Employment Flash

Skadden

November 2023

In This Issue:

1 NLRB Issues Final Rule on 'Joint Employer' Standard

2 NLRB Increases Scrutiny of Employment Policies

2 President Biden and California Governor Issue Executive Orders on Artificial Intelligence

2 EEOC Proposes PWFA Regulations

3 EEOC Issues Guidance on Addressing Visual Disabilities in the Workplace Under the ADA, Including in Connection With the Use of AI

3 New York City's DCWP Adopts New Rules on ESSTA

4 New York City Provides Guidance on Automated Employment Decision Tool Law

4 California Increases Paid Sick Days

5 California Expands and Strengthens Non-Compete Restrictions

5 California Supreme Court Deviates From US Supreme Court on PAGA Standing

5 New California Law Requires Diversity Reporting by VC Firms

6 California Enacts Rebuttable Presumption of Retaliation

7 International Spotlight

- France
- Germany
- United Kingdom

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

One Manhattan West
New York, NY 10001
212.735.3000

NLRB Issues Final Rule on 'Joint Employer' Standard

On October 26, 2023, the National Labor Relations Board (NLRB) issued a final rule titled "Standard for Determining Joint Employer Status," which rescinds and replaces the final rule titled "Joint Employer Status Under the National Labor Relations Act," which took effect in 2020.

Under the new standard, two or more entities will be deemed joint employers of a group of employees under the National Labor Relations Act (NLRA) if each entity has an employment relationship with the employees and they share or co-determine (control) one or more of the employees' essential terms and conditions of employment, whether or not such control is actually exercised and regardless of whether such control is direct or indirect. The new rule provides an exhaustive list of essential terms and conditions of employment, namely: (1) wages, benefits and other compensation; (2) hours of work and scheduling; (3) the assignment of duties to be performed; (4) the supervision of the performance of duties; (5) work rules and directions governing the manner, means and methods of the performance of duties and the grounds for discipline; (6) the tenure of employment, including hiring and discharge; and (7) working conditions related to the safety and health of employees.

A party asserting that an employer is a joint employer of particular employees has the burden of establishing the employer's authority to control, or exercise of control, over essential terms and conditions of employment by a preponderance of the evidence. If an employer is found to be a joint employer, it must bargain collectively with the applicable employees' representative regarding any term or condition of employment that it has the authority or power to control (regardless of whether it is an essential term or condition of employment under the rule), but the employer is not required to bargain any term or condition of employment over which it has no authority or power to control.

The new rule goes into effect on December 26, 2023, and the new standard will be applied only to cases filed after that date.

NLRB Increases Scrutiny of Employment Policies

On August 2, 2023, the NLRB adopted a new legal standard to determine whether an employer's work rule — such as those commonly found in employee handbooks — that does not explicitly restrict employees' protected activity under Section 7 of the NLRA is nevertheless unlawful under Section 8(a)(1) of the NLRA. In *Stericycle, Inc. and Teamsters Loc. 628*, 372 NLRB No. 113, the NLRB reversed the Trump-era decision in *Boeing Co.*, 365 NLRB No. 154 (2017), which had made it easier for employers to defend themselves against claims of having work rules that restricted concerted activity.

The 3-2 decision in *Stericycle* held that employer policies restricting concerted activity violate the NLRA if the policy creates a "reasonable tendency" to discourage employees from engaging in collective or organizing activities. An employer can rebut the resumption that a rule is unlawful by demonstrating that it advances legitimate and substantial business interests that cannot be achieved by a more narrowly tailored rule. In contrast, under the *Boeing* decision, the NLRB had engaged in a balancing test by weighing the nature and extent of the potential impact of the rule on NLRA rights against the legitimate justifications of the employer in implementing the rule. *Stericycle* provides a return (with additional clarity around how employer interests factor into the NLRB's analysis) to the previous standard from the 2004 decision in *Lutheran Heritage Vill.-Livonia*, 343 NLRB 646. In the *Lutheran* decision, the NLRB held that facially neutral rules that do not plainly target employee rights may nonetheless violate the NLRA if employees would reasonably construe the language to prohibit Section 7 activity.

