Employment Flash

Skadden

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Notable Noncompete Developments in 2018

Employers should consider reviewing and revising noncompetition agreements to reflect the changes in the noncompete legal landscape in 2018, including, for example, (i) the enactment of the Massachusetts Noncompetition Agreement Act, (ii) the renewed application and endorsement of Illinois' "Janitor Rule" and (iii) developments under Section 925(e) of the California Labor Code and California's general prohibition against noncompetition agreements.

Massachusetts Noncompetition Agreement Act

As reported in the September 2018 edition of *Employment Flash*, Massachusetts recently enacted the Massachusetts Noncompetition Agreement Act (Act), effective October 1, 2018, according to which noncompetition agreements entered into on or after that date by employees living or working in Massachusetts must comply with the Act's numerous requirements to be enforceable. Notably, the Act requires employers to pay "garden leave" or "other mutually-agreed upon consideration" if an employer wishes to restrict post-employment competition by covered employees.

The concept of "garden leave" originated in the United Kingdom and captures the period before an employee's termination of employment, usually the notice period, during which the employee remains employed with the employer and continues to receive paychecks but is instructed not to perform work. The Act defines "garden leave" as 50 percent of an employee's highest annualized salary over the two-year period preceding the employee's termination of employment, to be paid during the restricted period following termination of employment. Although the Act does not define "other mutually-agreed upon consideration" or clarify whether this consideration must be substantially equivalent to "garden leave," the legislative history of the Act seems to suggest that this consideration should consist of an amount similar to "garden leave." In any event, the Act increases the costs of noncompetition agreements for employers in Massachusetts. Employers with employees in multiple states, including in Massachusetts, should consider drafting state-specific noncompetition agreements to meet the requirements of the noncompetition laws in the various jurisdictions where employees are located.

Illinois' 'Janitor Rule'

A recent ruling by an Illinois federal judge reminds employers not to overreach when it comes to drafting noncompetition agreements. According to the "Janitor Rule," noncompetition agreements are unlikely to be enforceable if they are drafted so broadly as to prevent an employee from working for a competitor in any position (*e.g.*, even as a janitor), as opposed to only those positions similar to the ones held by the employee while working for the employer.

In *Medix Staffing Solutions, Inc. v. Dumrauf*, 2018 WL 1859039 (N.D. Ill. Apr. 17, 2018), the employee argued that the noncompetition agreement was so broad that it would prevent the employee from working for a competitor even as a janitor. Without specifically naming the "Janitor Rule," the U.S. District Court for the Northern District of Illinois held that, while the employee's janitor example was "a bit far-fetched," there was nothing in the noncompete to make the employee's argument inaccurate. Accordingly, the court found the noncompetition agreement so overbroad that it was unreasonable on its face. The court ruled that, because the noncompetition agreement was so broad as to be a ban on competition *per se*, the entire agreement was unenforceable. In addition to reinforcing the importance of the "Janitor Rule," *Medix* also serves as a reminder that employers should not assume a court will "blue pencil" or otherwise modify overbroad noncompetition covenants to make them enforceable. Courts may refuse to blue-pencil overbroad noncompetition agreements that are patently unfair as written (*i.e.*, fall within the ambit of the "Janitor Rule") and may refuse to enforce the entirety of such agreements.

