2015

U.S. Employer Update: 2014 Year in Review and 2015 Challenges

Baker & McKenzie

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Abstract
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Newsletter

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› **To read our Labor & Employee Relations Year in Review, click here.**

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U.S. Employer Update

2014 Year in Review and 2015 Challenges

2014 was another busy year for employers. In this newsletter we identify and provide proactive tips to address the top developments that impact how employers will operate in the U.S. in 2015. We also summarize the top 2014 developments in international employment for our multinational clients. Finally, we preview pending federal legislation and cases on the U.S. Supreme Court docket for which employers should "stay tuned."

Top Five Developments That Will Impact How You Operate in 2015

1. Paid Sick Time Laws Sweep the Nation

Paid sick leave laws have gained momentum in 2014 nationwide. From 2006 to 2014, numerous states or localities passed paid sick leave laws, including San Francisco, Oakland, Seattle, Connecticut, and New York City. In 2014 alone, twelve states or localities passed paid sick leave laws, including California (State-wide), Oakland California, and Massachusetts. Some states have refused to endorse paid sick leave, adopting laws that prohibit local governments from establishing the right to paid sick leave, such as Florida, North Carolina, Arizona, and Pennsylvania. Because of efforts from grass-roots organizations, employers should expect numerous states and localities to address paid sick leave in the near future.

- More information regarding New York City's paid sick leave law can be found here.
- More information regarding California's paid sick leave law can be found here.

Perhaps the biggest challenge for multi-jurisdictional employers will be dealing with the laws' various differences. Many of the laws differ in key areas, such as which employees are covered, how much sick time employees accrue, what sick leave can be used for, and whether sick leave can carry over from year to year. For instance, covered employees in Connecticut accrue one hour of paid sick leave for every forty hours worked, while covered employees in California and Massachusetts accrue one hour of paid sick leave for every thirty hours worked. Accordingly, employers with locations in multiple jurisdictions with paid sick leave laws will have to craft separate sick leave policies for each location.

Moreover, some locations will be governed by multiple paid sick leave laws. For example, employers who already provide paid sick leave under San Francisco's ordinance, which was passed in 2006, will not necessarily be in compliance with

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California's paid sick leave law. These employers will need to consider separate or harmonized policies that comply with the applicable local ordinance and state law.

As an alternative, employers can adopt an ERISA plan that covers PTO and sick leave benefits, by following certain regulatory protocol under ERISA. When done correctly, this can allow employers to have one uniform nationwide policy and pre-empt these various state and local sick pay ordinances. Click here to read more on ERISA governed PTO and sick pay policies.

Action Item: Employers should continuously monitor whether any of the jurisdictions in which they operate have passed paid sick leave laws. Most paid sick leave laws are broader in use, carry-over, and accrual rights than common PTO policies. Given the differences in the laws, employers should review their policies, will likely need to broaden them in some way, and may need to craft separate sick leave policies, possibly for each location subject to a paid sick leave law.

2. "Ban the Box" Trends in the U.S.

"Ban-the-Box" laws are aimed at prohibiting "yes/no" check boxes on housing and employment applications asking about prior arrests or convictions. According to studies, 1 in 4 Americans has an arrest or conviction on their record. The ban-the-box movement is aimed at removing barriers for those individuals who have been rehabilitated. Ban-the-box laws have seen an increase in support across the United States, with several populous states and cities adopting laws that limit when and how employers may ask applicants or employees about prior arrests or convictions. These locations include Massachusetts, Buffalo New York, Seattle Washington, and San Francisco California. Employers who are caught unaware or do not comply with these laws risk exposure to fines and penalties and becoming a target for individual and class wide lawsuits.

Click here to read about the nationwide developments. Click here to read more about the San Francisco ordinance.

Action Item: All U.S. employers should revisit their application forms and background check processes, add new notices to job postings and solicitations, and be in compliance with new applicant notice and workplace posting requirements under the various "Ban the Box" laws in the U.S.

3. Telecommuting Held a Reasonable Accommodation by the Sixth Circuit

This spring, the Sixth Circuit held that a telecommuting arrangement could be a reasonable accommodation for an employee suffering from irritable bowel syndrome. The EEOC argued that the employee was qualified for the position with a telecommuting accommodation. The Federal appellate court held that the burden shifted to the employer to prove either that physical presence is an essential function of the position, or the telecommuting arrangement would create an undue hardship, and these issues were questions for a jury to determine. The Sixth Circuit sent the case back to the district court for trial of those issues.

Planning Tip: As technology develops and remote workers increase, employers should take note that telecommuting may be a reasonable

accommodation that must be offered to disabled employees. This case offers an interesting and thorough analysis as to whether a telecommuting arrangement could be an appropriate accommodation. The Federal appellate court heavily analyzed the specific facts of the employee's job and whether telecommuting could be an option. Employers are well advised to do the same and carefully assess whether requested telecommuting accommodations should be granted in particular cases.