After *Stericycle*, employers should reconsider overly broad or ambiguous work rules, including those that appear to be facially neutral, and carefully draft any potential new rules to avoid any appearance of discouraging employees' Section 7 rights, particularly now that employer intent will not be considered a defense under Section 8(a)(1).

President Biden and California Governor Issue Executive Orders on Artificial Intelligence

On October 30, 2023, President Joe Biden issued an "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." Recognizing that artificial intelligence (AI) "holds extraordinary potential for both promise and peril," the executive order sets out, among other things, eight guiding principles and priorities of the Biden administration in connection with the advancement and development of AI, some of which may be of particular interest to employers.

For example, the executive order recognizes that in many aspects of life, such as employee hiring, AI use can "deepen[] discrimination and bias, rather than improving quality of life." Accordingly, the executive order provides that all federal AI policies must be consistent with the administration's dedication to advancing equity and civil rights and that AI must not be used to disadvantage those in society who are already denied equal opportunities. The executive order also recognizes that the development and use of AI requires a commitment to supporting American workers. In addition to giving workers a "seat at the table," including through collective bargaining, to ensure that they benefit from the new jobs and industries that AI creates, the executive order cautions that AI must not be deployed in ways that "undermine rights, worsen job quality, encourage undue worker surveillance, lessen market competition, introduce new health and safety risks, or cause harmful labor-force disruptions." The order tasks the secretary of labor with submitting a report to the president that (1) evaluates existing government programs that could be utilized to help workers displaced by AI and (2) identifies potential new legislative initiatives to support workers. President Biden also tasks the secretary of labor, in consultation with others (such as unions and workers), with producing a list of principles and best practices for employers to mitigate harm to workers while still maximizing the benefits of AI. The order comes just weeks after California Gov. Gavin Newsom issued Executive Order N-12-23 to study the development, use and risks of AI technology in the state and develop a deliberate and responsible process for evaluating and deploying AI within state government. Gov. Newsom's order, among other things, calls for (1) the development of guidelines for state agencies and departments to analyze the impact that adopting AI tools may have on vulnerable communities, (2) training for state government workers on the use of state-approved AI tools to achieve equitable outcomes and (3) engagement with the California State Legislature to develop guidelines, criteria, reports and trainings as directed by the order. As in President Biden's order, Gov. Newsom's order also "seeks to realize the potential benefits of [AI] ... while balancing the benefits and risks of these new technologies."

EEOC Proposes PWFA Regulations

On August 11, 2023, the Equal Employment Opportunity Commission (EEOC) issued proposed regulations to implement the Pregnant Workers Fairness Act (PWFA). The PWFA, which was signed into law in December 2022, requires covered employers to provide reasonable accommodations in the workplace to qualified employees and applicants who have limitations due to pregnancy, childbirth or related medical conditions, unless the accommodation will cause an undue hardship on the operation of the employer's business.

Included in the EEOC's proposed regulations are examples of accommodations it views as "simple, common-sense" accommodations, such as providing additional bathroom breaks, allowing employees to carry water bottles and drink water while working and permitting employees to sit or stand as they wish. The proposed regulations also include a non-exhaustive list of examples of potential reasonable accommodations, including schedule changes; part-time work and paid and unpaid leave; job restructuring; temporarily suspending one or more essential functions of the position; and modifying equipment, uniforms or devices; as well as a non-exhaustive list of examples of pregnancy, childbirth or related medical conditions that the EEOC has concluded generally fall within the statutory definitions of such terms.

The proposed regulations also ban a number of practices by employers, such as failing to provide an accommodation absent undue hardship, taking an adverse action against an employee or applicant seeking an accommodation, forcing an employee to take paid or unpaid leave if another effective reasonable accommodation exists and requiring an employee to accept an accommodation other than one arrived at through an interactive accommodation process.

