

## Top 10 Employer Resolutions For 2019

By **Allegra Lawrence-Hardy and Bonnie Burke** (January 8, 2019, 2:06 PM EST)

Happy New Year, and best wishes for a year that answers many of the pending questions in employment law. As we continue to prepare for 2019, resolve to stay abreast of these top 10 employment law issues.

### 1. Prepare to Update Salary Thresholds for “White Collar Exemptions” Under the FLSA

The U.S. Department of Labor has indicated that a new proposed rule for "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" under the Fair Labor Standards Act is expected in March. The increase in the minimum threshold should be smaller than the one proposed in 2016 and, if the September listening session with the DOL is any indication, the current annual threshold will likely increase from \$23,660 to approximately \$30,000 (as opposed to the \$47,476 threshold proposed in 2016).

Employers should brush off those 2016 workforce pay analyses and prepare to adjust the numbers an analysis in preparation for the new rule.

### 2. Review Pay Policies for Compliance With the Equal Pay Act

A petition for certiorari pending before the U.S. Supreme Court asks whether an employer can use salary history to justify pay gaps between genders. *Rizo v. Yovino* appeals from a decision of the U.S. Court of Appeals for the Ninth Circuit that held that “prior salary alone or in combination with other factors cannot justify a wage differential.”<sup>[1]</sup> Plaintiff Aileen Rizo was a middle school math teacher in Arizona before the Fresno County School District hired her as a math consultant. The school district considered her prior salary in Arizona as well as her education and experience when determining where to start her pay with the school district. Rizo later learned that her male counterparts were paid more than her for doing the same job.

Rizo appealed from a grant of summary judgment for the defendant. The Ninth Circuit held that prior salary is not a “factor other than sex” — an exception to pay differentials in the Equal Pay Act — because the prior salary could have been based on sex. Concurring decisions by three judges, however, did not necessarily agree that prior salary could never be a permissible factor. This decision created a split with the Seventh and Eighth Circuits, both of which allow employers to rely on prior salary with



Allegra Lawrence-Hardy



Bonnie Burke

other factors, or alone. Four other Circuits — the Second, Sixth, Tenth and Eleventh — may allow the use of prior salary in conjunction with other factors.

While waiting for the Supreme Court to decide whether it will hear the matter, employers may want to examine their pay policies to be clear about how pay is determined, and on what basis and with what methodologies it provides for increases in pay to ensure compliance with the various jurisdictions and in preparation for a decision from the court.

### **3. Be Aware of Your Company's Position as a Potential Joint Employer**

Last year ended with the National Labor Relations Board's short-lived Hy-Brand Industrial Contractors Ltd. decision. The Hy-Brand decision brought back the previous standard for determining joint employer status, looking at whether the entities had and exercised control over the putative joint employees. A new proposed rule, however, may do what the Hy-Brand decision could not do for long — change the test for determining whether an entity is a joint employer.

The test would predominantly affect unionized workforces at present, but since the DOL was looking to the test to determine joint employer status under the FLSA, all large employers should keep the test on their radar. Large employers should also be aware that the DOL's notice of proposed rule-making, which was expected in December 2018, could be released shortly. The proposed changes to its regulations concerning joint employment under the FLSA are intended to update and clarify the 60-year-old legislation.

### **4. Review and Update Policies Related to Discrimination**

District courts across the country have grappled with whether Title VII's protection against discrimination on the basis of sex also protects employees on the basis of sexual orientation or transgender status. The dispute is now before the U.S. Supreme Court. While the market has already corrected this issue for many, with employers adopting policies affording broad protections for their employees, employers should continue to monitor the progress of these cases as well as state and local laws. Employers with employees in multiple jurisdictions may want to ensure that their company policies comply with the law or rule of the jurisdiction providing the most comprehensive protections.

Employers should further resolve to look at all policies — benefits, leave time and compensation — to ensure total compliance with anti-discrimination laws. Be aware that advertising job openings on social media platforms could also violate anti-discrimination laws where the platform allows advertisements to exclude certain groups or target groups based on age, sex, demographics, interests or behaviors of the registered users.