4. EEOC Expands the Scope of the Pregnancy Discrimination Act

The Equal Employment Opportunity Commission (EEOC) issued new guidelines on pregnancy discrimination that afford greater protections to pregnant workers under the federal Pregnancy Disability Act. For example, if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the guidelines state that her employer must treat her in the same way as it treats any other temporarily disabled employee. This could mean that the employer may have to provide light duty, alternative work assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees. In addition, the guidelines stress that a pregnancy-related disability may be covered under the Americans with Disabilities Act (ADA), a proposition that some courts had rejected until recently. Under these guidelines, an employer would have to provide a reasonable accommodation to a woman who is disabled by pregnancy, absent undue hardship to the employer.

Many states and municipalities are taking matters into their own hands and have passed or are passing sweeping pregnancy accommodation legislation. Jurisdictions such as New Jersey, California, and New York City now require employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth. This could include anything from providing an employee with more frequent bathroom breaks to assisting her with non-manual labor. Other states and cities have proposed similar legislation as the accommodation wave continues to sweep the nation.

Action Item: Employers should investigate whether they reside in a jurisdiction with proposed or enacted pregnancy accommodation reforms. Regardless of where they do business, employers in the U.S. should examine their accommodation policies to ensure they are truly "pregnancy-blind" and do not run afoul of the PDA.

5. State/City Minimum Wage Increases

In the U.S., the movement to increase the minimum wage for hourly-paid workers is seeing results at the state and local levels. This year brought several increases to the State-wide and local minimum wages. Nationwide, on November 4, 2014, voters in four states and one city – Alaska, Arkansas, Nebraska, South Dakota, and San Francisco - approved ballot measures to gradually increase the minimum wage. Several U.S. cities have already passed minimum wage ordinances, including Chicago and Seattle. Michigan had already approved a state-wide minimum wage increase to $8.15 per hour, taking effect on September 1, 2014. Minnesota raised the State's minimum wage up to $9.50 per hour by 2016. California's state-wide minimum wage increased to $9.00 per hour this year, which included a corresponding increase in the minimum salary for exempt administrative, executive, professional, and computer software employees.

Meanwhile, five California cities, including Berkeley, San Francisco, San Jose, Oakland, and Richmond adopted or increased their city-wide minimum wages. The cities of Los Angeles and San Diego are also considering whether to raise the wage floor.

Action Item: Employers should continue to monitor developments at the state and local levels to ensure compliance with changing minimum wage laws. Many states have adopted increases which are scheduled to take effect later this year and throughout 2015.

Additional Developments

Wage and Hour

Supreme Court Resolves FICA Tax Treatment of Severance in Quality Stores Decision

Many U.S. employers have been following the *Quality Stores* case since 2012 when the Sixth Circuit held that FICA taxes did not apply to most severance payments. In the two years that have passed, many U.S. employers who had severance events filed FICA refund claims on the basis of the Sixth Circuit's decision in *Quality Stores*. On March 25, 2014, just weeks before another round of FICA refund claims was due to be filed, the U.S. Supreme Court issued its opinion holding that FICA taxes do apply to severance payments made by employers, leading to rejected FICA refund claims. Click here to read more.

U.S. Supreme Court Determines Employees Not Entitled to Compensation under FLSA for Time Passing Through Post-Shift Anti-Theft Screenings

In *Integrity Staffing Solutions Inc. v. Busk*, the U.S. Supreme Court held employees were not entitled to compensation under the FLSA for time spent passing through security check points after their shifts. In this case, two warehouse employees responsible for packaging and shipping products to customers filed a class action seeking compensation for time spent in mandatory, post-shift security screenings. In a unanimous decision reversing the Ninth Circuit, the Court stated that under the Portal-to-Portal Act, post-shift duties that are not integral and indispensable to the employee's principal activities are non-compensable under the FLSA. The Court found that the employer's requirement to be screened for security reasons after a shift was over was not integral to the duties of packaging and shipping products, and were more akin to waiting in line to receive pay checks after a shift had ended. The Court also rejected the Ninth Circuit's focus on whether the time spent was required by or a benefit to the employer, stating the FLSA uses a different standard for compensability, i.e., whether the activity is integral and indispensable to the work. The Court also rejected arguments out of hand that an employer had a duty under the FLSA to limit the time spent in such check points to a *de minimus* amount of time, stating that was a bargaining issue between the workers and the employer but does not make the time compensable under the FLSA.