EEOC Issues Guidance on Addressing Visual Disabilities in the Workplace Under the ADA, Including in Connection With the Use of AI

On July 26, 2023, the EEOC issued a technical assistance document that provided employers with guidance regarding the application of the Americans with Disabilities Act to job applicants and employees with visual disabilities. The document, which is one of a series of question-and-answer releases addressing particular disabilities in the workplace, outlines, among other things, when an employer may ask an applicant or employee about his or her vision, how an employer should treat voluntary disclosures about visual disabilities and the types of reasonable workplace accommodations that may be needed. The document also advises employers on how to handle safety concerns regarding applicants and employees with visual disabilities and how to prevent and correct harassment related to an employee's visual impairment.

The document also addresses the use of algorithms and AI and their potential impact on job applicants and employees with visual impairments. Accordingly, the release explains how algorithmic or AI decision-making tools may intentionally or unintentionally "screen out" job applicants or employees with visual impairments who, with or without reasonable accommodation, can perform the relevant job. The document suggests that employers take steps to inform employees and applicants of the use of such tools in hiring and promotion decisions and make reasonable accommodations where the technology may lead to individuals losing out on opportunities because of a visual impairment. As an example, the EEOC outlines a scenario where an employer uses an algorithm that takes into account keystrokes per minute to evaluate employee productivity. In this example, if the employer fails to notify employees or job applicants who are (1) blind or visually impaired and (2) who use voice recognition software because of their disability of the use of this algorithm, these individuals may rate poorly in such an evaluation and lose out on job opportunities. The document therefore suggests that an employer inform employees or applicants of how they will be assessed, so that those with visual disabilities are able to request alternative means of measuring their productivity.

New York City's DCWP Adopts New Rules on ESSTA

The New York City Department of Consumer and Worker Protection (DCWP) has adopted new rules relating to the city's Earned Safe and Sick Time Act (ESSTA). These rules clarify various aspects of the ESSTA, including employer size, employee eligibility, documentation and notice requirements, reporting standards and penalties. For example:

- In calculating employer size (headcount), which determines the application of ESSTA obligations, employers should count all employees nationwide, even those who are part-time, jointly employed or absent due to leave or suspension.
- While included for purposes of calculating an employer's size, employees performing work solely outside of New York City are not covered by the ESSTA. However, coverage does extend to hybrid employees who regularly work in New York City, even if their primary work location is outside of the city.
- Employers may require documentation and reasonable notice from employees regarding the use of sick and safe time, provided that the employer has a written policy regarding these requirements. Documentation may be provided by a mental health counselor, licensed clinical social worker or other licensed health care provider. The employer must reimburse the employee for costs incurred to obtain that documentation. With respect to an employer's requirement for an employee to provide reasonable notice of an absence, acceptable methods of notice include, but are not limited to, sending an email to a designated address or submitting a request via a scheduling software system (if the system is available to employees on non-work time), provided that such notice procedures are set forth in the employer's written policy.
- Employees must be compensated for sick and safe time at their regular rate of pay. Sick and safe time accruals and balances must be reported to employees each pay period on a paystub or other written documentation.

- While the ESSTA does not create a private right of action for employees, each employee is entitled to relief in the amount of $500 per calendar year for each year that an unlawful policy or practice remains in effect. In addition, every employee affected by the policy or practice is entitled to the sick and safe time the employee would have accrued, up to two times the maximum number of hours available for use in the calendar year. Importantly, a "reasonable inference" of lack of compliance with the ESSTA will exist if an employer fails to maintain or distribute a written sick and safe time policy or does not keep adequate records of employees' accrued sick and safe time use and balances.

The DCWP's rules became effective on October 15, 2023.

New York City Provides Guidance on Automated Employment Decision Tool Law

On July 5, 2023, the DCWP began enforcing its automated employment decision tool (AEDT) law. The law regulates AEDTs (sometimes called "artificial intelligence tools") by prohibiting employers and employment agencies from using these tools to screen candidates or employees for hiring or promotion decisions unless those tools have been subject to a bias audit within one year prior to their use, information about the audit is publicly available and notices have been provided to New York City job candidates and employees on whom the tools are used.