### **5. Plan for Changes to Your Employee Health Insurance and Wellness**

The future of the Affordable Care Act is uncertain. In its Dec. 14, 2018 decision, the United States District Court for the Northern District of Texas declared the individual mandate, 26 U.S.C. § 5000A(a), to be unconstitutional. The court further found that the individual mandate is essential to the other provisions of the ACA and cannot be severed from the act, making the entire ACA unconstitutional.[2] On Dec. 31, 2018, the same district court issued a stay in the case on the remaining issues while the defendants appeal.[3]

What does this procedural posture mean for employers? For the time being, reporting deadlines have

not been altered. Since the appeals process will likely take considerable time, employers should not anticipate a change to the status quo in 2019. That said, employers should begin looking ahead to 2020. Comments to the notice of proposed rule-making related to the health reimbursement arrangements, or HRAs, closed on Dec. 28, 2018, and could go into effect in 2020. The new rule would allow employers to reimburse employees for more than just out-of-pocket medical expenses by allowing employers to fund HRAs that will allow employees to use the tax-preferred funds for health insurance premiums. Employers should begin to anticipate what a change to the ACA could look like for their employees and what steps it should consider.

Pursuant to the August 2017 order from the U.S. District Court for the District of Columbia, the U.S. Equal Employment Opportunity Commission's regulations that permitted incentives up to 30 percent are no longer in effect as of Jan. 1, 2019. The EEOC announced that it is likely to propose new regulations in June 2019. Employers wishing to implement wellness incentives may want to consult with counsel to create a plan that will integrate well with any necessary changes to the employer's health insurance program.

## **6. Review and Update Arbitration Agreements**

New decisions by the U.S. Supreme Court may affect the terms of the agreements companies use. In May 2018, the Supreme Court decided that class action waivers in employee arbitration agreements are enforceable under the Federal Arbitration Act and the National Labor Relations Act Section 7 does not provide otherwise.[4] In October 2018, the Supreme Court heard arguments in three other cases that could further affect employee arbitration agreements.

In *Lamps Plus Inc. v. Varela*, the Supreme Court was asked to consider what language is required in an arbitration agreement to authorize class arbitration specifically, whether the FAA forecloses a state law interpretation of general language commonly used in arbitration agreements authorizing class arbitration.[5]

In *New Prime Inc. v. Oliveira*, the Supreme Court was asked whether the applicability of the FAA's Section 1 exemption — relating to transportation workers — “is an arbitrability issue that must be resolved in arbitration pursuant to a valid delegation clause” and whether Section 1's “contract of employment” applies to independent contractors.[6]

Similarly, in *Henry Schein Inc. v. Archer & White Sales Inc.*, the Supreme Court was asked whether, under the FAA, a court can “decline to enforce an agreement delegating questions of arbitrability to an arbitrator if the court concludes that the claim of arbitrability is ‘wholly groundless.’”[7] The Supreme Court held on Jan. 8, 2019, that the FAA “does not contain a ‘wholly groundless exception’ and therefore ‘parties may agree to have an arbitrator decide not only the merits of a particular dispute, but also ‘gateway’ questions of ‘arbitrability,’ such as whether the parties agreed to arbitrate or whether their agreement covers a particular controversy.”[8] It further held that, “courts ‘should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.’”[9]

Employers with employee arbitration agreements will want to be aware of the Supreme Court's decisions and adjust their agreements as needed. To boost enforceability, employers will want to review the language used and the circumstances under which the agreements are intended to be used to be sure the agreements serve their intended purposes.

## **7. Review and Update Paid Sick Leave in Connection With New Laws**

Six more state and local sick leave laws passed in 2018, rendering sick leave policies a bit of a minefield for multijurisdictional employers. Not all of the sick leave laws require that an employer provide sick leave time if the employer does not already do so. Some of the laws address carry over of accrued but unused time, while others provide direction about notice, posting and record-keeping, or use of sick leave to care for family members.

Employers should review the state and local laws in the jurisdictions where they have employees and ensure that their policies comply with applicable laws. Some multijurisdictional employers may need to increase sick leave to match the most generous leave law with which the employer must comply. Further, where sick leave laws require that sick leave may be used to care for family members (or where the employer has such a policy) ensure that those policies contain appropriate gender-neutral language when referring to spouses. Review record-keeping practices and posted notices related to leave laws and be aware of any additional anti-retaliation language required by applicable state and local laws.

## **8. Review Noncompete Agreements**

Massachusetts's new Noncompetition Agreement Act took effect on Oct. 1, 2018. It requires employers to pay half of the employee's base salary, or other consideration that is mutually agreed upon, for the period the employee is barred from working for a competitor. Massachusetts law follows closely behind California.