Planning Tip: This is welcome news for employers and provides an employer-friendly standard for compensable post-shift duties under the FLSA such as anti-theft and security screenings. Pending claims around the country are now likely to be dismissed, and U.S. employers can now re-visit their compensation practices for post-shift duties using the Court's standard as a guidepost. Nationwide employers should take note of state law requirements for

compensability, however, as some states have their own labor laws that can require payment for any time spent on activities required by the employer, even if they are post-shift activities.

Supreme Court Decision Clarifies when Donning and Doffing Time is Compensable in Unionized Workforce Context

On January 27, 2014, in *Sandifer v. United States Steel Corp.*, the U.S. Supreme Court held that the Fair Labor Standards Act (FLSA) did not require a unionized employer to pay its workers for time spent donning and doffing protective gear. Interpreting Section 203(o) of the FLSA, which provides that a collective bargaining agreement ("CBA") can exclude from hours worked any time spent "changing clothes" at the beginning or end of each workday, the Court held that "changing clothes" included any time spent donning and doffing protective gear.

Relying on dictionaries from the time Section 203 was enacted, the Court stated that "clothes" refers to "items that are both designed and used to cover the body and are commonly regarded as articles of dress." Applying this definition, of the twelve clothing items presented to the Court, it held that three of them—safety glasses, earplugs, and a respirator—are not "clothes." But because the vast majority of the workers' donning and doffing time did not involve these non-clothes items, they could not be compensated for that time.

The decision's application is limited to union employers. The Supreme Court stated that if not for Section 203(o), which only applies when there is a CBA, the donning and doffing time would otherwise be compensable under the FLSA.

Action Item: Employers with non-unionized workforces should analyze their payment practices under donning and doffing rules that apply outside of Section 203(o). Generally, where employees are required to change clothes on the employer's premises (by law or by rules of the employer), donning and doffing time is considered "integral and indispensable" to their principal work activities, and is compensable. Employers should be aware that when donning and doffing time is compensable, travel time from the changing rooms to the work areas is also compensable. Employers with unionized workforces should consider excluding payment for donning and doffing time in collective bargaining negotiations.

ERISA Updates

ERISA litigation in 2014 was focused mostly on administration of 401(k) retirement plans. The Supreme Court decisions were a mixed bag for ERISA defense lawyers. In one case, the Supreme Court decided that a plan based statute of limitations provision could be enforced. In the second case, the Supreme Court decided that the judicially created "presumption of prudence" enjoyed by fiduciaries concerning investments in company stock had no basis in ERISA's statutory language.

Supreme Court Update – The ERISA Plan Sponsor Can Now Control The Game Clock

Those of us who are sports fans know that timekeepers can control the outcome of any football game. On December 16, 2013, the U.S. Supreme Court announced that an ERISA plan's own contractual limitations period for filing claims will be enforced unless the time period specified is "unreasonably short' or

'[where] a controlling statute' prevents the limitations provision from taking effect." In a case where an employee sought long-term disability ("LTD") plan benefits after the three year time limit set out in the LTD plan, writing for a unanimous court, Justice Clarence Thomas concluded: "Neither condition is met here." *Heimeshoff v. Hartford Life & Accident Insurance Co*., No. 12-729, 571 U.S. ___, 134 S. Ct. 604 (2013). The plan's own statute of limitations was enforced because the Supreme Court views ERISA plans as contractual arrangements:

> "The principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan. The plan, in short, is at the center of ERISA. [E]mployers have large leeway to design disability and other welfare plans as they see fit. And once a plan is established, the administrator's duty is to see that the plan is maintained pursuant to [that] written instrument. This focus on the written terms of the plan is the linchpin of a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place."

(Internal quotes and citations omitted.)

In determining that the limitations period at issue was not unreasonably short, the Supreme Court noted that applicable regulations indicate most claims should be resolved within a one-year time period. Here, the plan's administrative review process required more time than usual but still left Heimeshoff with approximately one year to file suit, which the justices found to be a "reasonable" period of time.

Planning Tip: ERISA plan sponsors should consider adopting plan-based statutes of limitations. For plan sponsors who decide to include a contractual limitations provision, the plan should define when a lawsuit must be filed and ensure the limitation is imposed in the plan, the summary plan description and any communications with the participant. While the U.S. Supreme Court's decision applies to claims for plan benefits under ERISA section 502(a)(1)(B), it does not apply to breach of fiduciary duty claims, for which ERISA provides the statute of limitations.