To assist employers in complying with the new law, the DCWP released guidance in the form of FAQs.

One subject on which the FAQs provide helpful guidance is in clarifying the law's geographic reach. The law applies to employers (and employment agencies) that use AEDTs "in the city," which is outlined in the FAQs as instances where:

- the job location is at an office in New York City, either part-time or full-time;
- the job is remote, but associated with an office in New York City; or
- the location of the employment agency using the AEDT is located in New York City.

The FAQs also clarify that the law does not apply to general outreach efforts (i.e., it only applies if a candidate is being considered for promotion or has applied for a specific position).

Other helpful clarifications in the FAQs are as follows:

- While an employer must conduct a bias audit before using an AEDT, there are no specific actions an employer must take after reviewing the results of such an audit, even if the results of the audit seem to indicate a disparate impact.
- If demographic information is unavailable or insufficient to conduct a bias audit, the employer may either use test data or historical data of other employers or employment agencies to conduct the audit.
- Employers and employment agencies are ultimately responsible for ensuring a bias audit is done before using an AEDT, even if their AEDT vendor (that is, the vendor that created the AEDT) has already had an independent auditor conduct a bias audit of its tool.

California Increases Paid Sick Days

On October 4, 2023, Gov. Newsom signed Senate Bill 616 (SB 616), which increases the amount of paid sick leave available to employees, the annual accrual cap and the number of sick days employees can carry over from year to year. Effective January 1, 2024, all California employers, other than railroad carrier employers, must provide at least five (as opposed to three) days (40 hours) of paid sick leave each 12-month period to eligible employees. Employees located in California are eligible to accrue paid sick leave after 30 days of work for the same employer within a year from the commencement of employment, and employers must allow employees to use accrued sick days after 90 days of employment.

Employers may continue to provide paid sick leave through an accrual method of at least one hour of paid sick leave for every 30 hours worked. Employers also may use alternative accrual methods, such as frontloading or upfront vesting, so long as the accrual is regular and employees receive at least three days (24 hours) of paid leave within 120 calendar days of employment and five days (40 hours) within 200 days. Employees may carry over accrued but unused days year to year, but no accrual or carryover is required when an employer provides the full five days at the beginning of each year of employment, calendar year or 12-month period. Employers may still cap the amount of paid sick leave used, but SB 616 extends the annual usage cap from three days (24 hours) to five days (40 hours) and the annual accrual cap for employers using the accrual method from six days (48 hours) to 10 days (80 hours).

SB 616 also extends certain rights to non-construction industry employees covered by a collective bargaining agreement (CBA) who are otherwise exempt from the paid sick leave statute. Accordingly, these employees need not find a replacement worker to cover absences, may use paid sick leave for the same reasons as employees not covered by a CBA and are protected against retaliation for using paid sick leave.

Even with the changes noted above, California's paid sick leave requirements remain less than the requirements of certain local ordinances. For example, employers in the city of Los Angeles

that do not follow the accrual method for paid sick leave must provide six days (48 hours) of sick leave to an employee at the beginning of each year of employment, calendar year or 12-month period.

California Expands and Strengthens Non-Compete Restrictions

On September 1, 2023, Gov. Newsom signed Senate Bill 699 (SB 699) into law, which expands the reach of the state's prohibition on non-compete covenants and remedies available to employees who are party to agreements containing unenforceable non-competes or similar restrictive covenants. While non-compete covenants already are generally prohibited and void as being against public policy in California (Section 16600 of the California Business and Professions Code states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void"), SB 699 expands this prohibition. In Section 1 of SB 699, the California State Legislature specifically finds and declares that "California's public policy against restraint of trade law trumps other state laws when an employee seeks employment in California, even if the employee had signed the contractual restraint while living outside of California and working for a non-California employer." Thus, any employee non-compete or similar restrictive covenant that purports to restrain an individual from engaging in a lawful profession, trade or business is void and unenforceable regardless of where and when the covenant was signed, and regardless of whether employment was maintained outside of California. SB 699 also provides a private right of action to current, former and prospective employees, who may obtain injunctive relief, actual damages, or both, plus reasonable legal fees and costs, for violations of the law. SB 699 will be codified in the California Business and Professions Code and the law will take effect on January 1, 2024. Given that SB 699 seeks to limit the enforceability of contracts signed in other states with employers outside of California, the law may face constitutional challenges for its implication of the Commerce Clause and/or the Contract Clause of the U.S. Constitution.

