1, 2020. However, on December 6, 2019, the U.S. Chamber of Commerce and several other business associations filed a lawsuit challenging AB 51's validity and enforceability in light of the FAA, and specifically raising questions about whether the FAA preempts AB 51.[5] A temporary restraining order, issued by Judge Kimberly Mueller of the Eastern District of California on December 30, 2019 and modified on January 10, 2020, enjoins enforcement of AB 51 through January 31, 2020 with respect to arbitration agreements covered by the FAA. The Court will also decide whether to issue a preliminary injunction after the parties complete supplemental briefing on jurisdiction and standing issues.[6]

In 2018 and 2019, Illinois, New Jersey, Maryland, and Vermont also enacted legislation declaring void and unenforceable agreements requiring arbitration of certain employment disputes.[7] Vermont's law declares void and unenforceable any arbitration agreement offered to an employee as a condition of employment.[8] The law in New Jersey also imposes civil liability upon employers who discriminate or retaliate against employees who refuse to agree to mandatory arbitration provisions.[9] These statutes have not yet faced any preemption challenges, but in light of the California litigation, employers should expect such challenges to occur.

The U.S. Supreme Court's FAA jurisprudence has continued to enhance the strong federal policy favoring enforcement of arbitration agreements pursuant to their terms. After ruling in 2018 in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 1619 (2018), that agreements to arbitrate employment disputes are enforceable even if they contain mandatory class action waivers, the Supreme Court held in 2019 in *Lamps Plus, Inc. v. Varela*, 139 S.Ct. 1407, 1417-18, 1419 (2019), that arbitration agreements, which are ambiguous or silent as to whether they permit arbitration on a classwide or collective basis, presumptively only permit individual claims, unless the parties have affirmatively consented to arbitrate claims jointly, collectively, or for a class. As such, according to the Supreme Court's recent jurisprudence, arbitration should continue to serve as a potentially effective mechanism to limit employers' exposure to class or collective actions.

[1] *Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985, at *3 (S.D.N.Y. June 26, 2019).

[2] N.Y. C.P.L.R. § 7515 (McKinney); Alexander, Practice Commentary, McKinney's Cons Laws of NY, 2019 Electronic Update, Civil Practice Law and Rules, § 7515. The expanded statute was signed by the Governor on August 12, 2019 and became effective on October 11, 2019.

[3] CA LABOR 432.6 (d); CA GOVT § 12965; Cal. Dep't of Fair Employment and Housing, *Employees and job applicants are protected from bias* (last accessed Dec. 27, 2019), via https://www.dfeh.ca.gov/employment/.

[4] CA LABOR § 432.6; CA GOVT § 12953; CA LABOR § 432.5; CA LABOR § 433; CA PENAL § 19.

[5] *Chamber of Commerce of the United States of America v. Becerra*, No.: 2:19-at-01142 (E.D. Cal. filed Dec. 6, 2019).

[6] *See* Order Granting Leave to File Supplemental Briefing and Modifying Temporary Restraining Order, *U.S. Chamber of Commerce v. Becerra*, No. 2:19-cv-02456-KJM-DB, (E.D. Cal. Jan. 10, 2020).

[7] *See* IL ST CH 820 § 96/1-25 (b); NJ ST 10:5-12.7; MD LABOR & EMPLY § 3-715; VT ST T. 21 § 495h.

[8] VT ST T. 21 § 495h.

[9] NJ ST 10:5-12.10; NJ ST 10:5-12.11.

Legislative and Other Attempts to Limit Restrictive Covenant Agreements

By Christopher R. Dyess

Over the last several years, many states have sought to pass legislation limiting the enforceability of restrictive covenants. Despite those efforts, restrictive covenant agreements remain ubiquitous. A December 2019 report, based on a nationwide survey of hiring managers, found that between 36 million and 60 million out of the 129 million total private-sector employees in the United States have signed non-competition agreements. *See* A. Colvin & H. Shierholz, *Noncompete Agreements*, Economic Policy Institute, Dec. 10, 2019, available at https://www.epi.org/publication/noncompete-agreements/.The report also found that even in California, which has a well-known public policy against enforcement of non-competes except in limited circumstances, 45% of private sector businesses responding to the survey indicated that at least some of their workers are subject to non-competes.