Supreme Court Update – The Day the ERISA Presumption of Prudence Died

Unlike the song "American Pie," we doubt if anyone will pen a song lamenting the passing of ERISA's presumption of prudence. In a unanimous decision in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. ____, 134 S.Ct. 2459 (2014) ("*Dudenhoeffer*"), the U.S. Supreme Court rejected the "presumption of prudence" afforded to ERISA Employee Stock Ownership Plan (ESOP) fiduciaries holding company stock. The Supreme Court ruled that ERISA "does not create a special presumption favoring ESOP fiduciaries. Rather, the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings." Slip Opinion at p. 8. The disappearance of the "presumption of prudence" means plaintiffs must plausibly allege imprudence by a plan fiduciary charged with investment authority. The Supreme Court opined that a successful complaint should allege an alternative action that the defendant fiduciary could have taken that would have been consistent with the securities laws and that a prudent fiduciary…. would not have viewed as more likely to harm the fund than help it." In doing so, the Supreme Court expressly embraced the "efficient market" theory of liability:

> In our view, where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible under a general rule, at least in the absence of special circumstances. Many investors take the view that "they have little hope of out performing the market in the long run based solely on their analysis of publicly available information," and accordingly they "'rely on the security's market price as an unbiased assessment of the security's value in light of all public information.'" *Halliburton v. Erica P. John Fund, Inc.*, ____ U.S. ____, ____ 2014 BL 172975 (2014) (slip op., at 11–12).
>
> *Id*. at p. 16.

ERISA plaintiffs' lawyers thus have a new hill to climb — framing ERISA fiduciary breach claims that comport with the insider trading restrictions contained in federal securities laws. The door was left open to plaintiffs, however, "A plaintiff could nonetheless plausibly allege imprudence on the basis of publicly available information by pointing to a special circumstance effecting the reliability of the market price as 'an unbiased assessment of the security's value in light of all public information.'" *Dudenhoeffer*, Slip Opinion at p. 10.

Action Item: To make ERISA plans safe from "special circumstance" claims, employers should consider removing insiders from any positions that administer, operate or control a pension plan holding company stock. A second alternative would be to appoint an independent fiduciary, who is not an insider, to be solely responsible for determining whether to retain employer stock in the pension plan. A third variation to lessen "special circumstance" exposure would be to simply eliminate company stock as an employer matching or profit sharing contribution in the pension plan.

Importantly, the public information defenses suggested by the Supreme Court have a limited range-they only apply to EIAP's holding the stock of publicly traded companies. For the thousands of ESOP's funded by stock of companies that are not publicly traded, those fiduciaries must continue to attend to the particulars of their own procedural prudence so as to avoid being the subject of future judicial guidance.

Miscellaneous

The EEOC Challenges Broad Severance and Release Agreements

In February of this year, the EEOC filed suit against a nationwide pharmacy chain alleging that it utilized "an overly broad, misleading and unenforceable" separation agreement and release that interfered with employees' free exercise of their Title VII rights. The EEOC took issue with several elements of the form of separation agreement in question – some of which are fairly standard terms - including:

1. a cooperation clause which required the employee to notify the employer's General Counsel of any inquiries received in furtherance of, among other things, an administrative investigation, including from any investigator, attorney or other third party;

2. a non-disparagement clause which required the employee not to make any disparaging statements about the employer, without qualification;

3. a non-disclosure clause which required the employee not to disclose confidential information, including information on wages and benefit structures, information concerning affirmative action plans, and other information to any third party;

4. a general release of claims which included the release of the chain from "charges" and "any claim of unlawful discrimination of any kind"; and

5. a covenant not to sue which included "any complaint" and required the employee to agree "not to initiate or file, or cause to be initiated or filed, any action, lawsuit, complaint or proceeding" asserting any of the released claims and further requiring the employee to reimburse the chain for any legal fees associated with same.

Notwithstanding a qualification that provided nothing in the covenant not to sue was "intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency," the EEOC claimed the separation agreement interfered with an employee's right to file a charge with the EEOC or state agencies, or participate in their investigations. The EEOC sought a permanent injunction enjoining the pharmacy chain's use of the separation agreement and requiring it to reform its allegedly unlawful terms. It also sought a "corrective communication" from the chain to any employee (entered into by more than 650 employees in 2012) who had entered into the form Separation Agreement or similar release notifying them that they had 300 days to file a charge.

Ultimately the Court tossed the EEOC's claims on procedural grounds, ruling the EEOC was not authorized to file suit because it had not first attempted a pre-suit conciliation procedure required by statute. This case nevertheless shows the EEOC's cards and signals that the agency is eager to challenge releases it deems overly broad.

Action Item: Employers should review and consider revising if necessary their template severance and release agreements to include qualifications that explicitly preserves and clarifies an employee's right to file a charge with the EEOC or FEPAs and to participate and cooperate with an investigation conducted by these agencies.

NLRB Continues to Draw a Fine Line on What Employers May Require in Social Media Policies

This past year, the NLRB issued two opinions which provided guideposts on the extent to which employers may require employees to include disclaimers on personal social media posts that the statements reflect their own views, and not the views of the employer.