California's General Prohibition Regarding Noncompetition Agreements

A recent Delaware Court of Chancery decision, *NuVasive, Inc. v. Miles*, 2018 WL 4677607 (Del. Ch. Sept. 28, 2018), relied on Section 925(e) of the California Labor Code to enforce a noncompetition covenant in an employment agreement with a Delaware choice-of-law provision against a California employee who was represented by independent counsel during negotiations. Section 925 of the California Labor Code prohibits employers from requiring an employee who primarily resides and works in California to agree to a provision either (i) "requiring the employee to adjudicate outside of California a claim arising in California" or (ii) "depriving the employee of the substantive protection of California law with respect to a controversy arising in California." Section 925(e) exempts from these restrictions employees that are individually represented by legal counsel in negotiating the choice of law terms and forum selection provisions. The *NuVasive* court asserted, "[i]n Section 925, I find, the California Legislature has stated strongly its general view that the prohibition of covenants not to compete ... cannot be evaded by choice of law provisions, *but has made a policy decision that when contracting parties' rights are protected by representation, freedom of contract trumps this interest.*" Accordingly, the court applied Delaware law and enforced the noncompetition agreement. However, it is unclear whether a California court would rule differently if a California employee sought declaratory relief there, given California's strong public policy against noncompetition agreements, as codified in Section 16600 of the California Business and Professions Code. California courts have previously held that Section 16600 represents the state's strong public policy against the enforcement of noncompetes, thus rendering choice-of-law provisions allowing for the enforcement of noncompetes invalid.

NuVasive has not yet been mentioned in any California court decision, and no state courts in California have addressed Section 925. Of the handful of federal court decisions that make any mention of Section 925, only one specifically addresses Section 925(e), but it offers little insight into California courts' willingness to enforce noncompetes. Until the California courts, Legislature and/or administrative agencies provide additional guidance regarding the interaction between Section 925(e) and California's general prohibition against noncompetition agreements, employers should consider the legal risks associated with relying on *NuVasive* when entering into noncompetition agreements and employment-related agreements containing noncompetition provisions with employees in California. This holds true even if such agreements contain non-California choice-of-law or choice-of-venue provisions and employees are represented by independent counsel when negotiating such agreements.

California, Delaware and New York Enact Anti-Harassment Laws for 2019

California

The California Legislature enacted a number of laws that took effect January 1, 2019, and are designed to prevent and combat sexual harassment in the workplace. For example, California now requires that all employers with five or more employees provide at least two hours of sexual harassment and abusive conduct training to supervisory employees, and at least one hour of such training to nonsupervisory employees (including full-time, part-time, seasonal and temporary employees, and any others hired to work for less than six months). This training must be provided by January 1, 2020, and every two years thereafter.

In addition, the California Legislature enacted procedural and substantive changes regarding the litigation of harassment-related claims. In particular, California law now limits a prevailing employer's ability to collect legal fees and costs to actions that are "frivolous, unreasonable, or groundless" when filed. A new law now also provides victims of sexual assault and attempted sexual assault additional time to file a civil action for damages: either within 10 years of the alleged assault or within three years after the victim discovers, or reasonably should have discovered, that the assault occurred, whichever is later. The California Legislature stated its intent to change the evidentiary standards in harassment cases by, for example, lowering the burden to show that harassment altered a plaintiff's working conditions, allowing a single harassment incident to constitute a triable issue regarding hostile work environment, and stating that harassment cases are rarely appropriate for summary judgment disposition. In addition, the California Legislature enacted a law designed to eradicate harassment in the business relationship context by no longer requiring a plaintiff to prove he or she was unable to terminate the business relationship.

The new laws restrict the ways that an employer can contractually limit an employee's ability to bring, or participate in, actions or proceedings relating to unlawful conduct in the workplace. For example, employers are prohibited from requiring an employee to sign a release of a claim or right under California's Fair Employment and Housing Act in exchange for a raise or bonus, or as a condition of employment or continued employment. California law also prohibits an employer from (i) attempting to deny an employee's right to disclose information about unlawful or potentially unlawful acts in the workplace, (ii) executing a settlement agreement that prevents an employee from disclosing information about pending harassment actions, and (iii) executing any contract or settlement agreement that waives an employee's right to testify in proceedings about alleged criminal conduct or alleged harassment.

These new laws are consistent with the trend of revisiting and revising executive employment agreements to shield employers from liability if executives engage in unlawful conduct. For example, employers are revising definitions of "for cause" terminations to encompass sexual misconduct, adding clawback provisions when misconduct is revealed after severance has been paid and requiring indemnification for costs arising from an executive's misconduct.

