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# Top 10 Employer Resolutions For 2018

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Everything old is new again. In 2017 employers watched as a variety of interpretations, guidance documents and definitions were rolled back to pre-Obama administration status. What happened in 2017, and what developments should employers be alert to in 2018? Here is a summary of some key rollbacks as well as some issues to watch in 2018.

**1. Prepare to Go Back to the Future**

**Overtime Exemptions**

The U.S. Department of Labor's final rule "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" isn't dead; it's merely delayed. The Department of Labor intends to issue a new proposed rule in 2018, likely with a smaller increase in the minimum threshold. Employers may want to brush off those 2016 workforce pay analyses and prepare to adjust the numbers.

**Joint Employer**

On Dec. 15, 2017, the National Labor Relations Board completely overruled Browning-Ferris in its Hy-Brand Industrial Contractors Ltd. decision and "return[ed] to the principles governing joint employer status that existed prior to that decision." As such, joint employer entities must actually exercise joint control over essential employment terms, and the control must be "direct and immediate"; joint employer status will not result from control that is "limited and routine." Further, on Dec. 19, 2017, the NLRB asked the D.C. Circuit to remand Browning-Ferris to the NLRB for reconsideration in light of the Hy-Brand decision.

Relatedly, Labor Secretary Alexander Acosta withdrew two wage and hour administrator's interpretations (AI) (No. 2016-01, No. 2015-1) on joint employment and independent contractors, and the House of Representatives passed H.B. 3441. The bill, still pending, aims to amend the National Labor Relations Act and Fair Labor Standards Act to provide a "direct control" standard for joint employers.

**EEO-1 Report**

The U.S. Equal Employment Opportunity Commission revised its EEO-1 report in September 2016 to include W-2 data it hoped to use to help close the pay gap. In August 2017, the federal Office of Management and Budget halted the new reporting requirement, however, due to concerns that the report would not comport with the Paperwork Reduction Act. Employers who are required to file an EEO-1 should ensure that they file all necessary information by the March 31, 2018 deadline.

**2. Review and Update Policies Related to Discrimination**

On Dec. 21, 2017, the Eighth Circuit again held that Title VII of the Civil Rights Act does not protect against sexual orientation discrimination. The Eleventh Circuit takes the same position. On Dec. 11, 2017, the U.S. Supreme Court denied a writ of certiorari to hear the Eleventh Circuit case and decide whether Title VII's "because of ... sex" encompasses discrimination based on an individual's sexual orientation. The Seventh and Sixth Circuits, however, agree with the EEOC that sex discrimination under Title VII includes sexual orientation and gender identity. The circuit split on the issue will remain and potentially widen in light of the Oct. 4, 2017, U.S. Department of Justice announcement that Title VII "does not prohibit discrimination based on gender identity per se, including transgender status." The DOJ further stated that it "will take that position in all pending and future matters."

Employers should be aware of state and local laws that protect against discrimination based on gender identity and sexual orientation, and be sure that their policies and procedures are compliant.

**3. Note Significant Changes From the NRLB's GC**

In a Dec. 1, 2017, memorandum, the new General Counsel for the NLRB, Peter B. Robb, rescinded the 2017 general counsel memo that concluded that university teaching and research assistants, and scholarship athletes were all employees for the purposes of organizing unions and for examining unfair labor practices. Robb also rescinded the 2015 general counsel memo that wreaked havoc on employee handbooks and specific policies, such as camera and recording policies, and use of company logos. The Dec. 1 memo also scrubbed several initiatives that were in effect, including one seeking to extend the Purple Communications decision from email to other electronic systems. Cases involving any of these issues, among others, are to be brought to the Division of Advice for "appropriate guidance on how to present the issue to the Board."

Robb clarified that existent law would continue to control in cases that have already been fully briefed to the board "to avoid delay," and board decisions related to the various issues continue to control for the time being.

**4. Review and Update Sexual Harassment Policies and Procedures**

Employers should heed the national call for renewed attention to sexual harassment in the workplace. A bill — Ending Forced Arbitration of Sexual Harassment Act of 2017 — was recently introduced in Congress and purports to exclude sexual harassment claims from employee arbitration agreements. The new tax law, discussed below, also includes a provision related to sexual harassment settlements.

Employers should resolve to examine their current policies and practices related to sexual harassment at all levels of their company and consider a fresh approach. Outside counsel can be an important resource for insight into new ways to address sexual harassment prevention and training.

**5. Be Aware of Biometrics Laws and Growing Litigation**

Employers who use biometric data should be aware of the growing litigation — often purported class actions — surrounding the collection, storage and use of employees' biometric data. Biometric data includes fingerprints, voiceprints, retina or iris scans, and facial geometry, though specific laws may provide different definitions. The collection, use, storage and protection of this data is particularly important because the data, if compromised or stolen, cannot be changed.

