What's expected in employment law in 2021?

20 January 2021

Employment & Immigration, USA

- **Diversity, equity and inclusion requirements**
- **Cal/OSHA emergency standards**
- **COVID-19 vaccine – can employers make it mandatory?**
- **EEOC developments**
- **Protecting Right to Organise Act**
- **Leave and accommodation requests**
- **Upcoming cases**

With 2020 having ended as an unprecedented and historic year, this article highlights what changes are expected in 2021 and how these may affect employers and employees.**(1)**

Diversity, equity and inclusion requirements

There are several diversity, equity and inclusion requirements that may affect employers, depending on their size and whether they are a private or public corporation.

SB-973

California's new pay data reporting law (SB-973) will take effect on 31 March 2021 and will apply to private employers which have more than 100 employees and must file an annual EEO-1. In a departure from prior years, employers will need to disclose the number of employees by race, ethnicity and sex whose annual earnings fall within the particular pay bands. Employers will provide a snapshot of any pay period of their choice but should be aware of the pay period selected, as there may be misleading information if they have recently promoted or hired certain employees leading to reports showing pay disparities.

AB-979

AB-979 is a new Californian requirement that publicly held corporations in California must achieve diversity on their board of directors by having a minimum number of directors from underrepresented communities by 2023. By the end of 2021, all boards must have at least one diverse director (ie, a person of colour or a person who self-identifies as lesbian, gay, bisexual or transgender). By the end of 2022, boards with five to eight directors must have at least two diverse directors and boards with nine or more directors must have at least three diverse directors. This new requirement has raised questions on how employers will achieve this. Some will follow the 'wait and see' method as litigation is expected and an order may be issued that essentially stays this mandate. Others may adopt a practice of adding seats within a reasonable period that allows them to comply with this law by the end of 2021. With respect to non-compliance, the fine for an initial violation is $100,000 and the fine for subsequent violations is $300,000.

Diversity training for federal contractors and subcontractors

On 22 September 2020 an executive order was issued that prevents federal contractors and subcontractors from providing any training that has divisive effects. The law aims to eliminate divisive effects for military agencies and federal grant recipients. Under the order, training that has divisive effects and is therefore banned includes concepts:

- of inherent race or sex superiority;
- of inherent racism or sexism;
- that state that an individual's moral character is necessarily determined by their race or sex;
- that state that meritocracy or traits such as hard-work ethic are racist or sexist or were created by a particular race to oppress another race; and
- of assigning fault, blame or bias to a race or sex or to members of a race or sex because of their race or sex.

This executive order will likely be repealed under the new Biden administration. Employers should keep an eye on this in January 2021.

Cal/OSHA emergency standards

Many employers have reviewed their COVID-19 policies to ensure compliance with the California Division of Occupational Safety and Health's (Cal/OSHA's) emergency standards that came into effect on 30 November 2020 and are in place for 180 days (for further details please see "Cal/OSHA adopts emergency COVID-19 workplace standards").

The emergency standards apply to all Californian employees and employers, except:

- employees who work from home;
- worksites where an employee has no contact with others; or
- employers that are covered by Section 5199 of Cal/OSHA Title 8 Regulations.

Employers should pay attention to these emergency standards and review policies if they intend to bring employees back into the workplace. Employers must:

- have written COVID-19 prevention plans;
- provide training on COVID-19 policies and avoidance; and
- keep records that they have followed the above steps in the above order.

This becomes important if a workplace is exposed to COVID-19. If a workplace experiences an outbreak or a major outbreak, the employer must meet substantial new requirements until there have been no new cases for 14 days. Employers must ensure that their policies are compliant so that they are not subject to penalties or facility shutdowns.

COVID-19 vaccine – can employers make it mandatory?

The Equal Employment Opportunity Commission (EEOC) has already deemed COVID-19 in the workplace to be a 'direct threat' with respect to requiring COVID-19 viral testing (for further details please see "COVID-19 vaccine FAQs for employers"). Further, on 16 December 2020 the EEOC published several FAQs to guide employers that choose to implement a mandatory COVID-19 vaccination policy.

Employers can implement a mandatory COVID-19 vaccination policy, subject to some conditions and exceptions.