Delaware

The Delaware Legislature passed a new law that took effect January 1, 2019, with increased protections against sexual harassment, harassment training requirements and notice obligations. The new law builds on the Delaware Discrimination in Employment Act by explicitly making sexual harassment an unlawful employment practice when (i) submission to such harassment is made — either explicitly or implicitly — a term or condition of employment, (ii) submission to or rejection of such harassment is used as the basis for employment decisions affecting an employee, or (iii) such harassment has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive working environment. Employers face liability for sexual harassment of an employee when (i) a supervisor's sexual harassment results in a negative employment action of an employee, (ii) the employer knew or should have known of a nonsupervisory employee's sexual harassment of an employee and failed to take appropriate corrective measures or (iii) a negative employment action is taken against an employee because the employee filed a discrimination charge, participated in an investigation of sexual harassment or testified in any proceeding about the sexual harassment of an employee.

These new protections apply to employers with at least four employees, including the state, General Assembly, state agencies and labor organizations. The new law protects traditional employees, unpaid interns, applicants, joint employees and apprentices. It also provides employers with an affirmative defense if they can prove that (i) they exercised reasonable care to prevent and correct any harassment promptly and (ii) the employee unreasonably failed to take advantage of any preventive or corrective opportunities the employer provided.

For employers with 50 or more employees in Delaware, the new law requires "interactive" sexual harassment training and education that must be provided to both nonsupervisory employees and supervisors as follows: (i) new employees must be trained within one year of beginning employment and every two years thereafter, and (ii) current employees must be trained within one year of January 1, 2019, and every two years thereafter. Employers who provided existing nonsupervisory employees and supervisors with legally compliant training before January 1, 2019, are not required to provide additional training until January 1, 2020.

New York

As discussed in the September 2018 edition of *Employment Flash*, by October 9, 2019, all New York state employers must provide sexual harassment training to all employees located in the state and must do so every year thereafter. Beginning January 1, 2019, all companies that bid on state contracts must submit an affirmation that they have a sexual harassment policy and have provided compliant sexual harassment training to all employees. The sexual harassment training must include (i) interactive components, (ii) an explanation of sexual harassment, (iii) examples of prohibited conduct, (iv) information concerning the federal and state statutory provisions on sexual harassment and available remedies, (v) information concerning employees' rights of redress and available forums for adjudicating claims, and (vi) information addressing the conduct and responsibilities of supervisors.

In addition, as discussed in the June 2018 edition of *Employment Flash*, New York City passed an anti-harassment law requiring employers with 15 or more employees to provide sexual harassment training to all employees who work 90 or more hours per calendar year in New York City. This law goes into effect April 1, 2019, and requires training every year thereafter. Like the state version, the New York City training must be interactive and contain the components described above. In addition, the training must describe the adjudication process of numerous city and state agencies and provide information on bystander intervention training.

Minimum Wage Increases in 2019

Effective January 1, 2019, the minimum wage increased in the following 19 states, and in a number of cities, as a result of state legislative action, voter ballot initiatives and/or scheduled cost-of-living increases: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Maine, Massachusetts, Minnesota, Missouri, Montana, New Jersey, New York, Ohio, Rhode Island, South Dakota, Vermont and Washington. In California, the minimum wage increased from $10.50 to $11 for employers with 25 or fewer employees, and from $11 to $12 for employers with 26 or more employees. In Massachusetts, the minimum wage increased from $11 to $12. And in New York, the minimum wage increased from $12 to $13.50 for employers in New York City with 10 or fewer employees; from $13 to $15 for employers in New York City with 11 or more employees; from $11 to $12 for employers in Long Island and Westchester County; and from $10.40 to $11.10 for all remaining employers in New York state. Delaware will raise its minimum wage again later in 2019, along with Michigan and Oregon, both of which will do so for the first time in 2019. This upward trend in minimum wage rates is anticipated to continue as state and municipal governments seek to provide workers with a meaningful wage in the face of rising costs of living and a federal minimum wage of $7.25, which has not changed since 2009.