Additionally, on October 13, 2023, Gov. Newsom signed into law Assembly Bill 1076 (AB 1076), which also will be codified in the California Business and Professions Code and take effect on January 1, 2024. AB 1076 codifies existing case law in *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937 (2008) and voids any non-compete clause, regardless of how narrowly tailored, if it does not fall within one of the limited statutory exceptions (the sale or dissolution of a corporation, partnership or limited liability corporation) set out in the California Business and Professions Code. AB 1076 also makes it unlawful to include such a non-compete clause in an employment contract or to require an employee to enter into such an agreement. Finally, AB 1076 requires employers, by February 14, 2024, to notify all current employees and former employees who were employed after January 1, 2022, whose contracts include a non-compete clause or who were required to enter into a non-compete agreement that does not fall within a statutory exception, that the non-compete clause or agreement is void.

California Supreme Court Deviates From US Supreme Court on PAGA Standing

On July 17, 2023, in *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104, the California Supreme Court held that a plaintiff can pursue representative (non-individual) claims under the state's Private Attorneys General Act (PAGA) in court even in cases where the individual claims (claims seeking penalties for violations committed against the plaintiff) are sent to arbitration. This decision departs from last year's U.S. Supreme Court decision in *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, which held that if an individual PAGA claim goes to arbitration, the non-individual claims can be dismissed in court for lack of standing.

In addition to clarifying that "compelling arbitration of [] individual claims does not strip [a] plaintiff of standing as an aggrieved employee to litigate claims on behalf of other employees under PAGA," the California Supreme Court in *Adolph* also clarified that the outcome of a PAGA plaintiff's individual claims in arbitration will be binding on the issue of standing in respect of the non-individual claims, meaning if an arbitrator determines that a plaintiff is not an "aggrieved employee," then said plaintiff has no standing to pursue non-individual claims in court. Accordingly, the California Supreme Court indicated a trial court can stay the non-individual PAGA claims, pending arbitration of the individual PAGA claims.

New California Law Requires Diversity Reporting by VC Firms

On October 8, 2023, Gov. Newsom signed Senate Bill 54 (SB 54) into law, which is the first piece of legislation in the U.S. that is aimed at increasing diversity in venture capital (VC) funding. SB 54, titled "Fair Investment Practices by Investment Advisers," requires every VC company that meets certain criteria (described below) to report on an annual basis the demographic information, at an aggregated level, of the founding team members of companies in which the VC company made an investment in the prior calendar year. The following aggregated demographic information of founding team members must be reported: gender identity, race, ethnicity, disability status, LGBTQ+ status, veteran status and California residency. SB 54 also requires a covered VC company to report whether any founding member declined to provide the requested demographic information.

A covered VC company is one that (1) (a) primarily engages in the business of investing in, or providing financing to, startup, early stage or emerging growth companies, or (b) manages assets on behalf of third-party investors; and (2) (a) is headquartered in California, (b) has a significant presence or operational office in California, (c) makes VC investments in businesses that are located in or have significant operations in California or (d) solicits or receives investments from a person who is a resident of California.

The required report is due to the California Civil Rights Department each year on March 1, starting on March 1, 2025, and the reports will be published on the department's website.