In a continuation of a nationwide trend in restrictive covenant law, 2019 saw several states pass legislation restricting the enforceability of such covenants. Specifically, Maine, New Hampshire, Washington, Maryland and Rhode Island all passed restrictive covenant legislation in 2019. Many of these state laws impose an income threshold on enforceability, effectively banning non-competes for employees who make below a certain salary threshold. For example, Maine's new restrictive covenant law bans non-competes for employees earning wages at or below 400% of the federal poverty level (which comes out to $49,960 based on the current federal poverty level), and also requires employers to give employees at least three (3) business days to review and negotiate any non-compete agreement. The new Maryland law bans non-competes for employees who earn less than $15 per hour or $31,100 annually. Washington set a much higher threshold, banning non-competes for employees earning less than $100,000 and for independent contractors earning less than $250,000 per year. New Hampshire's new law bans non-competes for employees earning an hourly rate that is equal to or less than 200% of the federal minimum wage (*i.e.*, $14.50 per hour based on the current federal minimum wage), while Rhode Island's new law bans non-competes for employees earning at or below 250% of the federal poverty level (*i.e.*, $31,225).

In 2019, courts continued to interpret whether California law treats employee non-solicitation restrictions the same as non-competition restrictions – *i.e.*, as *per se* void and unenforceable (except in certain narrow circumstances) under Section 16600 of the California Business and Professions Code. A series of California cases in late 2018 and into 2019 held that employee non-solicitation provisions do fall within the purview of Section 16600, and thus, are presumptively void, subject to a few exceptions. *See*, *e.g.*, *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal. App. 5th 923, 930 (Ct. App. 2018); *Barker v. Insight Glob. LLC*, 2019 WL 176260, at *3 (N.D. Cal. Jan. 11, 2019); *WeRide Corp. v. Kun Huang*, 379 F. Supp. 3d 834, 851 (N.D. Cal. 2019). In a recent Delaware case interpreting California employee non-solicitation law, the court refused to honor a Delaware choice of law provision in an employment agreement with a California employee as it related to an employee non-solicitation restriction, finding that *AMN Healthcare* and its progeny dictate that such restrictions conflict with a fundamental policy of California. *See Nuvasive, Inc. v. Miles*, 2019 WL 4010814, at *4-7 (Del. Ch. Aug. 26, 2019) ("*NuVasive II*"). To date, the California Supreme Court has not weighed in on this issue. Thus, at least for now and pending any further developments in the case law, employers may continue to face challenges when seeking to enforce employee non-solicitation restrictions against California employees.

Employers should note that in an earlier ruling in the same Delaware litigation, the court held that the Delaware choice of law and forum selection clauses were enforceable with respect to the employment agreement's non-competition provision because of California Labor Code Section 925 ("Section 925"),

which allows for enforcement of out-of-state choice of law and forum selection provisions when the employee was represented by counsel in negotiating the agreement. *See NuVasive v. Miles*, 2018 WL 4677607, at *1 (Del. Ch. Sept. 28, 2018) ("*NuVasive I*"). The court based its subsequent decision in *Nuvasive II* on further development of the factual record, which led the court to conclude that the employee had *not* been represented by counsel in negotiation his employment agreement, and thus, that the represented employee exception under Section 925 should not apply. *See Nuvasive II*, 2019 WL 4010814, at *3. Thus, while California courts are not bound by the ruling of the Delaware court, *Nuvasive II* does not change the takeaway from *Nuvasive I* that the represented employee exception in Section 925 may provide a mechanism for employers to apply non-California law in restrictive covenant agreements with California employees who are represented by counsel in negotiating the agreement.

Legislative Efforts to Regulate Independent Contractor Classification

By Omar Abdel-Hamid

As discussed in our December 2019 *Employer Update*, California recently passed Assembly Bill 5 ("AB5"), which went into effect January 1, 2020. Following the April 2018 decision in *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903 (2018), in which the California Supreme Court first announced the "ABC Test" for worker classification, the California legislature codified and expanded the stricter ABC test in AB5 to cover employee classification under the state's wage and hour rules and Unemployment Insurance and Labor Codes. AB5 provides that a worker is generally presumed to be an employee unless the hiring entity can prove: (A) the worker is free from control and direction in the performance of the work, both under the terms of the contract and in fact, (B) the worker performs work that is outside the usual course of the hiring entity's business, *and* (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Although AB5 went into effect on January 1, 2020, various ongoing litigations will continue to determine the statute's contours. For example, Uber and Postmates filed suit on December 30, 2019 challenging AB5's constitutionality and alleging that it unfairly discriminates against workers and employers in the so called "gig economy." In yet another lawsuit, a federal judge ruled on January 9, 2020 that the ABC test does not apply to independent truck drivers since the Federal Aviation Administration Authorization Act, a federal statute governing trucking companies engaged in the transportation of goods, preempts AB5.