Seventh Circuit Limits Age Bias Claims to Employees, Not Job Applicants

On January 23, 2019, the U.S. Court of Appeals for the Seventh Circuit held in *Kleber v. CareFusion Corporation*, No. 17-1206 (7th Cir. Jan. 23, 2019), that the federal Age Discrimination in Employment Act (ADEA) does not protect outside job applicants from disparate impact age discrimination. In *Kleber*, a lawyer in Illinois who was 58 at the time applied for a job at a medical supply company. The applicant alleged that the company hired a less-qualified candidate who was 29 and that the job description, which required that applicants have "no more than 7 years" of relevant experience, was discriminatory against applicants who are older. The applicant argued that applicants, as well as employees, should enjoy similar protections under the ADEA as those afforded to applicants and employees under Title VII of the Civil Rights Act of 1964, a federal statute that prohibits discrimination on the basis of certain protected characteristics, such as race, color, religion and sex.

The Seventh Circuit held that the plain language of the ADEA — which, unlike Title VII, does not include the term "applicants" — makes clear that Congress did not intend to extend disparate impact protection under the ADEA to applicants. The Seventh Circuit's decision reflects and reinforces an existing judicial split regarding this issue. The U.S. Court of Appeals for the Eleventh Circuit in *Villarreal v. R.J. Reynolds Tobacco Co.,* 839 F.3d 958 (2016), has held that the ADEA does not provide a basis for an applicant to make a successful disparate impact claim because an applicant is not an "employee" under the statute. Notably, in *Villarreal*, the Equal Employment Opportunity Commission filed an *amicus* brief supporting the position that the ADEA provides a statutory basis for applicants to bring claims of age-based disparate impact in hiring. However, in *Rabin v. PricewaterhouseCoopers LLP*, 236 F.Supp.3d 1126 (N.D. Cal. 2017), a federal district court in the U.S. Court of Appeals for the Ninth Circuit held that disparate impact claims under the ADEA are not limited to employees. In addition, in *Champlin v. Manpower Inc.*, No. 4:16-CV-00421 (S.D. Tex. Jan. 24, 2018), a federal district court in the U.S. Court of Appeals for the Fifth Circuit held that absent binding authority on the language in the ADEA, it would not dismiss an applicant's disparate claim under the ADEA. It remains to be seen whether and how other federal courts and the U.S. Supreme Court will address this issue going forward.

NLRB Revises Employee Classification Test

On January 25, 2019, in *SuperShuttle DFW, Inc. and Amalgamated Transit Union Local 1338*, Case 16–RC–010963, the National Labor Relations Board (NLRB or Board) overturned its 2014 decision in *FedEx Home Delivery and International Brotherhood of Teamsters, Local Union No. 671*, 361 NLRB No. 55 (Sept. 30, 2014), holding that the 2014 decision impermissibly altered the common-law employee classification test by limiting the importance of entrepreneurial opportunity (*i.e.*, whether a role presents the opportunities and risks inherent in entrepreneurialism). In *FedEx Home Delivery*, the NLRB declined to adopt the traditional common-law employee classification test previously articulated in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C.Cir. 2009), and found that the U.S. Court of Appeals for the District of Columbia Circuit's test disproportionately emphasized the entrepreneurial opportunity of workers without due consideration of the constraints that a company may place on workers' ability to realize such opportunity.

In its 2014 decision, rather than examining entrepreneurial opportunity as a stand-alone factor, the NLRB treated it as only a part of another factor of "whether the evidence tends to show that the putative independent contractor is, in fact, rendering services as part of an independent business." At the same time, it considered other traditional factors of the employee classification test including, but not limited to, the degree of control exercised by the employer, skills required on the job and duration of working relationship between the worker and the employer. Furthermore, in its 2014 decision, the NLRB determined that, to be relevant, evidence of entrepreneurial opportunity must be more than theoretical, demonstrating what the workers in question have actually done to realize their entrepreneurial opportunity. In overruling its 2014 *FedEx Home Delivery* decision, which had "fundamentally shifted the independent contractor analysis, for implicit policy-based reasons" by discounting the weight of entrepreneurial opportunity, the NLRB in *SuperShuttle DFW* underscored that entrepreneurial opportunity is "an important animating principle" by which to evaluate the factors of the traditional common-law test of employee classification. Applying the traditional common-law employee classification test, the NLRB in *SuperShuttle DFW* concluded that the franchisees that operate share-ride vans are independent contractors and thus are not covered by the National Labor Relations Act (NLRA or Act).