In a recently published advice memorandum, the NLRB Associate General Counsel opined that an employer does have a legitimate interest in protecting itself against unauthorized postings made purportedly on its behalf. Therefore, an employer's social media policy requiring individuals *who identified themselves as company employees on a site* to include a disclaimer explaining that their views on such site were their own and did not reflect the views of their employer was lawful. The advice memorandum drew the distinction between a posting on a site

and a text message, noting that requiring an employee append a disclaimer to a text message could be unduly burdensome.

Earlier this year, in a decision pertaining to the social media policy of a national supermarket chain, an administrative law judge concluded that a similar disclaimer, required to be used by employees on every instance of publishing work related information online, is chilling the employees' exercise of their NLRA rights, unreasonably burdensome and violates the NLRA.

Although the rules on disclaimers employees must make when identifying themselves with the employer online are not entirely clear in light of NLRB's case-by-case approach, it is clear the NLRB wants to see employers narrow their disclaimer requirements to no more than the extent necessary to protect their legitimate interest in preventing employees from making unauthorized statements in social media.

Action Item: Employers should review their social media policies to make sure that any obligations or restrictions, in particular disclaimers, imposed on employees are founded in law (such as FTC disclaimer requirements), not overly broad or burdensome, and limited to the extent necessary to protect the legitimate interest of the employer in ensuring that an employee's personal musings do not become imputed to the employer.

OSHA Update

OSHA Issues New Rule Expanding Reporting and Recordkeeping Requirements

In September 2014, the Occupational Safety and Health Administration (OSHA) released a final rule that alters employers' reporting and recordkeeping obligations. The new requirements will take effect on January 1, 2015.

Reporting Requirements:

Under the new rule, covered employers must contact OSHA and report the following:

- Any work-related fatality within 8 hours;
- Any work-related inpatient hospitalization of 1 or more employees within 24 hours;
- Any work-related amputation within 24 hours;
- Any work-related loss of an eye within 24 hours;

Under the previous rule, employers were required to report work-related incidents within 8 hours only if the incident resulted in a fatality or the hospitalization of 3 or more employees. OSHA estimates that the new reporting requirement could result in tens of thousands of additional reportable incidents per year. Not only will the new reporting requirements increase the administrative burden of reporting for employers, but because OSHA on-site inspections are often triggered from reported incidents, there will likely be an increase in OSHA on-site inspections.

Action Item: Employers should train supervisors and managers on the new reporting requirements. Employers should also self-audit their

facilities, and make sure all of their equipment, procedures, training, and records are up-to-date and in order. By doing so, if OSHA conducts an inspection following the reporting of an isolated accident, the employer will be in a better position regarding potential OSHA citations and fines.

OSHA Recordkeeping Requirements Expanded

Unless exempt, employers are required to maintain certain records that track workplace injury and illness information, including OSHA 300 logs. In general, employers with 10 or fewer employees are exempt, as are certain establishments in specific low-hazard industries.

Under the new rule, employers with ten or fewer employees are still exempt from maintaining injury and illness records. However, OSHA has made changes to the industries that are specifically exempt from maintaining records. Under the prior rule, numerous low-hazard industries were exempt based on the Standard Industrial Classification, or "SIC," classification. The new rule uses a classification system based on the North America Industry Classification System, or "NAICS." This change is estimated to require approximately 200,000 establishments that were previously except to now keep records. Likewise, the change will also result in approximately 160,000 establishments now being exempt from OSHA's record-keeping requirements.

Action Item: Employers should review their NAICS code and determine whether or not they will be required to keep injury and illness records. A list of the industries that will now be required to maintain OSHA records can be found here. Employers who are now required to keep records should implement new policies and procedures as necessary, and train supervisors on how to properly record an incident.

Pending Federal Legislation & Anticipated Regulatory Updates

- **White Collar Exemptions** - In March of 2014, President Obama gave instructions to modernize and streamline the white-collar exemptions to the FLSA's overtime requirements. The DOL stated a proposed rule revising the white collar exemptions are expected in February 2015.

- **National Labor Relations Act (Quickie Election Rule)** - The National Labor Relations Board proposes to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board believes that the proposed amendment would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. The proposed amendments would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate request for Board review of regional directors' pre- and post- election determinations into a single, post-election request. The proposed amendment would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election. Comments and reply comments were received April, 2014. A notice of public hearing was to be issued during the reply comment period in Washington, DC.

- **Labor Management Reporting Disclosure Act (Persuader Rule)** - The Department of Labor intends to publish a final rule revising its interpretation of section 203(c) of the Labor Management Reporting and Disclosure Act (LMRDA). That statutory provision creates an "advice" exemption from reporting requirements that apply to employers and other persons in connection with persuading employees about the right to organize and bargain collectively. The revised interpretation would narrow the scope of the advice exemption. A final rule is slated for December 2014.