Mandatory vaccination policies must be:

- job related;
- consistent with business necessity; or
- justified by a direct threat.

Any policy requiring a vaccination must assume that there will be flexibility and carve outs to comply with Title VII, the American with Disabilities Act and other applicable state laws.

EEOC developments

There are recent EEOC developments that will affect all employers.

The first is the proposed revision of the EEOC's guidance manual on religious discrimination in the workplace. The previous manual was last updated in 2008 and since that time there have been several cases on religious discrimination and religious accommodations in the workplace. The manual is a great summary of the case law as interpreted by the courts and the EEOC. The second development is that as of September 2020, the EEOC has scaled back its enforcement policies relating to pattern and practice cases against employers.

Protecting Right to Organise Act

Employers must be aware of the Protecting the Right to Organise (PRO) Act that was passed by the House of Representatives in February 2020.

President Biden has stated that he supports the PRO act and following the November 2020 election, many labour groups have increased pressure requesting that this be one of his top priorities. The PRO act proposes significant changes to the National Labour Relations Act and existing case law. Among other provisions, it would:

- eliminate right-to-work laws in 27 states;
- reverse *Epic Systems*;
- broadly implement the 'ABC' test for independent contractors; and
- provide a private right of action for unfair labour practice charges.

In addition, the PRO act would seek to return to the previous joint employer test that existed under the Obama administration.

Leave and accommodation requests

When it comes to leave and accommodation requests, the most important thing (outside of ensuring that policies and handbooks are updated) is that managers and supervisors dealing with these requests are well equipped to provide answers that are aligned with their employer's policies.

Employers must take the extra step to ensure that the people who are administering the policies and are getting the day-to-day questions are being trained about how to properly respond to employees and know what the updates are. In California, there are drastic changes to the California Family Rights Act of which employers must be aware – it now applies to employers with five or more employees and there are no geographical restrictions. Additional amendments of which employers must be aware include:

- Kin Care leave;
- military leave;
- the expansion of protection for employees who are crime victims; and
- EEOC guidance on remote working as a reasonable accommodation.

Upcoming cases

There are many cases that came out in 2020 or will be coming out in 2021 of which employers should be aware.

Naranjo v Spectrum Security Services gave a favourable ruling for employers as to whether meal and rest break payments constitute a wage. The California courts of appeal stated no, these types of payment are premiums and not wage payments that would trigger violations to derivative statutes. The ruling is currently with the California Supreme Court, which will hopefully affirm the decision.

Magadia v Wal-Mart, which is pending review with the US Court of Appeals for the Ninth Circuit, is also favourable to employers that use retroactive overtime payments. The ruling from the US District Court for the Northern District of California in this case held that such payments must denote, at the very least, the hours associated with such retroactive overtime payments. Employers should review wage statements and ensure the denoting of hours associated with any retroactive overtime payments unless and until a higher court overturns the district court decision.

Ferra v Loews Hollywood Hotel addresses whether the term "regular rate of compensation" in Section 226.7 of the Labour Code requires the same calculations as the term "regular rate of pay" in Section 510(a) of the Labour Code. The California courts of appeal stated that employers must pay the meal and rest break premiums at the base rate of compensation, not at the regular rate of compensation. This could have significant implications for employers if the California Supreme Court overturns the appellate court decision.

Finally, transport employers should keep an eye on *International Brotherhood of Teamsters v Federal Motor Carrier Safety Administration*, which will resolve the propriety of the Federal Motor Carrier Safety Administration's order that its hour of service rules pre-empt California meal and rest period laws.

For further information on this topic please contact Christopher A Braham, Yesenia M Gallegos or Elvira Kras at McDermott Will & Emery's Los Angeles office by telephone (+1 310 277 4110) or email (cbraham@mwe.com, ygallegos@mwe.com or ekras@mwe.com). Alternatively, please contact Ellen M Bronchetti at McDermott Will & Emery's San Francisco office by telephone (+1 628 218 3800) or email (ebronchetti@mwe.com). The McDermott Will & Emery website can be accessed at www.mwe.com.

Endnotes

(1) This article is based on a recent webinar, available here.

Kristin E Michaels, partner, assisted in the preparation of this article.


Christopher A Braham


Yesenia M Gallegos


Elvira Kras


Ellen M Bronchetti