NLRB Narrows Definition of Concerted Activity

On January 11, 2019, the NLRB ruled that complaints made by individual employees to management in front of other employees do not qualify as protected concerted activity under the NLRA. In *Alstate Maintenance, LLC & Trevor Greenidge*, 367 NLRB No. 68 (2019), the Board ruled in a 3-1 decision that the employer did not illegally fire an employee for complaining in front of several of his co-workers to a supervisor about an assignment for which the employee thought he would not receive a tip. The Board in *Alstate* overturned its previous ruling in *Wyndham Resort Development Corp. & Gerald Foley*, 356 NLRB No. 104 (2011), that an individual employee's complaint made in a group setting was sufficient to qualify as concerted activity under the Act, and the Board in *Wyndham* dismissed any requirement that employees previously agree to act in concert with each other. The majority in *Alstate* reasoned that *Wyndham* incorrectly conflated mere group settings with protected group complaints and held that, by overruling *Wyndham*, the Board was returning to its previous line of precedent that action by a single employee qualifies as concerted activity under the NLRA only if that individual was authorized to act on behalf of the group or was attempting to induce group action.

California Court Questions Enforceability of Certain Employee Nonsolicits

Under California law, post-employment noncompetition agreements are generally void as unlawful restraints on trade and business under California Business and Professions Code Section 16600, but California courts have enforced various employee nonsolicitation provisions. However, the enforceability of employee nonsolicitation provisions under California law was called into question on November 1, 2018, by the California Fourth District Court of Appeal in *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 239 Cal. Rptr. 3d 577, 581, which found that a post-employment employee nonsolicitation provision was void under Section 16600. In that case, the plaintiff, AMN Healthcare, Inc. and the defendant, AMN competitor Aya Healthcare Services, Inc., were both in the business of providing temporary travel nurses to medical care facilities. As a condition of employment with AMN, AMN employees, including "travel nurse recruiters," were required to enter into confidentiality and nondisclosure agreements that, among other things, prohibited the solicitation of any AMN employee for one year after termination of employment.

The *AMN* court held that the employee nonsolicitation provision "restrained individual defendants from practicing with Aya their chosen profession of recruiting travel nurses." The court clarified that unless a contractual restraint falls into one of Section 16600's statutory exceptions (*i.e.*, sale of business, dissolution of partnership or dissolution or sale of a limited liability company), the restraint is void. The court distinguished this case from *Loral Corp. v. Moyes*, 219 Cal. Rptr. 836 (Cal. App. 6th Dist. 1985), which found that a noninterference agreement that restrained a former employee "from disrupting, damaging, impairing or interfering with his former employer by raiding ... employees" did not appear to be a restraint on trade under Section 16600. The *AMN* court reasoned that unlike in *Loral*, where the court found that the noninterference agreement only prohibited former employees from soliciting other employees and did not prevent former employees from seeking other employment, in *AMN*, enforcement of the employee nonsolicitation provision would prevent AMN's former employees from engaging in their profession, given the nature of their jobs as recruiters. In the wake of *AMN*, the enforceability of at least certain employee nonsolicitation provisions under California law remains questionable.

California Clarifies Salary History Law

As discussed in the November 2017 edition of *Employment Flash*, a California law that went into effect on January 1, 2018, prohibits employers from asking job applicants for information about their salary history but does not prohibit employers from considering salary information that an applicant volunteers without any prompting. The law requires employers to provide a position's pay scale to an applicant upon reasonable request but did not define key terms such as "applicant," "reasonable request" or "pay scale."