- **Contractor Reporting on Employee Compensation** - In August of 2014, the Office of Federal Contract Compliance Programs (OFCCP) proposed that certain Federal contractors and subcontractors begin supplementing their EEO-1 Report with summary information on compensation paid to employees by sex, race, ethnicity, and specific job categories, as well as other relevant data points such as hours worked, and the number of employees. The comment period has been extended until January 5, 2015.

- **Federal Minimum Wage Hike** - In January, Democrats in favor of legislation that would bring the federal minimum wage from $7.25 to $10.10 began outlining the "path forward" for the bill. Strong debate is expected in both the House and Senate. The Senate was expected to consider the bill in February. With Republicans taking control of both the House and Senate, Democrats anticipate Republicans will back away from the minimum wage hike.

Pending Cases

US Supreme Court

- *Perez et al v. Mortgage Bankers Association* - The Supreme Court will address the efficacy of the Department of Labor's 2010 reclassification of mortgage loan officers as eligible for overtime pay where the DOL failed to use notice-and-comment rulemaking procedures. The Court's eventual decision will impact the DOL's rulemaking authority—specifically, whether it can legislate through administrator interpretations. The Court will hear oral arguments for the case in December, but is not expected to issue its opinion until 2015.

- *Mach Mining LLC v. EEOC* - The Supreme Court will address whether the EEOC's statutorily required efforts to informally resolve claims before taking employers to court is subject to judicial review. Specifically, the Supreme Court will address whether the EEOC's pre-suit efforts to conciliate or settle discrimination charges under Title VII of the 1964 Civil Rights Act are subject to judicial review. The Supreme Court was urged to review this case because the underlying issue had divided federal appeals courts.

- *Young v. UPS* - The Supreme Court will address the Pregnancy Discrimination Act (PDA), and whether an employer can treat employees who require accommodations for non-pregnancy related disabilities more favorably than pregnancy-related disabilities. Young claims UPS violated the PDA by failing to provide her the same accommodations as non-pregnant employees with similar limitations, such as workers hurt on the job, those who qualified for ADA accommodations and those who lost

their U.S. Department of Transportation certification. The Fourth Circuit held that the language of the PDA does not require that pregnancy be treated preferentially, and found that UPS had "crafted a pregnancy-blind" accommodation policy that was applied equally to all employees based on the cause of the disability or accommodations and not the disability itself.

International Trends

Once again, this year has proved to be busy for US multinationals operating and expanding globally. Throughout the year, we have discussed various trends and legal updates for global employers, from wage and hour compliance, to contingent workers, to mobile employees, as well as acquisitions and restructurings. Below, we highlight three of the most recent trends that seem to be "top of mind" for many multinational employers as they look to the new year, and which we do expect to continue drawing attention into 2015. Specifically, the challenges of global expansion, implementing "global" policies, including the rise in popularity of unlimited or open vacation.

Around the World in 90 Minutes

For more information on specific jurisdictions, click here to request our December 17th webinar, where we traveled the world in 90 minutes, focusing on major updates and trends in a few key commercial jurisdictions, "Around the World in 90 Minutes: Top Employment Developments in Key Global Markets." Also, look for our Global Employer publication in early 2015.

Boots on the Ground: Employment Considerations for Companies Expanding Abroad

For a company to expand its global footprint in a competitive marketplace almost always requires engaging workers on the ground. This is never truer than it is right now for multinational employers looking to take advantage of new markets, talent and opportunities. The legal risks and challenges in structuring these relationships differ significantly around the world, and the complexity is further compounded by the intersection with other areas of law, including tax, corporate and immigration, to name a few. When considering whether to engage a worker in a new country, the main areas of consideration are employment, tax and corporate doing business requirements. This means that companies looking to get "boots on the ground" quickly need to be prepared to consider whether or not a local entity is required to engage workers, and the appropriate type of local presence, which is largely driven by tax and corporate considerations.

Engaging Without a Local Entity

If it is determined that no local presence is required, there are typically three options available for a non-local or "foreign" company to engage workers in country: (a) direct hires, (b) third-party hiring / outsourcing, and (c) independent contractors.

Direct Hires. In some jurisdictions, where the law limits the ability of a foreign employer to directly engage local nationals or practical obstacle exist (e.g., inability of a foreign employer to enroll employees in local social security or equivalent programs), employment law challenges may therefore prompt the company to establish a local presence or explore other options for engaging workers. Even in those jurisdictions where it is possible to employ individuals from

an employment law perspective without a local presence, certain procedural challenges remain. Furthermore, when hiring employees directly in-country, it is important to thoroughly monitor employee activities in order to manage tax liability and comply with corporate maintenance requirements.