In his signing message, Gov. Newsom explained that SB 54 resonated with his commitment to advance equity and provide for greater economic empowerment of historically underrepresented communities, but acknowledged that the new law contains "problematic provisions and unrealistic timelines that could present barriers to successful implementation and enforcement." Relatedly, the governor said his administration plans to propose "cleanup language" to the new law as part of the 2024-25 Governor's Budget.

California Enacts Rebuttable Presumption of Retaliation

On October 8, 2023, Gov. Newsom signed Senate Bill 497 (SB 497), also known as the "Equal Pay and Anti-Retaliation Protection Act," which will go into effect on January 1, 2024. SB 497 changes the current standard of establishing claims of retaliation, making it easier for employees to establish a *prima facie* case by creating a rebuttable presumption of retaliation if an employee is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to adverse action or inany other manner discriminated against in the terms and conditions of his or her employment, in each case, within 90 days of engaging in certain activity protected by the California Labor Code and California's Equal Pay Act. Protected activity includes actions such as making a complaint about unpaid wages or equal pay violations or making a complaint about any right that is under the jurisdiction of the California labor commissioner.

Currently, in order to establish a *prima facie* case of retaliation, an employee must demonstrate that: (1) the employee engaged in a protected activity, (2) the employer took an adverse action against the employee and (3) there was a causal relationship between the protected activity and the adverse action. If the employee demonstrates a *prima facie* case, the burden shifts to the employer to offer a legitimate non-retaliatory reason for the act, at which point the burden of proof shifts back to the employee to prove that the employer's proffered reason was pretextual. Once SB 497 becomes effective, an employee will no longer be required to establish a causal relationship between the protected activity and the adverse action in order to demonstrate a *prima facie* case if the two events occurred within 90 days of each other. Instead, if an employer takes an adverse action against an employee within 90 days of an employee engaging in protected activity, the burden immediately shifts to the employer to prove the act was non-retaliatory. SB 497 also increases the civil penalty for retaliation, with employers potentially liable for up to $10,000 per employee for each violation, to be awarded to the employee.

International Spotlight

France

Employment Documents Written in English May Not Be Enforceable

Under Article L. 1321-6 of the French Labor Code, any document containing obligations imposed on an employee, or provisions that are necessary for an employee to perform his or her work, must be written in French. This rule, however, does not apply to documents received from abroad or those provided to foreign employees in France.

In two recent decisions dated June 7, 2023, (n° 21-20.322) and October 11, 2023, (n° 22-13.770), the French Supreme Court (Cour de cassation), reaffirmed this language requirement.

In the June 2023 case, a former employee had challenged the enforceability of a commission plan — drafted and communicated to him exclusively in English — under which his former employer (a French subsidiary of a U.S. parent company) deducted commissions from his remuneration in accordance with the provisions of the plan. The employee argued that the commission plan was not enforceable against him pursuant to Article L. 1321-6 of the French Labor Code. The Court of Appeal of Toulouse dismissed the employee's claim and ruled that the commission plan was enforceable on the basis that the company's working language was English and that many emails were exchanged between the parties in English, including those written by the employee.

Similarly, in the October 2023 case, a company's former employee had challenged the enforceability of documents that set targets to receive variable compensation on the basis that they were written in English. The Court of Appeal of Versailles dismissed the employee's claim and held that since the English language was used within the company (which was a subsidiary of a U.S. entity), the mere fact that the documents were written in English was insufficient to render them unenforceable against the employee.

The Cour de cassation was unpersuaded by these facts and overturned both decisions of the courts of appeal on the basis that the only relevant exception provided by Article L. 1321-6 of the French Labor Court to the French language requirement was for documents "received from abroad." Since the courts of appeal did not verify whether the documents were received from abroad, the cases were referred back to each of the courts.

Germany

Employer Permitted To Use Open Video Surveillance in Breach of Contract Case

According to a decision of the Federal Labour Court (2 AZR 296/22, June 19, 2023), there is no general prohibition against an employer using open (as opposed to covert) video recordings of an employee in a dismissal protection lawsuit for the purpose of proving intentional conduct on the part of the employee that violates his or her employment contract. The ruling stated this is the case even if the employer's video surveillance measures do not fully comply with the requirements of applicable data protection laws.

