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New Year, New Employment Laws

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With the start of the New Year, employers should resolve to take action to ensure employment policies and practices are in compliance with recently enacted and revised laws. In addition to federal laws such as OSHA that impact employers across the nation, District of Columbia employers are now subject to (or soon will be subject to) a myriad of additional new laws that significantly alter employer obligations in 2015. Employers need to be proactive by updating employment policies and ensuring compliance with requirements of these new laws.

Expansion of Reporting Requirements by OSHA

The Occupational Safety and Health Administration (OSHA) has revised its Occupational Injury and Illness Recording and Reporting Requirements, codified at 29 C.F.R. § 1904.2 and 29 C.F.R. § 1904.39, effective January 1, 2015.

Under a prior version of the law, employers were only required to report workplace fatalities and to report injuries when three or more workers were hospitalized in the same incident. Effective January 1, 2015, employers are now required to report all work-related fatalities within 8 hours and to report all in-patient hospitalizations involving one or more employees. Amputations, and losses of an eye, must be reported within 24 hours of becoming aware of the incident. This expanded reporting rule applies to **all employers** under OSHA's jurisdiction, even those exempt from the recordkeeping rules. These specified injuries can be reported to OSHA by calling 1-800-321-OSHA or by contacting the nearest regional OSHA office.

Additionally, beginning January 1, 2015, certain industries that were previously exempt from OSHA's requirements will now be required to keep routine OSHA records, such as the OSHA 300 Log of Work-Related Injuries and Illnesses. The expanded requirements now mandate that automobile dealers, specialty food stores, liquor stores, performing arts companies, museums, historical sites, and building supply dealers must fully comply with all recordkeeping requirements. Other industries remain only partially exempt from OSHA's recordkeeping requirements, since they must still report the critical job-related incidents listed above within the federally-mandated time limits.

To ensure compliance with the new reporting and recordkeeping rules, employers covered by the federal OSHA should do the following:

- Review their safety handbooks and employment policies to ensure compliance with the new reporting requirements;
- Determine whether they will or will not be required to keep injury and illness records and update recordkeeping policies as appropriate; and
- Train employees on the new reporting and recordkeeping requirements.

Amendments to the District of Columbia Paid Sick and Safe Leave Act

Amendments to the District of Columbia Paid Safe and Sick Leave Act became effective October 1, 2014. The Amendments significantly alter the prior law, expanding the scope and extent of paid leave available to District of Columbia employees. The class of employees covered under the Act has been broadened, and any employer in the District of Columbia "who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency or similar entity, employs or exercises control over the wages, hours, or working conditions of" is obligated to provide paid leave pursuant to the Act. Notably, there are no longer any length of service pre-requisites to eligibility for leave under the Act as amended. An employee becomes eligible to accrue leave on the first day of employment. However, an employee may be required to complete 90 days of service prior to being eligible to take paid leave under the Act. Employers with:

- 100 or more employees must provide one hour of paid leave for every 37 hours an employee works, up to a maximum of seven days annually,
- 25 to 99 employees must provide one hour of paid leave for every 43 hours an employee works, up to a maximum of five days annually, or
- 24 or fewer employees must provide one hour of paid leave for every 87 hours an employee works, up to a maximum of three days annually.

Accrual is no longer capped and employees may carry over unused accrued paid leave benefits from year to year without limit. The provision in the prior version of the Act specifying that accrued benefits need not be paid at termination has been removed, and the Act is now silent with respect to termination. Although it is unclear, it appears as if employers may specify that employees will not be paid for unused leave at termination.

Under the amended law, an employer will be required to reinstate any previously accrued but unused paid leave when an employee: (1)who was transferred out of DC returns to a position with any division, entity, or location of the same employer within DC; or (2) is rehired within one year of separation from employment.
Employers are required to maintain records of hours worked by employees and accrued leave taken for a period of three years, and to allow the Office of the DC Auditor to access their records to monitor compliance. Failure to maintain or to allow access to these records will create a rebuttable presumption that the law was violated.