Third-Party Hiring (Outsourcing). In many jurisdictions, a third-party hiring or outsourcing relationship can be used to engage workers without a local entity. Three common ways to do this are: (i) contracting with a local entity—typically a partner or distributor—to engage workers to service the foreign company's account; (ii) use of licensed service providers, sometimes referred to as staffing agencies or labor dispatch companies; or (iii) professional employer organization, or ''PEO,'' which began in the U.S., but is quickly spreading as a hiring model. A PEO hiring structure will, however, essentially document a dual-employment relationship, which could raise certain permanent establishment tax and corporate "doing business" issues if the company does not have a legal entity where the employees are being engaged.

Independent Contractors. As an alternative to directly hiring employees or engaging through a third party, a company may also consider engaging individuals as independent contractors. Directly engaging a local independent contractor who does not have or exercise the authority to conclude contracts will likely not create a taxable presence. The primary employment law risk is the potential liability created by misclassification of an individual as a contractor when in fact the individual is treated as, and acts as, an employee. In addition, even if properly classified, in some jurisdictions contractors have specific registration and personal income tax obligations, which the foreign entity could be liable for if not properly paid by the individual. Some jurisdictions have special protections for independent contractors, depending on the type of activity they are engaged in, such as sales agents in Brazil and Colombia.

Hiring Through a Local Entity

Where a company determines to set up a local presence, the above hiring options exist as well, with some variation. In the case of direct hires and local employment, local employment laws will apply. All employment-related activities and employment documentation must be compliant with local laws. Further, a clear understanding of applicable collective bargaining agreements is imperative to ensure full compliance with wage and hour and benefits entitlements. Finally, implementation of the U.S. parent company code of conduct and business ethics is crucial to both comply with U.S. laws and not unwittingly create untenable situations where compliance with the U.S. codes means violation of local employment laws. Companies will need to carefully review all of these issues to ensure compliance locally.

Planning Tip: Taken together, local market requirements can appear overwhelming to companies expanding abroad for the first time. Yet, through an integrated analysis of employment, tax and corporate issues relevant to entering a new jurisdiction, as well as a little bit of planning, U.S. companies can help ensure a hospitable environment for their businesses in foreign markets.

Managing an International Workforce through Global Employment Policies

As 2015 approaches, in-house Legal and HR professionals with growing international workforces tend to look for uniform branding and consistent approaches to global workforce management. One vehicle to achieves these

goals is through company employment policies. This can seem challenging given local legal differences and varying cultural expectations.

As such, companies are faced with questions such as - should we develop a single, broad policy to cover our entire global operations in a consistent and predictable manner, or should we develop local policies, implemented according to local laws by the local employer? Or, is there something in between? Although there is no single answer to these questions, there are recognized and tested approaches based on a company's growth needs, global footprint and workforce profile

Three Approaches to International Policies

Generally the key approaches to drafting company employee policies for an international workforce fall into three categories: (1) Global Policy; (2) Local Policy; or (3) Hybrid Approaches, each of which has advantages and disadvantages depending on the type of policy and its implementation requirements.

Global Policy

A single global policy that applies to a company's entire U.S. *and* international workforce is the most efficient approach and ensures the greatest amount of drafting consistency. A common trade off, however, is a limited ability to actually enforce it against employees outside the U.S. This is because, to avoid offending local laws, the policy must be relatively general and include phrases such as "to the extent permitted by applicable law." This leaves a question as to what the law actually is and how a local court will interpret the law to be.

Additionally, in seeking uniformity, a single global policy that is not properly drafted could actually extend U.S. protections to non-U.S. employees that would not otherwise apply. For example, an overly U.S.-centric global employee handbook or work rules may extend Title VII protections against discrimination or harassment based on categories such as gender or sexual orientation that are protected under U.S. federal and state laws, but not in other jurisdictions. In some cases, local law may actually require discrimination, such as in a reduction in force in many countries, where employers often need to consider employees' national origins, ages, disabilities, when making the required "social selection".

As such, there are only a few topics that can (and in fact should) be properly addressed in a global policy, such as an equity plan and a code of ethics and business conduct.

Local Policy

The local policy applies only to the workforce in one jurisdiction, and can offer a company the greatest possible protection under local law while achieving consistency with cultural norms and expectations. For some U.S. multinationals, however, the management of numerous local policies combined with the concern of losing a uniform global identity discourages this approach.

Despite these concerns, in some cases fully localized policies are strongly recommended. Employee handbooks, for example, include a collection of topics that are strictly governed by local laws (e.g., working hours, leaves of absence, time off, IT monitoring and use, etc.). These types of policies must recognize local legal requirements.