Assembly Bill 2282, which went into effect on January 1, 2019, offers some clarity. The new law defines (i) "applicant" as an individual who is seeking employment with, and is not currently employed by, the employer, (ii) "reasonable request" as a request made after an applicant has completed an initial interview with the employer, and (iii) "pay scale" as a salary or hourly wage range. The new law clarifies that employers may ask about an applicant's salary expectation for the position for which they have applied. In addition, the new law clarifies that when an employer is setting a new salary for an existing employee, the employer may consider the individual's current pay, but any resulting wage disparity must be based on one or more of the following factors: (i) a seniority system, (ii) a merit system, (iii) a system that measures earnings by quantity or quality of production, and (iv) a bona fide factor other than sex.

E-Scooters, Micro-Mobility and Related Employment Considerations

Dockless electric scooters (e-scooters), bicycles and other electrically powered micro-mobility options have become increasingly popular in major metropolitan areas within and outside the United States. E-scooter usage, in particular, has grown exponentially. Through an e-scooter company's smartphone app, a user can locate, rent, ride around town (at up to 15 miles per hour, for now) and drop off the rented e-scooter nearly anywhere. Employers should prepare policies to take advantage of the benefits, while mitigating the potential risks, associated with employee usage of e-scooters and all forms of micro-mobility modes of transportation for work purposes. For example, employers should consider the risks of employees injuring themselves or others while operating such devices on company premises or while carrying out company-related business. Workers' compensation insurance generally covers employee injuries that arise out of and in the course of employment. Thus, employees who are injured while operating such devices for work-related purposes are generally entitled to workers' compensation benefits. Workers' compensation premiums, which are largely driven by the past cost of injuries and future chances of risk, may increase as a result.

Employers should also consider the prospect of serious injuries to employees who use rideable electric devices, whether such use is for business or pleasure. Serious injuries, or any injury for that matter, could implicate federal, state and/or local leave and disability laws. Separately, employers can be held liable for the injuries that their employees cause to others while operating a rideable electric device within the scope of employment. Employers may also find themselves responsible for paying fines incurred by employees who use a rideable electric device, and reimbursing employees for such use, especially given that regulations concerning e-scooters and other rideable electric devices vary by jurisdiction and are generally not well-known. For example, some jurisdictions ban riding e-scooters in bike lanes or in general traffic, and if an employee incurs a fine while operating an e-scooter for work-related purposes, some state and local laws may require his or her employer to cover the fine. Additionally, employers may be required to reimburse employees for the costs associated with renting a rideable electric device for work-related purposes.

Given the prevalence of such devices and the potential risks and opportunities associated with usage, employers can look to mitigate liability and promote safety by crafting new policies or revising existing policies, such as for vehicle usage and injury/illness prevention, to incorporate use restrictions and/or safety measures specific to e-scooters and other similar forms of transportation.

International Spotlight

Gender Pay Gap Reporting and Transparency

The September 2018 edition of *Employment Flash* summarized the requirements of the U.K. Equality Act 2010 Regulations 2017, which went into effect on April 6, 2017. The regulations introduced mandatory gender pay gap reporting by large private and voluntary sector employers to identify the difference between the average pay of men and women in the U.K., with the goal of narrowing that gap.

The regulations should be considered in the context of the European Commission's focus on combating the gender pay gap within the European Union and ensuring that existing legal rules governing the principle of equal pay between men and women are enforced. This equal pay principle, which compares the pay of men and women in equivalent roles, has been codified in European law (and applied across the EU) since at least 1975.

Though currently there is no Europewide legal framework for gender pay gap reporting, in March 2014, the commission published its "Recommendation on strengthening the principle of equal pay between men and women through transparency." The recommendation does not impose new legislation on the

EU member states, but it does encourage each member to put in place at least one of the recommended action points, including:

- requirements for large and medium-size employers to regularly report the average remuneration by category of employee or position, broken down by gender;
- mandatory pay audits of large employers and making such audits available to workers' representatives and social partners upon request; and
- inclusion of equal pay issues and pay audits in collective bargaining.

