WORKING WISE - VOLUME 7

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Labor, Employment and Workplace Safety Alert

1. GENDER PARITY LAWS FOR CORPORATE BOARDS: THE START OF A TREND?

Improving the representation of women on corporate boards has been top of mind for state legislators in recent years, with one state mandating a specific number of women-directors and others imposing corporate reporting requirements relating to board composition.

California blazed the trail in this area in 2018 with SB 826. That law requires public companies with principal executive offices located in the state to have at least one woman on their corporate board by the end of 2019 (either by adding a seat or replacing an existing director) and either two or three by the end of 2021, depending on the total number of directors (one on boards that have four members or less, two for boards of five, and three for boards of six or more). Employers face hefty fines, $100,000 for a first violation and $300,000 for subsequent violations, for non-compliance. The law is being challenged in court as a violation of the California Constitution's prohibition against sex-based classifications, but remains in effect.

New Jersey and Michigan have followed California's lead, introducing similar bills that are still making their way through the legislative process.

Other states (namely Maryland (HB 1116/SB 911), Illinois (HB 3394), and, most recently New York (A 6330/S 4278)) have taken a softer approach to the issue, requiring covered corporations to report annually the number of women board members, but stopping short of mandating a certain board composition.

Why It's Important: Employers domiciled or doing business in California, Maryland, Illinois, and New York should familiarize themselves with the state-specific requirements in this area to ensure compliance. As part of this growing trend, we can expect that other states may follow suit, passing laws similar to those discussed above.

2. CALIFORNIA'S ANTI-ARBITRATION LAW IS DELAYED

California makes our update twice this month.

First, we've been following California's landmark anti-arbitration law (AB 51) in a number of prior posts found here. As we last reported here, trade associations posed a challenge to enforcement of the law, arguing that it was preempted by the Federal Arbitration Act, a federal law that courts have consistently interpreted to favor the use of arbitration.

The law was to take effect on January 1, 2020, but implementation was delayed as a California court agreed to stay the law's effective date. According to the court, the plaintiffs' pursuit of an injunction:

"rais[ed] serious questions going to the merits and showing that the balance of hardship tips decidedly in their favor. Plaintiffs also have shown a likelihood of irreparable injury and that a restraining order is in the public

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interest. Specifically, plaintiffs have raised serious questions regarding whether the challenged statute is preempted by the Federal Arbitration Act as construed by the United States Supreme Court. Plaintiffs' argument that allowing the statute to take effect even briefly, if it is preempted, will cause disruption in the making of employment contracts also is persuasive…."

The court heard oral argument on the plaintiff's motion for preliminary injunction on January 10, 2020, ultimately issuing an order on February 7th granting the preliminary injunction blocking AB 51 from becoming effective.

Why It's Important: As we've discussed, if AB 51 ultimately survives this legal challenge, it would remove an oft-used option for employers to utilize mandatory arbitration agreements for employment-based claims. We'll continue to follow this developing story with potentially far-reaching implications for employers doing business in California.

3. CALIFORNIA'S GIG ECONOMY LAW UNDER ATTACK

Our next California update relates to AB 5, California's ground-breaking labor bill that, among other things, takes aim at the state's "gig" economy and extends wage and benefit protections to workers in that space and other industries; see here for our prior post. The law took effect on January 1, 2020 and a mere one day later, was met with a proposed ballot measure that would overturn the law as it relates to app-based transportation providers and delivery drivers. The proposed measure would:

- establish different criteria to determine whether app-based transportation providers and delivery drivers are employees or independent contractors, a distinction which determines whether individuals are entitled to certain state law protections (namely minimum wage, overtime, unemployment insurance, and workers' compensation); and
- require companies employing independent contractor drivers to provide alternative benefits, including minimum compensation, health care subsidies, vehicle insurance, safety training, and sexual harassment policies.

Supporters must collect 625,000 signatures to place the measure on the Fall 2020 ballot.

Why It's Important: The true effect of AB 5 remains to be seen and, as evidenced by the California Attorney General's proposed ballot measure, its scope may be significantly modified. Nevertheless, California employers relying on an independent contractor model should consult with experienced counsel to evaluate their model and any related exposure.

4. CLEANING HOUSE: EEOC RETRACTS ANTI-ARBITRATION POLICY STATEMENT

The EEOC recently rescinded its 22-year old policy statement disfavoring mandatory arbitration agreements between employees and employers as a condition of employment.

The EEOC adopted the policy in 1997 citing a number of concerns with the arbitration process, namely a perceived lack of public accountability for the employer by being permitted to arbitrate employment disputes, few (or no) opportunities for judicial review, and perceived structural biases inherent in the arbitral forum. Since that time, however, the US Supreme Court has issued numerous decisions endorsing the use of arbitration

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agreements both in the employment context and generally. Based on these decisions, the EEOC concluded that the policy statement did not reflect current law and should not be relied upon by EEOC staff in investigations or litigation.

Why It's Important: The US Supreme Court has long and repeatedly found mandatory arbitration agreements in employment and other disputes enforceable. The policy statement rescission brings the EEOC in line with that well-established case law and approach. Practically, however, the retraction may have little effect, as employees are still able to file a charge of discrimination with the EEOC notwithstanding a mandatory arbitration agreement. Moreover, the EEOC made clear that the retraction will not prevent the EEOC from challenging a specific arbitration agreement that it considers unenforceable.

5. NEW YORK EMPLOYERS TAKE NOTE: STATE JUMPS ON THE SALARY HISTORY BAN BANDWAGON

On January 6, 2020, New York became the latest state to prohibit inquiries into the salary history of an applicant or current employee. Here are the high-level highlights of the New York ban:

- The law applies to all public and private employers within New York state and protects both applicants and employees seeking employment, whether full-time, part-time or seasonal. Independent contractors, freelancers, and other contract workers are not covered by the ban, unless they work through an employment agency.
- The law broadly prohibits New York employers from seeking, requesting, or requiring wage or salary history from applicants or current employees or refusing to interview, hire, promote, or employ an applicant or employee who does not provide salary history. Likewise, retaliation for filing a complaint alleging a violation of the law is specifically prohibited.

The law does not prohibit an applicant from voluntarily disclosing his or her prior salary if unprompted, nor does it prevent an employer from requesting an applicant's salary expectations.

New York joins a growing number of states (currently Alabama, California, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New Jersey, Oregon, Washington, and Vermont) that already have similar laws on the books. Likewise, a growing number of municipalities (such as New York City and Philadelphia) have also implemented their own bans.

Why It's Important: New York employers should ensure that their policies, job applications, and other documents used in the hiring process comply with the state's new law. As these bans are becoming more and more widespread, employers with operations across multiple jurisdictions may also want to evaluate their hiring processes, generally, to ensure current and future compliance.

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