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From the Employment, Labor & Benefits Practice Group

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NEWS *FLASH*

Electronic Disclosure Relief Is On Its Way!

On October 23, 2019, in response to Executive Order 13847, the Department of Labor proposed new regulations for the electronic disclosure of pension plan documents. The proposal creates a new safe harbor for electronic disclosures that can be made in addition to, or in lieu of, the 2002 safe harbor.

The new safe harbor has a "notice and access" structure where "covered individuals" must be provided notice that pension plan documents are on the web. Under the proposed regulation, a "covered individual" is any participant or beneficiary who provides the employer with an email address (even if it is an employer provided email address) or a smartphone number. Any pension plan document or notice required to be provided under ERISA (i.e. summary plan descriptions, summary annual reports, statements of material modifications) are eligible for electronic disclosure. It should be noted that this regulation does not apply to welfare plan documents (yet).

Prior to taking advantage of this safe harbor, plan administrators must provide (in paper) an initial notice to participants and beneficiaries that it intends on providing future plan documents and notices in electronic format, and provide the individuals the opportunity to choose to still receive paper documents. Once this initial notice has been sent, the plan administrator can satisfy the disclosure requirements by issuing an electronic notice (by email or to a smartphone) to each participant and beneficiary that the plan document is available on the employer's website (or website of the third party administrator). The document must be available on the website the same day as the notice is provided. The electronic notice must also inform the individuals that they are entitled to receive a paper copy of the document, without charge, and who to contract to request the document.

The proposed regulation is open for comment until November 22, 2019 and will be effective sixty (60) days after the final regulation is published. We'll keep you posted as this develops.

California Bans Mandatory Arbitration of Certain Employment Claims

On October 13, 2019, California Governor Gavin Newsom signed California Assembly Bill 51 into law, which bans employers from requiring applicants and employees to enter into mandatory arbitration agreements governing disputes that arise under the California Fair Employment and Housing Act ("FEHA") or the California Labor Code. While employers will not be able to use voluntary opt-out clauses to avoid reach of the law, it is unclear how this law will affect voluntary arbitration agreements. The new law goes into effect on January 1, 2020, and applies only to contracts for employment entered into, modified, or extended on or after January 1, 2020.

It is very possible that the law will be challenged on grounds that it is preempted by the Federal Arbitration Act. Given the likelihood of such a challenge to the law, employers with California employees could choose to maintain the status quo and continue mandatory arbitration programs until anticipated litigation plays out, provided the employer has a complete understanding of the risks associated with noncompliance with the new law. If, on the other hand, California employers want to prepare for compliance with the new law, such employers should consider striking all mandatory arbitration agreements and voluntary opt-out clauses relating to disputes under the FEHA or the California Labor Code from their new-hire documentation and related form agreements.

DOL Announces New Overtime Regulations

The Fair Labor Standards Act requires that most U.S. employees be paid at not less than time and one-half their regular rate of pay for all hours worked over 40 hours in a workweek, unless the employee qualifies for an exemption. On September 24, 2019, the Department of Labor ("DOL") announced changes to the "white-collar" employee exemption and the "highly compensated" employee exemption. The following outlines the changes set to go into effect January 1, 2020.

White-collar employees who meet certain tests regarding their job duties and are paid on a salary basis at a certain salary level are exempt from overtime pay. The current regulations provide that in order to meet this exemption, the employee must be paid at a minimum salary level of $455 per week. Beginning January 1, 2020, this minimum salary level will change to $684 per week. New to this exemption, employers may now use nondiscretionary bonuses and incentive payments, including commissions, paid on an annual or more frequent basis to satisfy up to 10% of the new $684 salary level.

The DOL regulations also contain an exception for highly compensated employees who may not otherwise meet the full job duties portion of the white-collar exemption. While this exemption is not new, the annual salary requirement that makes an individual "highly compensated" is changing. Beginning January 1, 2020, employees who are paid a total annual compensation of $107,432 or more, which includes at least $684 per week paid on a salary basis, are exempt from overtime pay requirements. This is an increase from the current regulations which require annual compensation of $100,000. The requirement that the highly compensated employee primarily perform office or non-manual work and regularly perform at least one of the job duties required by the white-collar exemption does not change.

Before January 1, 2020, we would urge all employers to audit all of their positions and wage and hour practices to ensure that:

1. Positions are properly classified as exempt or nonexempt from federal and state minimum wage and overtime rules. Remember, exempt positions must meet both a salary basis test and a duties test.

2. Nonexempt employees are being paid properly. Remember, timekeeping records must be maintained, travel time properly paid and certain bonuses and other payments included in overtime calculation.

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