Under California's Business & Professions Code, noncompete provisions between employers and employees will not likely be enforceable in California, regardless of choice-of-law clauses, if the employee performs work in California. While these two states have the most severe limitations on noncompete agreements, employers who require employees to sign noncompetes should be aware of the procedural and substantive requirements of the laws in the states where they have employees and be sure that the agreements clearly state the need for the agreement and the consideration offered in exchange. Companies that require employees to sign a noncompete agreement should consider a careful review of the terms of the agreement to ensure that it truly protects legitimate business interests and to confirm that such an agreement is still permissible in the jurisdiction(s) where their employees work.

## **9. Consider Employee Biometric Data in Plans for a Cybersecurity Breach**

Companies are increasingly worried about data breaches and have robust cybersecurity plans in place, but those plans sometimes neglect to take into account the extensive confidential data held by a company's human resources department. A 2018 survey determined that, by 2020, approximately 90 percent of employers will use employee biometrics in the workplace. When addressing how to minimize cyber risk, employers should consider whether measures that use, collect and store employee biometric data are worth the risk.

Presently, three states — Illinois, Texas and Washington — have laws protecting employee biometric data, such as fingerprints, retina scans, voiceprints, facial geometry and palm prints, to name a few. These biometrics are often used by employees to clock in and out of their workplaces or access sensitive information or areas within their workplaces. Illinois' law provides the most extensive protections and, in the last two years, the state saw an increase in litigation for the failure of companies to safeguard these biometrics. As the use of employee biometrics increases, more states will likely craft legislation to

protect the data.

Employers should carefully consider whether using biometric data — and losing it to a breach or other mishandling — is worth the risk and subsequent costs. Employers choosing to use the data should create policies to address the use, storage and disclosure of biometric data. Consider how the company will store, transmit and otherwise safeguard the data. Finally, check insurance policies to assess whether and to what extent the policies cover the use of biometric identifiers and whether any specific procedures or requirements must be in place for a claim stemming from the loss of employee biometric data.

## **10. Review FMLA Policies and Procedures**

On Aug. 28, 2018, the DOL released new opinion letters addressing eligibility for organ donors to use Family and Medical Leave Act leave time and the applicability of “no-fault” attendance policies or attendance policies with point systems as they are applied to the FMLA. Employers should consider reviewing their FMLA policies in light of these opinion letters and the increasing abuse of intermittent FMLA leave.

Companies often feel trapped by the law and the uncertainties surrounding it. Promulgating thorough policies and procedures, however, can help thwart abuse. Employers should consider policies that clearly explain how intermittent leave is calculated and how mandatory overtime, holidays and rotating schedules figure into the calculation. Consider how employees access company policies and procedures to ensure that employees know how and when to report leave, even when they are away from the office. Consider the method used to track FMLA leave, as opposed to other types of leave, to help stave off FMLA leave abuse. Review policies pertaining to recertification to ensure that the employer has the information it needs to confirm how often and for how long the employee will need intermittent leave. Be sure that the employee is aware of his or her leave limitations as well.

Be aware of other company policies that work hand-in-hand with FMLA leave, such as a fraud/dishonesty policy, attendance policy and any policy against outside employment. Employers who have not reviewed and updated their policies and procedures recently should consult with their counsel to ensure that all policies and procedures comply with any recent case law, and provide employers with protection against abuse. Note that in September the DOL released updated FMLA forms and certification notices. Employers should be sure to use the updated forms, which are available on the DOL’s website.

## **Conclusion**

Many employers will have legal developments on their minds in 2019. While waiting for answers to pending petitions and notices of new regulations and rules, employers should resolve to be alert to these 10 issues and prepare to make the necessary changes to their policies and procedures. As always, follow up your policy changes with training that effectively engages and educates your workforce, and you should not hesitate to engage counsel to help you along the way.

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*Allegra Lawrence-Hardy is a founding partner and Bonnie Burke is an attorney at Lawrence & Bundy LLC.*

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[1] 887 F.3d 453, 456 (9th Cir. 2018) petition for cert. filed, \_ U.S.\_ (Sept. 4, 2018) (No. 18-272).

[2] Texas v. United States, 4:18-CV-00167-O, 2018 WL 6589412 (N.D. Tex. Dec. 14, 2018).

[3] Texas v. United States, 4:18-CV-00167-O, 2018 WL 6844173 (N.D. Tex. Dec. 30, 2018).

[4] See Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

[5] 138 S. Ct. 1697 (2018).

[6] 138 S. Ct. 1164 (2018).

[7] 138 S. Ct. 2678 (2018).

[8] 2019 WL 122164, 586 U.S. \_ (Jan. 8, 2019).

[9] Id.