In November 2017, the commission adopted the "EU Action Plan 2017-2019" to address the causes of the gender pay gap. The plan includes a number of action items for the current commission to implement by the end of its current mandate in 2019, including:

- raising public awareness about the gender pay gap;
- enhancing partnerships to tackle the gender pay gap;
- improving the application of the equal pay principle;
- breaking the "glass ceiling" and addressing vertical segregation (*i.e.*, the overrepresentation of men in higher-status jobs in many sectors of the economy);
- tackling the "care penalty" for those with caretaker responsibilities; and
- uncovering gender inequalities and stereotypes.

The regulations have already attempted to address some of these issues in the U.K., most notably by alerting and informing the public about the gender pay gap. Now, other European countries, including France and Germany, are considering similar rules.

France

Despite recent legislative efforts, in 2017 the Organisation for Economic Co-operation and Development found that the median gender pay gap in France is 9.9 percent. In light of this figure, additional measures were implemented to address the gender pay gap. The French government adopted a new law on September 5, 2018 ("Loi Avenir Professionnel"), which went into effect on January 1, 2019, that contains a specific chapter aimed at remediating the gender pay gap and addressing sexual harassment and sexist behavior in the workplace. In particular, the new law created a yearly obligation for businesses with over 50 employees to measure, report and publish their gender pay gap figures and effectively remediate such pay gaps. Companies with more than 1,000 employees will have until March 1, 2019, to report their figures for 2018. Companies with between 250 and 1,000 employees will have until September 1, 2019, to report their figures for 2018. Companies with between 50 and 250 employees will have until March 1, 2020, to report their figures for 2019.

Companies are required to measure the following five metrics over a period of 12 months:

- actual gender pay gap figure within the company, based on 10-year age groups and socio-professional category, worth up to 40 points;
- percentage of women whose salary increased after maternity leave, worth up to 15 points;
- difference in promotions between men and women, worth up to 15 points;
- difference in pay increase, excluding promotions, between men and women, worth up to 20 points; and
- number of the least-represented gender among the top 10 paid employees of the company, worth up to 10 points (only for companies with more than 250 employees).

A certain number of points will be attributed depending on how well the company performs in each category. The results of the calculation will be compiled into a report, and if companies fail to obtain the target score of 75 out of 100 points, they will have three years to remedy the failure or face a potential fine of up to 1 percent of their total yearly payroll costs.

A transparency obligation accompanies the new law. This obligation requires companies to publish their overall gender pay gap results and their proposed measures for reducing the pay gap. Each company's grade must be published on the company's website or communicated to the employees by another means if the company does not have a website. In addition, the company must communicate its report and the planned corrective measures, if any, to its works council and by electronic filing to the French Ministry of Labor.

The ministry announced in March 2018 that, to ensure compliance with gender equality regulations, Labor inspections are expected to quadruple from 1,730 to 7,000 annual evaluations.

Germany

The June 2017 edition of *Employment Flash* summarized recent equal pay developments in Germany. German legislators have focused on pay transparency, as opposed to gender pay gap reporting, to enable the enforcement of equal pay laws. The Transparency of Remuneration Act (TRA), which went into effect in Germany on June 1, 2017, applies nationwide in all industry sectors and prohibits unequal pay based on an employee's sex with respect to employees who perform comparable work. Notably, the TRA provides that employees working in establishments with more than 200 employees can request information about the average remuneration of a group of at least six comparable employees. An employee must show in an application to the employer that the employees in the group to be compared are in fact comparable. The information to be provided by the employer is establishment-specific information. Therefore, higher wages paid by the same employer to employees in other establishments and in other regions of Germany are not relevant for the comparison. The employer is obligated to provide information within three months of an employee's request. If the employer fails to comply with these requests, a presumption of unequal treatment applies, and the employee is entitled to the higher average remuneration. Furthermore, if the employer complies and the information shows that at least six comparable employees of the opposite sex are paid more on average for performing the same or equivalent work, the employee is entitled to the higher average remuneration. The TRA does not specify any penalties for unequal pay violations.

Each country's pay gap figures are different, and the reasons for such figures will vary. Accordingly, there is no "one size fits all" remedy to address equal pay issues. What is clear, however, is that similar initiatives are being considered across Europe to address such issues.

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