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LABOR AND EMPLOYMENT

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16 LABOR & EMPLOYMENT RESOLUTIONS FOR 2016

By Alizah Z. Diamond

Chewbacca has announced that he and R2D2 will be challenging Donald Trump for the Republican nomination. And, now that I almost certainly have your attention, it is that time of year again — the time to review and reflect on all that has happened this past year and to look ahead to new possibilities in the upcoming year. What resolutions will we make for 2016?

As we enter the final year of the Obama Administration, there appears to be little sign that the Administration's pro-employee regulatory agenda, or the encroaching initiatives at the state and local levels, will slow down in 2016. Indeed, a significant number of crucial workplace issues are in the spotlight as we enter the new year, including increased minimum wage rates and leave rights, final roll-out of the Affordable Care Act, whistleblowers, medical marijuana use, new limitations on hiring and background check practices, increased scrutiny of worker classification, the proposed expansion of overtime eligibility to millions of workers, pregnancy discrimination, religious accommodation, and the National Labor Relation Board's expansion of its "joint employer" standard. To help employers navigate successfully through a number of these issues, we encourage employers to consider making the following resolutions:

1. Prepare for minimum wage increases set to go into effect on January 1, 2016, if you employ federal contract workers or are an employer in one of the following states: Alaska, Arkansas, California, Colorado, Connecticut, Hawaii, Massachusetts, Michigan, Nebraska, New York (eff. Dec. 31, 2015), Rhode Island, South Dakota and Vermont. Other states have increases that are set to go into effect in the summer of 2016, including Maryland, Minnesota and Washington, D.C.

2. Prepare for compliance with expected final regulations from the U.S. Department of Labor (DOL) revising the "white collar" exemptions for executive, administrative and professional employees under the Fair Labor Standards Act's (FLSA) minimum wage and overtime requirements. In 2015 the DOL proposed rules that would increase the minimum weekly salary requirement for exempt "white collar" employees from $455 per week to a weekly salary at the 40th percentile of weekly earnings for full-time salaried workers, based on Bureau of Labor Statistics data. For 2016, the 40th percentile number is projected to be at least $970 per week, which amounts to about $50,440 per year. This means an increase of more than 50% in the salary threshold to classify employees as exempt under the "white collar" exemptions. Further, while the rules that were proposed do not change more than the minimum salary threshold, the final rules conceivably could revise the job duties test for executive, administrative, and professional employees as well, as the DOL also solicited comments on some aspects of these tests. Employers should review their current classifications to ensure that

employees classified as exempt meet the new salary requirements and, at a minimum, still satisfy the current job duties tests. Employers will need to decide whether to raise the salaries of their lower paid currently exempt employees or re-classify them as "non-exempt" and make them eligible for overtime. Reclassification of employees who work irregular hours or significant overtime during certain times of the year may pose particular challenges.

3. For federal contractors and employers in an increasing number of states and municipalities, review paid time off (PTO), sick leave, and family/parental leave policies and procedures to ensure that they are compliant with new laws requiring mandatory sick leave and family/ parental leave for employees.

- **Paid Sick Leave**: In September 2015, President Obama signed an Executive Order requiring federal contractors to provide their employees with an hour of paid sick leave for every 30 hours an employee works, up to seven paid sick days per year. The Order reflects an accelerating trend at the state and local levels to require employers to provide paid sick leave. As of 2015, paid sick leave laws have been enacted in California, Connecticut, Massachusetts, Oregon and Washington, D.C. and in a significant number of cities located in New Jersey, New York and Pennsylvania. Paid sick leave laws are also pending in other jurisdictions, including at the New Jersey state level, where the state Senate this month passed a bill that would require employers of all sizes to provide paid sick leave to workers. Those employers now required to provide paid sick leave should update relevant policies, paying close attention to issues such as accrual, carryover and caps on leave and pay out of accrued and unused leave upon termination of employment. Employers may find it easier, for compliance and maintenance purposes, to consolidate their vacation and sick time policies into a single PTO program.
- **Paid Family/Parental Leave**: A growing number of states and cities are requiring employers to provide some paid family/parental leave to employees including, as of 2015, California, New Jersey, Massachusetts and Rhode Island. Paid family leave is already provided to municipal workers in a number of cities. Notably, last week in New York City, Mayor Bill de Blasio issued an executive order requiring six weeks of paid parental leave be provided to certain city workers who aren't represented by unions. Further, all employers, even employers that are not covered by such laws but which, nonetheless, provide paid maternity/parental leave to workers, should be mindful of recently issued guidance from the EEOC which states that, while women workers may be given extra leave time for medical reasons related to childbirth, employers must otherwise treat women and men the same with respect to parental leave policies. Employers should review and, if necessary, update their leave policies accordingly.