Recently, a number of cases were filed in Illinois against employers in a variety of industries alleging violations of the Illinois Biometrics Information Privacy Act. Most often, the allegations stem from timekeeping systems that use fingerprint identification coupled with an alleged lack of proper consent by the employees. Alaska, New Hampshire and Washington have also proposed legislation governing the use of employee biometrics and will likely be joined by other states.

Employers who use employee biometrics should be aware of local laws and should consider having a written policy that complies with applicable law(s). Companies may also want to ascertain whether they have insurance to cover hacking, theft or mishandling of employee biometrics.

**6. Prepare for Possible Changes to Employee Arbitration Agreements**

The U.S. Supreme Court has yet to issue its decision on whether class action waivers in employee arbitration agreements violate the NLRA. While the DOL changed its position in June, siding with employers in favor of waivers, the NLRB remained against such waivers when it argued the case to the U.S. Supreme Court in early October (under the direction of prior General Counsel Richard Griffin). A decision by the high court that class action waivers violate the NLRA could necessitate revisions to employee agreements.

Further, as mentioned above, the proposed Ending Forced Arbitration of Sexual Harassment Act of 2017 could create a carve-out in arbitration agreements for sexual harassment claims. Employers should be aware of the act's progress, and how it may affect their employee arbitration agreements.

**7. Be On The Lookout: High Court's Dodd-Frank Retaliation Decision**

The U.S. Supreme Court heard oral arguments for Digital Realty Trust Inc. v. Paul Somers in November and will decide whether the anti-retaliation provision for "whistle-blowers" in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 protects individuals who have internally reported alleged misconduct but not reported to the U.S. Securities and Exchange Commission.

The Ninth Circuit recently joined the Second Circuit in adopting the expansive position of the 2015 SEC guidance. The SEC stated that "for purposes of the employment retaliation protections provided by Section 21F of the" SEC, an employee can be considered a whistleblower for reporting potential securities law violations either to the SEC or internally. The Fifth Circuit's 2013 decision stands in contrast, and the U.S. Supreme Court's decision should resolve the split and clarify for employers whether an employee is protected for raising issues internally.

**8. Review and Revise Wellness Program Incentives**

On Dec. 20, 2017, the U.S. District Court for the District of Columbia vacated the EEOC's rules permitting wellness program incentives of up to 30 percent, effective Jan. 1, 2019. The decision stemmed from

the AARP's lawsuit against the EEOC, in which it objected to the sizable incentives awarded in exchange for employees' sensitive medical and genetic information, and equal penalties if the employee declined to provide such information. The AARP argued that the incentives/penalties were so large that turning over the information could not truly be "voluntary" (in accordance with the Americans with Disability Act and the Genetic Information Nondisclosure Act). The EEOC was ordered to promulgate a new rule, if any, by the end of August 2018. Employers who revised their wellness plans for 2018 may have to revise them again for 2019.

**9. Be Aware of Changes to Paid Leave Laws and Incentives**

Seven states (Arizona, California, Connecticut, Massachusetts, Oregon, Rhode Island, Vermont and Washington,) and Washington, D.C., have passed laws requiring employers to provide paid sick leave for their employees. Washington's Paid Sick Leave Act and Rhode Island's Health and Safe Families and Workplaces Act take effect in 2018. Employers with employees in these locations should ensure that policies and pay practices are compliant.

While no federal law requires employers to provide paid sick leave, the new tax law may provide an incentive for employers to offer at least partial pay during Family and Medical Leave Act-qualifying leave, as discussed below.

**10. Understand How the New Tax Laws Could Affect Your Company**

The Tax Cuts and Jobs Act (TCJA), passed in December 2017, included provisions that could affect employers.

For example, Section 13307 of the TCJA, "Denial of Deduction for Settlements Subject to Nondisclosure Agreements Paid in Connection with Sexual Harassment or Sexual Abuse" amends Section 162 of the tax code and does not allow companies to take a deduction for settlements, payments or attorneys' fees related to sexual harassment or sexual abuse if the settlement or payment is subject to a nondisclosure agreement. When considering such a settlement or payment, employers — together with their counsel and tax advisers — should decide whether including a nondisclosure provision in a settlement outweighs the benefits of a tax deduction.

The TCJA further provides a tax credit to eligible employers who offer paid leave under the Family and Medical Leave Act. Employers are not required to offer paid leave, but if they offer at least a percentage of the employee's pay during leave, and meet certain other requirements, they may be eligible for a tax credit.

Further, the TCJA repealed the individual insurance mandate in the Affordable Care Act (ACA) but left intact the employer mandate and the "Cadillac Tax" scheduled to take effect in 2020. Employers should continue to comply with these sections of the ACA and monitor the law for changes.

Discussion of the TCJA is intended to alert employers to changes in the law as they pertain to employment law issues, and not as tax advice. Employers are encouraged to seek guidance and advice from their tax professionals.

**Conclusion**

Employers should not be surprised by feelings of déjà vu. Instead, resolve to be ever vigilant to many

changes and challenges in 2018. Protect your company and its employees with a careful review of your policies and procedures, and follow up with training that effectively engages and educates your workforce.

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