'Social Plan Zero' is Possible in Employer Restructurings

In cases where an employer undertakes a major restructuring effort, said employer is obligated to negotiate a "social plan" (pursuant to which employees affected by the restructuring may receive benefits, such as severance payments) with the applicable works council. If no agreement on the financial arrangements of the social plan can be reached, a conciliation board is empowered to determine the plan pursuant to the Works Constitution Act.

According to a decision of the Federal Labour Court (1 ABR 28/21, February 14, 2023), in deciding on a social plan, the conciliation board must take into account not only the social interests of the affected employees, but also what is economically reasonable for the employer. In determining the total amount of social plan benefits an employer will be required to pay, the board must ensure that the continued existence of the employer and the jobs of any continuing employees are not jeopardized. This means that a very low-funded social plan, or even a so-called "social plan zero" (*i.e.*, a social plan that does not provide for any financial benefits to the affected employees), is possible. The Federal Labour Court made clear that a social plan is not economically justifiable if it would lead to illiquidity, balance sheet over-indebtedness or an unacceptable reduction in equity. The court also clarified that only the financial circumstances of the employing entity itself, and not a parent entity, may be considered by the conciliation board.

United Kingdom

UK Government Makes Changes to Flexible Working Rights and Acas Launches Consultation on Code of Practice

On July 20, 2023, the Employment Relations (Flexible Working) Act 2023 (ERFWA) received Royal Assent in the U.K. The ERFWA, which was the subject of a consultation in 2021, updates the existing regime to support employees who ask to work flexibly, for example, on part-time or reduced hours, or from home for some or all of their working time. The ERFWA is expected to come into force in July 2024, giving employers time to prepare for the changes that are included in the legislation. The key changes are:

- introducing a requirement that employers consult with employees to explore options before rejecting a flexible working request;
- increasing the number of statutory flexible working requests employees can make in any 12-month period from one to two;
- decreasing the time within which employers are required to respond to a flexible working request from three months to two (unless an extension is agreed to by the employee); and
- removing the current requirement for employees to set out how the effects of their flexible working request might be dealt with by the employer.

Under the current rules, employees must have 26 weeks of continuous service before they are able to make a flexible working request of their employer. While the ERFWA itself does not grant employees a right to make a day-one request for flexible working, the government has announced that it intends to introduce further legislation to make this change at a later stage.

Shortly before the new legislation came into effect, the Advisory, Conciliation and Arbitration Service, or Acas (a non-departmental public body of the Department for Business and Trade), launched a consultation on its draft Code of Practice on flexible working, which seeks to encourage a more positive, collaborative approach to flexible working. In particular, the Code highlights the importance of transparency throughout the flexible working request process and encourages employers to clearly explain their decisions on the requests to employees.

While employers still have the discretion to assess the "reasonableness" of individual flexible working requests, companies and organizations should ensure that their policies and procedures for dealing with flexible working requests are compliant with the ERFWA and the Code to reduce the risk of employee claims and reputational damage. Employers also should anticipate having to dedicate more resources to respond to flexible working requests, given the obligations imposed on employers by the ERFWA and the government proposal to grant employees a day-one right to make a request.

Contacts

David E. Schwartz
Partner / New York
212.735.2473
david.schwartz@skadden.com

Anne E. Villanueva
Partner / Palo Alto
650.470.4596
anne.villanueva@skadden.com

Helena J. Derbyshire
Of Counsel / London
44.20.7519.7086
helena.derbyshire@skadden.com

Philippe Despres
Of Counsel / Paris
33.1.55.27.11.56
philippe.despres@skadden.com

Noemi Blasutta
Counsel / Toronto and Los Angeles
416.777.4742 (Toronto)
213.687.5000 (Los Angeles)
noemi.blasutta@skadden.com

Ulrich Ziegler
Counsel / Frankfurt
49.69.74220.150
ulrich.ziegler@skadden.com