While AB5's language states that the ABC test will apply only prospectively for purposes of the Unemployment Insurance and Labor Codes, the statute affirmatively states that it "does not constitute a change in, but is declaratory of, existing law with regard to wage orders of the Industrial Welfare Commission and violations of the Labor Code relating to wage orders." Any claims involving businesses or professions falling with one of the exceptions specified under AB5, however, would still be assessed under the earlier, less restrictive classification test. The California Supreme Court is also set to determine whether *Dynamex*'s ruling applies retroactively to pending wage order disputes dating back to before the new test was established.

Several other states are also considering legislative enactments that would impact employers' ability to classify workers as independent contractors. After passing more limited worker classification laws in the 2018-2019 legislative session, New Jersey legislators are expecting to reintroduce legislation in the upcoming session adopting the ABC test, although legislators believe the test will be more lenient, albeit with fewer exceptions, than AB5. New York's proposed legislation would adopt the same ABC test as articulated in AB5, but the bill, Senate Bill 6699A, is currently still in the Senate Rules Committee. Legislators in Oregon and Wisconsin are expecting to reintroduce bills in 2020 seeking to implement the ABC test after worker classification legislation in both states failed to advance out of committee in 2019.

Developments in Overtime Requirements and Regulations

By Lauren E. Richards

On September 24, 2019, the U.S. Department of Labor ("DOL") announced its final rule to amend the overtime regulations under the Fair Labor Standards Act ("FLSA") for bona fide executive, administrative, professional, and highly compensated employees, also known as the FLSA "white collar" exemptions (the "Final Rule"). The Final Rule, effective on January 1, 2020, is the first significant change in the FLSA overtime salary thresholds since 2004.

As discussed in our March 2019 Employer Update, in 2016, the DOL issued a new rule increasing the salary threshold and making additional changes to the regulations (the "2016 Rule"). On November 22, 2016, the United States District Court for the Eastern District of Texas enjoined the 2016 Rule for "exceed[ing] [the DOL's] delegated authority and ignor[ing] Congress's intent by raising the minimum salary level such that it supplants the duties test." *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 530 (E.D. Tex. 2016).

On March 7, 2019, the DOL released a new proposal (the "2019 Proposed Rule") to raise the salary threshold to $679 per week (the equivalent of $35,308 annually), a significant increase from the then-current 2004 salary threshold of $455 per week (the equivalent of $23,660 annually), but much lower than the 2016 Rule's $913 per week (the equivalent of $47,476 annually). The 2019 Proposed Rule proposed a notice-and-comment rulemaking process every four years to revise the threshold, rather than the automatic updates under the 2016 Rule. Finally, the 2019 Proposed Rule would have increased the total annual compensation threshold under the "highly compensated employees" (HCE) exemption from $100,000 to $147,414. Neither the 2016 Rule nor the 2019 Proposed Rule made any changes to the standard duties test.

The Final Rule raises the salary threshold to $684 per week (the equivalent of $35,568 annually) and raises the total annual compensation required to meet the HCE exemption to $107,432 per year. The slight change to the minimum salary threshold results from the use of updated data at the time of the rule's promulgation, with the only difference being that the Final Rule did *not* project forward to January 2020 as had been contemplated in the 2019 Proposed Rule. The HCE exemption threshold in the Final Rule marks the 80th percentile of full-time salaried workers nationally, while the proposed threshold was targeted at the 90th percentile. The DOL received few comments addressing the HCE exemption, though some expressed concerns about the effort needed for employers to apply the standard duties test to employees who would fall below the proposed HCE threshold. The DOL therefore chose the 80th percentile to minimize administrative costs for employers. The Final Rule also permits employers to use nondiscretionary bonuses and incentive payments (including commissions) that are paid at least annually, to satisfy up to 10% of the salary threshold.