Retaliation for requesting or taking leave is prohibited. An employer taking an adverse action against an employee within 90 days of an employee requesting or taking leave under the Act shall raise a rebuttable presumption that the employer has violated the Act.

The amended law now allows for a private right of action for the first time.

Fair Criminal Record Screening Amendment Act of 2014 ("FCRSAA")

The FCRSAA, which took effect on December 11, 2014, generally prohibits employers with 10 or more employees in the District from conducting any pre-offer inquiry into an applicant's criminal background. The Act does allow targeted use of post offer criminal background checks, with an individualized assessment of each candidate, taking into consideration the factors set forth in the Act. The Act also recognizes limited exceptions, such as when another law requires consideration of an applicant's criminal history. The above prohibitions also apply to unpaid internships and independent contractor relationships.

Once a conditional offer of employment has been made, Employers may inquire about the applicant's criminal background and may conduct criminal background checks. If the applicant or employee has a criminal background, the employer must conduct an individualized assessment to determine if the conviction renders the applicant/employee unqualified for the position in question prior to revoking a conditional offer or taking adverse employment action. The individualized assessment must take into consideration the following factors:

- The specific duties and responsibilities for the position sought;
- The bearing of the criminal offense on the applicants' fitness or ability to perform the duties and responsibilities of the position sought;
- The time since the offense;
- The age of the applicant at the time of the offense;
- The frequency and seriousness of the offense; and,
- Any information produced by or on behalf of the applicant to show his or her rehabilitation and good conduct since the offense.

An applicant that believes an adverse action was impermissibly taken based on a criminal conviction has 30 days from the time of the adverse action to request the employer provide a copy of all records obtained in its consideration of the applicant. The employer then has 30 days

to provide these records and also provide the applicant with a notice of his or her right to file an administrative complaint with the DC Office of Human Rights. Employers who conduct background checks must also ensure compliance with the notice requirements of the Fair Credit Reporting Act.

There is no private right of action under the law, meaning an aggrieved person must file an administrative complaint with the DC Office of Human Rights. Penalties for employers violating the law range from $1,000 to $5,000 depending on the employer's size, half of which may be awarded to the complainant.

Wage Theft Prevention Amendment Act of 2014 ("WTPAA")

The WTPAA, which is projected to take effect on January 14, 2015, significantly modifies District of Columbia wage laws.

New Pay Notice Requirements. Within 90 days of the law's effective date, employers must provide every existing employee a written notice, in English and in the employee's primary language, setting forth the following:

- The employer's name and any "dba" names it uses;
- The employer's main office or principal business place address;
- The employer's telephone number;
- The employee's rate of pay, basis of that rate including by the hour, shift, day, week, salary, piece, or commission, any allowances claimed as part of the minimum wage, including tip, meal or lodging allowances, or overtime rate of pay, exemptions from overtime pay, living wage, exemptions from the living wage, and the applicable prevailing wages;
- The employee's regular payday; and
- Any other information deemed material and necessary.

New employees hired after the law goes into effect must also receive this notice. An amended notice must be provided if any of the above listed information changes, such as when there are changes to pay rates. Notices provided under the Act must be signed and dated by the employer and the employee. It is anticipated that the District of Columbia will provide a template notice within 60 days of the law's effective date. Failure to comply with the Act's notice requirements subjects employers to fines of $500 per employee.

