WORKING WISE – VOLUME 3

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A monthly snapshot of U.S. labor and employment law developments, and why they matter.

1. CALIFORNIA LABOR LAW EXTENDS WAGE AND BENEFIT PROTECTIONS TO STATE'S GIG ECONOMY WORKERS

Workers in California's "gig" economy – comprised of temporary positions, short-term engagements and independent contractors (think popular ride sharing and delivery services) – may enjoy expanded wage and benefit protections come 2020 thanks to AB 5, a labor bill signed into law on September 18, 2019. Here are the high-level highlights:

- *Reclassification*: AB 5 applies a strict test to determine whether a worker is an employee or an independent contractor.
- *Benefits*: If the worker qualifies as an employee, s/he will be entitled to benefits and protections like minimum wage, overtime and paid leave.
- *Coverage/exemptions*: The law covers a wide range of industries (including health care, media, trucking and transportation) but exempts some 50 others (namely licensed insurance brokers, doctors, lawyers, architects, engineers, veterinarians, accountants, real estate agents, cosmetologists, and fishermen). Other groups are still trying to make their way into the latter group.
- *Injunctive Relief*: AB 5 authorizes the attorney general and some municipal attorneys to bring lawsuits to compel the reclassification of independent contractors as employees. So, basically, the law adds another set of potential plaintiffs (aside from the employees themselves), but ones that likely will not be as amenable to settling without the reclassification.

The law takes effect on January 1, 2020.

Why It's Important: Challenges to worker classifications have long been a source of potential liability for employers, regardless of where they do business. While the true impact of AB 5 is yet unclear (will it put the "gig" economy on its ear?), the law provides another reason why California employers should review those classifications and adjust them as appropriate. While the law applies only to California employers, look for other states to follow California's lead and pass similar legislation.

2. NEW YORK CITY EXPANDS PROTECTIONS FOR FREELANCERS AND INDEPENDENT CONTRACTORS

Further solidifying its reputation as being at the forefront of expanding worker protections, New York City recently passed a new law extending the City's Human Rights Law to freelancers and independent contractors, groups that comprise a significant portion of the City's workforce. The amendment does two important things: (i) it allows freelancers and independent contractors to file complaints of discrimination with the New York City Commission

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on Human Rights, and (ii) it expands coverage of the Human Rights Law to businesses employing or engaging a total of four or more employees or independent contractors.

Mayor Bill de Blasio is expected to sign the amendment into law shortly and it will take effect in early 2020.

Why It's Important: Employers doing business in New York City take note—under the new law, you may now be subject to the City's Human Rights Law (and/or be subject to claims from a group of individuals who, previously, did not have standing under the Law) and may see an uptick in discrimination complaints, as the amendment expands the group of potential filers.

3. EXEMPT TO NON-EXEMPT? DOL FINALLY RELEASES FINAL OVERTIME RULE

The DOL's final overtime rule is here. Announced on September 24, 2019 and set to take effect on January 1, 2020, the rule does the following:

- *Makes approximately 1.3 million more workers eligible for overtime pay*—to be exempt under the new rule, "white collar" employees (executive, administrative and professional employees) must now make $684 per week ($35,568 annually), up from $455 per week.
- *Changes total annual compensation requirements for "highly compensated employees*"—currently, $100,000 per year and, under the new rule, $107,432 per year.
- *Allows employers to use nondiscretionary bonuses and incentive payments to satisfy up to 10% of the standard salary level*—this includes commissions and, according the DOL, was included in recognition of evolving pay practices.

Why It's Important: The DOL's new rule is one of the Department's most anticipated changes, and one that has been almost 4 years in the making — stemming back to the Obama administration. Because wage and hour litigation and disputes remain a significant source of potential exposure, U.S. employers should take note of the new rule and take immediate steps towards compliance. Employers should also be aware of salary thresholds applicable to state law exemptions—California and New York already impose higher thresholds to meet their exemptions and other states, namely Washington and Pennsylvania, are also considering similar measures.

4. NLRB ISSUES TWO PRO-EMPLOYER DECISIONS

The National Labor Relations Board (NLRB) continued its trend of employer-friendly decisions, issuing two more in September:

Take a look at [the CBA], and then make a change: It's now easier for employers to make unilateral changes (i.e., changes without further bargaining with the union). The NLRB abandoned the "clear and unmistakable waiver" standard – one that it had applied for years and under which an employer would be found to violate the NLRA unless the collective bargaining agreement unequivocally and specifically referred to the type of employer action at issue – in favor of the more relaxed "contract coverage" standard – under which the NLRB will examine the plain language of the CBA to determine whether the change made by the employer was "within the compass or scope of contractual language granting the employer the right to act unilaterally." It is likely that the NLRB's shift will favor employers seeking to apply more "general" contract language, including a broad management rights clause.

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Micro-Units No More?: A second NLRB decision clarified its prior holding in 2017's *PCC Structurals, Inc*. decision, and took aim at the so-called "micro-unit" strategy, under which a union targets smaller subsets of a larger workforce to win a union vote. According to the NLRB, a union can only employ this strategy under certain, limited conditions. The September decision rolls out a three-part test examining: (1) whether employees in the proposed unit share an internal community of interest; (2) whether the proposed unit has interests that are sufficiently distinct from excluded employees; and (3) whether industry-specific considerations affect the unit determination.

Why It's Important: The Board's prior, "strict construction" approach to interpreting CBAs relative to refusal to bargain/unilateral change cases presented a significant challenge to employers, who will want to monitor the latest decisions under the new, more relaxed standard. Likewise, the Board has reaffirmed its intention to closely scrutinize micro units, establishing a three-part test examining, inter alia, whether there is an appropriate basis to exclude workers a union did not seek to include in the petitioned-for unit. While these decisions are positive and welcome developments for employers, their application and ultimate outcome still depend on the specific facts of the case and the language of the particular collective bargaining agreement. Employers should continue to ensure that CBAs are carefully and comprehensively drafted, while seeking out sound labor advice to address specific issues that may arise during the course of an agreement.

5. SCALIA CONFIRMED

President Trump's Labor Secretary nominee was confirmed on September 26, 2019. The confirmation of Eugene Scalia, the son of late Supreme Court Justice Antonin Scalia, has been hailed as a significant victory for the business community. While it is anticipated that Scalia's leadership of the Department will result in employer-friendly policy decisions, Scalia took a measured, even-handed approach on September 19th when articulating a mission statement for the Department before the Senate Health, Education, Labor and Pensions Committee, explaining that the Department is tasked with:

"Enforcing the worker protections enacted by Congress; offering programs that help prepare Americans for a lifetime of productive work, while also helping supply the skilled workforce needed by American businesses; and providing support to workers who've fallen on hard times, whether through loss of work, loss of retirement benefits, or work-related illness or injury."

Why It's Important: As discussed in a prior edition of Working Wise, employers are hoping that Scalia's management-side background will bring balance back to labor policies adopted during the Obama administration. With Senate Minority Leader Chuck Schumer calling the nomination "a disgrace," employers can anticipate continued - and perhaps amplified - friction between lawmakers and the administration.

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