Employers who have not yet reassessed their employees' classifications in light of the Final Rule should do so. Employers also should prepare for more frequent increases to the salary thresholds, as the DOL intends to issue a proposal to update the thresholds every four years "unless the Secretary determines that economic or other factors warrant forestalling such an update." Employers also should remain cognizant of changing overtime salary thresholds at the state level. New York and California continue to impose more stringent requirements than the federal regulations, and other states have been moving in the same direction. For example, Washington's Department of Labor and Industries recently announced an increase to the minimum salary for exempt workers to approximately $83,356 by 2028, with an initial increase to $35,100 effective July 1, 2020 (acknowledging in its announcement that the federal threshold would be higher than the state threshold until 2021). Washington will also update its job duties test. Maine, as part of legislation to raise the state minimum wage, also raised the overtime exemption threshold to $36,000 per year, effective January 1, 2020. Other states, such as New Jersey and Colorado, are also evaluating increases to their states' overtime exemption thresholds.

Developments in Regulating Employee Biometric Data and Privacy Issues

By Omar Abdel-Hamid

As we move to an increasingly data driven world, more states are adopting legislation to regulate the collection and use of biometric data markers. Passed in 2008, Illinois' Biometric Information Privacy Act ("BIPA") was the first comprehensive state legislation to address the privacy and protection of biometric information, which the statute defines as a retina or iris scan, fingerprint, voiceprint, or scan of the hand or face. Under BIPA, companies collecting biometric information from employees must obtain written releases and inform employees in writing that their data is being collected or stored and indicate the time span and purpose for the collection. Employers also must develop a written policy establishing retention schedules and guidelines for permanently destroying data, are prohibited from selling or profiting off data, and must protect the stored data just as they store and protect other confidential and sensitive information.

A January 2019 decision from the Illinois Supreme Court held that companies could potentially face liability under BIPA even if the aggrieved individuals suffer no actual injury or adverse effect. This ruling prompted a surge in BIPA class actions. In *Rosenbach v. Six Flags Entm't Corp.*,[1] the plaintiffs alleged, on behalf of themselves and a putative class, that the defendant stored their fingerprints without informing them as to how the information would be used or stored, but claimed no actual injury or harm. The Illinois Supreme Court ruled that individuals "need not allege some actual injury or adverse effect, beyond violation of his or her rights under the Act, in order to qualify as an 'aggrieved' person[.]"[2] The Illinois Supreme Court has yet to determine whether a violation of BIPA without actual harm is sufficient for an *employee* to be an "aggrieved person," although several federal district court cases decided before *Rosenbach* have held that such employees have no standing to sue.[3]

Several other states followed Illinois' lead and passed legislation in 2019 regulating an employer's ability to store, use, or sell employee biometric data. Washington and Texas both already had biometric privacy laws in place similar to BIPA, although neither state's laws provide aggrieved employees with a private right of action. The California Consumer Privacy Act ("CCPA"), which went into effect on January 1, 2020, imposes notice obligations on businesses that collect personal information, including biometric data, requires that business provide individuals with information regarding how the data will be used, and requires that businesses offer individuals the ability to opt out and request deletion of all personal information. The CCPA definition of "consumer" includes employees and requires employers to protect employee personal information in the same manner as they would protect consumer personal information. However, Assembly Bill 25, passed on October 11, 2019, exempts employee data from the CCPA's requirements until 2021. In July 2019, New York adopted the Stop Hacks and Improve Electronic Data Security Act (the "Shield Act"), effective on October 23, 2019, and amended existing data breach notification laws to cover biometric data and requires businesses to "develop, implement, and maintain reasonable safeguards to protect the security, confidentiality and integrity of the private information." The Shield Act applies to "any person or business that owns . . . computerized data which includes private information," thus subjecting many businesses outside of New York to the new legislation's reach. The Shield Act also mandates that employers notify employees in the event of a data breach. The Shield Act provides until March 21, 2020 to establish required data protection programs, but the data breach notification requirements are operative as of the October 23, 2019 effective date. Massachusetts, Florida, and Arizona also all have pending legislation to enhance protections for biometric data.

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[1] 129 N.E.3d 1197 (Ill. 2019).

[2] *Id.* at 1207.

[3] *See, e.g.*, *Aguilar v. Rexnord LLC*, No. 17 CV 9019, 2018 WL 3239715 (N.D. Ill. July 3, 2018); *Goings v. UGN, Inc.*, No. 17-CV-9340, 2018 WL 2966970 (N.D. Ill. June 13, 2018).