Other Modifications to District of Columbia Wage Laws. The amendments also impact the Wage Payment and Wage Collection Law ("WPWCL"), the Living Wage Act ("LWA"), the

Minimum Wage Revision Act ("MWRA"), and the Accrued Sick and Safe Leave Act ("ASSLA") in many ways, such as:

- FLSA non-exempt employees must be paid at least twice a month and within one business day following involuntary terminations (excluding employees responsible for handling employer monies).
- Emergency Amendments to the original Act clarified that bona fide executive, administrative, and professional employees are exempt from the WTPAA's requirement for employers to record the "precise time worked" each day and each workweek by employees and are only required to be paid once per month.
- General contractors are jointly and severally liable for their subcontractors' WPWCL, LWA and ASSLA violations, and failure to pay wages under the MWRA, although subcontractors generally must indemnify general contractors for damages caused by such violations. Emergency amendments were included in December to provide that a very limited exception where the contract between the general contractor and subcontractor provides otherwise and the contract was in effect prior to the effective date of the Act (expected to be January 14, 2015).
- Employers likewise are jointly and severally liable for their staffing agencies' WPWCL, LWA, MWRA and ASSLA violations, with the staffing agency required to indemnify its client. The limited exception set forth above also applies to staffing agencies and their clients.
- Negligent WPWCL and MWRA violations are now punishable as misdemeanors.
- There is a new administrative process for MWRA, LWA, ASSLA and WPWCL administrative complaints, and each statute now allows for a private cause of action with remedies including back pay and reinstatement and, for the MWRA, treble damages. The Emergency Amendments added in December provide maximum caps for monetary penalties.
- Class actions are now more likely because the definition of "similarly situated" employees is now "two or more persons employed by the same employer at some point during the applicable statute of limitations period who allege one or more violations that raise similar questions as to liability and seek similar relief." Employees who seek different amounts in damages or have different jobs may now be considered "similarly situated."
- Retaliation against any employee who complains about violations, initiates or intends to initiate a complaint, provides information or participates in any investigation, or otherwise exercises rights under the Act is strictly prohibited.
- Retaliation is presumed to have occurred if an adverse action is taken against the employee within 90 days of any of the above protected activities.

- Any business found guilty or liable in any judicial or administrative proceeding of committing or attempting to commit willful violations of these laws will not be eligible to obtain a license to do business for the three-year period following the violation.

Employees may file a civil action or file an administrative complaint asserting a retaliation claim under any of these statutes. Employers found liable for retaliation will be subject to a variety of penalties, including economic damages, civil penalties, liquidated damages, attorney fees, and injunctive relief (including reinstatement of the complaining employee).

Protecting Pregnant Workers Fairness Act of 2014 ("PPWFA")

The PPWFA is projected to go into effect January 21, 2015. The Act requires employers to provide reasonable accommodations to employees whose ability to perform their job is affected by pregnancy, childbirth, breastfeeding, or related medical conditions, unless such accommodations would work an undue hardship on the operation of the employer's business. Employers are required to engage in an interactive process with any employee requesting or needing an accommodation. The Act provides specific examples of reasonable accommodations that may be required, such as more frequent or longer breaks; leave to recover from childbirth; a private non-bathroom space for expressing breast milk; proper seating; light duty job assignments; temporary transfer to a less strenuous position; modifying equipment; modifying work schedule; and excusing an employee from heavy lifting.

Undue hardship is defined as "any action that requires significant difficulty in the operation of the employer's business or significant expense on the behalf of the employer when considered in relation to factors such as the size of the business, its financial resources, and the nature and structure of its operation." Medical certification regarding the need for reasonable accommodations may be required by the employer, provided the employer requires certification for other situations involving temporary disabilities such as Family and Medical Leave.

The Act prohibits employers from:

- Refusing to make reasonable accommodations;
- Retaliating against an employee that requested an accommodation;
- Denying employment due to the employer's need to make reasonable accommodations;
- Forcing an employee to accept an accommodation that is not necessary; or
- Requiring an employee take leave instead of offering an accommodation.

Employers must post and maintain a notice of PPWFA rights in English and Spanish. Employers must also provide written notice to all new employees upon hire and to all existing employees within 120 days after the Act's enactment date. Finally, subsequent to the effective date of the

Act, employers also must provide written notice of PPWFA rights to any employee that notifies the employer of her pregnancy or other condition covered by the Act, within 10 days of receiving such notice.