Employment Counseling & Litigation Webinar Series

To help employers navigate the changing landscape of employment challenges here in the U.S. and around the globe, we also offer a monthly webinar series that offers practical advice on cutting edge issues for domestic and global employers. In 2014, we offered the following webinars:

- The Changing Landscape for Federal Government Contractors
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- Global Labor Spotlight on China
- Deemed Export Regulatory Compliance
- The New Extended Enterprise: Employment Issues in Supply Chains
- Managing Incivility in the Workplace and Regulating Off Duty Conduct
- Managing Your Globally Mobile Workforce: Practical Tips for Preparing for the Worst and Hoping for the Best for Employees Working Internationally
- Effective Use of Binding Arbitration Agreements with US Workforces
- Navigating Paid Sick Leave Laws in the U.S.
- Around the World in 90 Minutes: Top Employment Developments in Key Global Markets

To request a playback of any of these 2014 webinars, or any other webinar in this Series, click here.

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Hybrid Approaches

In an effort to obtain both the uniformity of a global single policy and the jurisdictional compliance of a local policy, companies often invent various middle-of-the-road approaches. The two most common hybrid approaches are: (1) regional policies (for APAC, EMEA, etc.), and (2) a modified U.S. policy with country-specific addenda.

Regional policies can be used for certain topics in areas where there are common rules across a region, such as a properly drafted anti-harassment policy. For other topics, however, even where there is regional regulation, local laws implement the regulation so differently that a regional policy will have the same consequences as a global policy. For example, although the EU working-time directive sets a maximum working week of 48 hours, countries like France still limit the workweek to 35 hours, whereas the UK allows employees to opt out of the 48 hour limit by separate agreement.

An alternative hybrid approach, is drafting locally complaint amendments to a U.S. parent company policy. This creates the appearance of a global policy while satisfying local requirements. Practically speaking, however, it can be complex and even confusing for employees who have to review both the U.S. policy and the local supplement to understand what rules apply to him/her directly.

Implementation

Once the company adopts an approach and drafts the policy, the next step is to ensure that it is properly implemented. Regardless of the approach, if a policy is not rolled out according to local requirements, the policy can become a nullity, in which case the company cannot rely on the terms of the policy, or even create liability. What is required for proper implementation varies by country, but may include translation (e.g., France and Russia), adoption by the local board, notification or consultation with works councils (e.g., Germany) or employee representative bodies (e.g., the democratic process in China), filings with labor authorities (e.g., for internal regulations in France, for work rules in Japan), proper distribution (electronic or hardcopy) to employees, and collection of acknowledgements or consents.

Takeaways

Whether to adopt a single global policy, local policies or a hybrid approach to employment policies depends most importantly on the type of policy, the jurisdictions where it will be implemented, and the company's philosophy, values and risk tolerance for deviation from local law. Often, the first step in this process is to engage in advanced planning and discuss the various approaches with counsel. If the right approach is selected and carefully managed, employment policies can be an invaluable tool to protect the company, respond to employee questions, guide local HR teams and globalize the company's values and mission.

Going Global with an Unlimited Vacation Policy – Can it be Done?

One example of a long-accepted U.S. practice that is back in vogue and now garnering global attention is unlimited or "open" vacation policies. The concept of unlimited vacation (or paid time off) developed in the U.S. over the past decade, as companies searched for ways to give employees greater time off flexibility, reduce administrative tracking burdens and cut costs by avoiding payout of

accrued and unused vacation under state laws. While this policy has clear benefits, it can be tricky to implement even in the U.S. (with the crop of new paid sick leave, for example), and a whole new set of challenges arise when considering global implementation of unlimited vacation.

While the idea of open-ended vacation access can be exciting and motivating for a global workforce, prior to implementing an unlimited vacation policy outside the U.S., however, there are several key factors that companies should consider, to ensure that they roll out a policy that both reflects the company's practices and intentions and also complies with local laws.

As a starting point, it is important to first understand the minimum statutory vacation / holiday entitlements that non-U.S. employees enjoy on a country-by-country basis. This is because the unlimited vacation policies can only offer vacation days that are *in addition* to these statutory entitlements. Practically, this means non-U.S. employers may need to separately manage statutory and unlimited time off, among other requirements. Then, the unlimited vacation policy will need to be carefully drafted for use outside the U.S. to mitigate against several risks, including: (1) the policy becoming an acquired right, (2) potential discrimination if not granted by managers equitably, and (3) application to unpaid leaves and abuse of the policy. Further, implementation steps such as notice, consultation and translations requirements should also be considered. Finally, companies should determine the potential cost savings and administrative costs involved in implementing an unlimited vacation policy outside the U.S.

Click here to learn more about this growing trend.