2020 Supreme Court Term

By Sarah Legault

In 2020, the United States Supreme Court will decide the critical question of whether Title VII of the Civil Rights Act of 1964 ("Title VII"), and more specifically, Title VII's language protecting against "discrimination because of sex," prohibits discrimination based on sexual orientation and transgender identity in the trio of cases *Bostock v. Clayton County*, No. 17-1618; *Altitude Express, Inc. v. Zarda*, No. 17-1623; and *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, No. 18-107.

In the combined cases *Bostock* and *Zarda*, male employees claimed that their employers allegedly fired them because of their sexual orientation, *i.e.*, because they were attracted to men.[1] As such, in these cases, the Supreme Court will decide whether Title VII protects against discrimination based on sexual orientation. In *R.G. & G.R. Harris Funeral Homes Inc.*, R.G. & G.R. Harris Funeral Homes Inc. allegedly terminated the plaintiff's employment because she was transitioning from a male to a female, and would begin dressing as a woman in the workplace.[2] As such, the Supreme Court will determine in this case the related question of whether Title VII prohibits discrimination against transgender individuals. The United States Courts of Appeals are currently divided on the issue of whether Title VII prohibits discrimination based on sexual orientation and gender identity. The Sixth Circuit Court of Appeals in *R.G. & G.R. Harris Funeral Homes Inc.* held that Title VII does prohibit discrimination based on gender identity.[3] The Second Circuit Court of Appeals in *Zarda* similarly ruled that Title VII protects against discrimination based on sexual orientation.[4] However, the Eleventh Circuit Court of Appeals in *Bostock* reached the opposite conclusion, reaffirming the Circuit's earlier precedent in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), holding that Title VII does not cover sexual orientation.[5]

On October 8, 2019, the Supreme Court heard oral arguments in this trio of cases. In *Bostock* and *Zarda*, the parties argued whether the word "sex" in Title VII's language "because . . . of sex" includes sexual orientation.[6] The parties also argued whether sex and sexual orientation are indistinguishable as bases for discrimination, such that a court performing a Title VII analysis should inquire whether a man who dates men receives the same treatment as a woman who dates men, instead of inquiring whether a homosexual man receives the same treatment as a homosexual woman.[7] According to the employees, treating a man who wishes to date men differently than a woman who wishes to date men is inherently sex discrimination.[8] In *R.G. & G.R. Harris Funeral Homes Inc.*, the parties similarly argued whether sex and transgender status are separate bases for discrimination.[9] The employee contended that when the employer allegedly discriminated against the employee because of her transgender status, the employer effectively discriminated against her for failing to conform to (or alternatively, for contravening) the sex stereotypes associated with her biological sex and/or for changing sex.[10]

Roughly half of the states across the country currently do not have statutes prohibiting sexual orientation and gender identity discrimination.[11] Thus, the Supreme Court's rulings in this set of cases in the context of Title VII could have significant implications on employers operating in states that currently provide no protection against discrimination on these bases.

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[1] *Bostock v. Clayton Cty. Bd. of Commr's*, 723 Fed. App'x 964, 964 (11th Cir. 2018), *cert. granted sub nom. Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018), *cert. granted sub nom. Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019).

[2] *E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019).

[3] *E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 571-81.

[4] *Zarda v. Altitude Express, Inc.*, 883 F.3d at 108.

[5] *Bostock v. Clayton Cty. Bd. of Commr's*, 723 Fed. App'x at 964.

[6] 42 U.S.C. § 2000-e-2(a); *see*, *e.g.*, Transcript of Oral Argument, *Bostock v. Clayton Cty.*, No. 17-1618 & *Altitude Express, Inc. v. Zarda*, No. 17-1623 at 7:17-8:9 (Karlan) (Oct. 8, 2019) [hereinafter, "*Bostock* and *Zarda* Transcript"].

[7] *Bostock* and *Zarda* Transcript at 7:17-8:9 (Karlan); *id.* at 50:5-16 (Sotomayor).

[8] *Id.* at 7:17-8:9 (Karlan).

[9] Transcript of Oral Argument, *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107 at 3:17-4:15 (Cole) (Oct. 8, 2019); *id.* at 27:22-28:9 (Burch).

[10] *Id.* at 3:17-4:15 (Cole) (Oct. 8, 2019); *id.* at 27:22-28:9 (Burch).

[11] *See* Non-Discrimination Laws, MAP, http://lgbtmap.org/equality-maps/non_discrimination_laws (last updated Dec. 19, 2019).

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