WORKING WISE – VOLUME 4

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U.S. Labor, Employment and Workplace Safety Alert

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1. SUPREME COURT TO DECIDE WHETHER TITLE VII'S PROTECTIONS EXTEND TO LGBTQ WORKERS

Many readers are aware of Title VII's prohibition on discrimination in the workplace "because of… sex." But does "sex" include an employee's sexual orientation or gender status/identity? On October 9, 2019, the United States Supreme Court heard lengthy and historic oral argument on that very question in a pair of closely watched cases that could reshape federal discrimination law. Two of the cases were brought by gay men and the other brought by a transgender woman, all of whom alleged that they were fired on account of their sexual orientation or gender status/identity. A decision is expected by the end of June 2020.

Why It's Important: The legal landscape relating to protection of LGBTQ workers is complex and uncertain, wrought with circuit splits relating to whether Title VII prohibits discrimination based on sexual orientation and gender status, along with a patchwork of state and local laws extending such protections. The Supreme Court's decision in these cases will have far-reaching effects in this area, providing employers with clarity relative to the relationship between Title VII and LGBTQ employees.

2. MARYLAND BANS NONCOMPETE AGREEMENTS FOR LOW-WAGE WORKERS

On October 1, 2019, Maryland joined the growing list of states that have banned noncompete agreements for low-wage employees, defined under the Maryland law as those earning less than $15 per hour or less than $31,200 per year. Maryland employers are not wholly without protection, though, and can still prohibit employees – including lower wage earners within the scope of the new law – from using or taking "a client list or other proprietary client-related information."

Why It's Important: Noncompete bans for low-wage workers are a growing trend among states, as we previously reported, and vary significantly not only in terms of substance, but also applicable wage thresholds. Employers doing business in Maryland or any other state(s) that have enacted such a ban should ensure that they are in compliance, as well as explore steps they can take to protect proprietary and confidential information and trade secrets after the employment relationship has been terminated.

3. CALIFORNIA PROHIBITS MANDATORY EMPLOYEE ARBITRATION

California again makes our top stories in October with Assembly Bill 51, a new law banning employers from entering into mandatory arbitration agreements relative to claims arising under California's Fair Employment and Housing Act ("FEHA") and/or the California Labor Code. Here are the details:

- Employees can't be forced to arbitrate discrimination (or any other) claims under the FEHA or the California Labor Code.
- Employers can't use voluntary opt-out clauses to escape the law's reach.
- Employees can sue their employers for violation of the law, deemed an "unlawful employment practice," for which attorneys' fees are recoverable, creating a new basis of potential liability – and expanding potential costs – for employers.

The law is slated to take effect on January 1, 2020, although there are significant questions as to whether the law is preempted by the Federal Arbitration Act, notwithstanding an attempted carve-out.

Why It's Important: Employers have long relied on mandatory arbitration agreements for employment-based claims for a multitude of reasons, among them cost savings, efficiency, and confidentiality. Assembly Bill 51, however, would remove this option for employers, even if the employee voluntarily agrees to it. That said, it's anticipated that the new law will be challenged (and likely struck down) as preempted by the Federal Arbitration Act, which broadly upholds voluntary arbitration agreements—the Supreme Court has consistently struck down other state laws that interfere with arbitration, and it's possible that the Court will do the same here.

4. THE RISE AND REACH OF BIPA CLAIMS: IS YOUR COMPANY AT RISK?

Since 2015, a popular social media site has been litigating a putative class action alleging violations of the Illinois Biometric Information Privacy Act ("BIPA"). According to the plaintiffs in that case, the social media site's facial recognition and photo tagging feature – which allows users to recognize their friends from previously uploaded photographs and "tag" them in new ones – violates the statute's prohibition on the collection and use of face geometry and other biometric data without written releases from users. This past summer a class was certified and, in August 2019 and again in October 2019, the defendant social media site lost bids to have that ruling reversed. The defendant social media site indicated in a recent motion to stay proceedings that it intends to appeal these decisions to the United States Supreme Court.

Why It's Important: Claims alleging BIPA violations are on the rise, with more and more companies (regardless of industry) finding themselves on the receiving end of demand letters and formal complaints. BIPA has become a go-to for enterprising plaintiffs' attorneys for a few reasons—its requirements are stringent; it doesn't require a plaintiff to allege or prove any actual injury or damages (a technical violation is sufficient); it applies not only to biometric identifiers (retina or iris scans, fingerprints, voiceprints, or scans of hand or face geometry) but also to biometric information, which includes any information "based on" a biometric identifier if the information is used to identify an individual; it covers companies outside of Illinois that possess, collect, capture, purchase, receive

through trade, or otherwise obtain biometric identifiers or biometric information of employees and individuals in Illinois; and it allows courts to award "liquidated damages" of $1,000 per negligent violation or $5,000 for each intentional or reckless violation. Moreover, no courts have yet ruled on whether the collection of biometric information from one individual may constitute multiple technical violations of various subsections of the statute, warranting additional damages beyond $1,000 or $5,000. It's a good time for businesses both in and outside of Illinois who market, sell or provide services to consumers in the state to review existing BIPA compliance programs (or implement new ones) which, at a minimum, address the company's collection, use, and storage of biometric data; notices and consents; and storage, security, transmittal, and destruction of covered data.

5. AMENDMENTS TO MEXICO'S LABOR LAWS — COMPLIANCE CONSIDERATIONS FOR U.S. COMPANIES

Mexico recently amended its labor laws to be in compliance with the U.S.-Mexico-Canada Agreement ("USMCA"), NAFTA's successor under which Mexico agreed to reform those laws. In relevant part, the reforms: (1) ensure workers' rights to unionize; (2) prohibit employers from forcing workers to join or leave a union; and (3) bar employers from requiring workers to vote for a specific candidate in labor elections.

Why It's Important: Under the leadership of President Trump, the United States reached the USMCA with Mexico and Canada to benefit North American workers, farmers, ranchers, and businesses, and create more balanced, reciprocal trade, which supports high-paying jobs for Americans and grows the North American economy. U.S. companies with operations in Mexico should familiarize themselves with Mexico's labor law reforms and ensure compliance, both through policy and procedure reviews and training for Mexican HR departments and personnel.

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