4. Review technological security and confidentiality policies and procedures to ensure that company data is protected not only from outside attack, but also from disloyal employees in light of a growing split among federal appellate courts on whether employees with authorization and login credentials to the employer's computer system can be civilly liable under the Computer Fraud and Abuse Act (CFAA) for taking company data – such as customer lists – when they depart to join a competitor. Although five circuit courts of appeals have held that an employee misusing his/her access to information in violation of company policy constitutes "exceeding authorized access" under the CFAA, in December 2015, the Second Circuit Court of Appeals (which covers New York, Connecticut and Vermont) published a decision in the matter of *U.S. v. Valle*, holding that if an employee is authorized to access his employer's computer systems, that employee's taking of data in violation of company policy does

not amount to a violation of the CFAA. The Court joined the Fourth and Ninth Circuit Court of Appeals in a growing minority of courts adopting this position. Employers should strongly consider implementing security measures to restrict sensitive data only to active employees who require access, as well as technological barriers such as encryption, monitoring and lockout protocols and firewalls.

5. Be aware that as the traditional physical boundaries of the workplace are quickly becoming obsolete for many employers due to the rise of telecommuting by employees, telecommuting arrangements must be balanced against the potential legal implications of allowing employees to work remotely. Common issues that may arise from telecommuting include, for example:

- **Wage & Hour Compliance:** Employers should be mindful that non-exempt employees working from home are likely entitled to minimum wage and overtime for hours worked over 40 in a workweek. Overseeing compliance with wage and hour law can be difficult when employees perform their work in a remote setting, and employers must implement relevant policies and frequently monitor employee schedules and time-keeping records to proactively identify potential issues.

- **Privacy & Data Security**: Telecommuting also invariably implicates data security concerns for employers. While many employers choose to minimize risks by mandating the use of employer-provided equipment which better enables them to implement electronic security measures, other employers allow the workplace use of dual-use devices such as personal smart phones, tablets or laptops. In such situations, to monitor employee use of such devices employers must, among other things, obtain employee consent to access content on dual-use devices and ensure that managers do not access private content employees may have stored in order to mitigate the risk of violating the Computer Fraud Abuse Act, the Stored Communications Act or related state laws.

- **Telecommuting as a "Reasonable Accommodation" to Disabled Employees**: More employers are facing the dilemma of whether to permit telecommuting as a "reasonable accommodation" for employees with disabilities under the Americans with Disabilities Act (ADA). While employers may be comforted by the Sixth Circuit Court of Appeals' recent *en banc* decision in the matter of *EEOC v. Ford Motor Co.*, confirming that regular on-site presence is an "essential function" of most jobs that employers are not required to sacrifice to accommodate a disabled employee, the Court also made clear in its decision that, in certain circumstances, such as for jobs that are less interactive, telecommuting may be a viable reasonable accommodation. Accordingly, employers should consider updating their policies to make clear, where appropriate, that on-site presence is an essential job function, as well as adopting neutrally-worded telecommuting policies and taking steps to ensure that they respond to requests for telecommuting arrangements fairly and consistently to avoid an inference of discrimination.

6. Review application and employee background check procedures and educate hiring personnel to ensure compliance with the Fair Credit Reporting Act (FCRA), state and local "Ban the Box" laws and state social media privacy laws. In 2015, we saw a wave of FCRA lawsuits concerning employer failure to provide disclosures and obtain authorization from an applicant/employee before procuring a "consumer report" from a consumer reporting agency, PEO or other outside vendor. Simultaneously, an increasing number of states and municipalities, most recently Oregon, New York City and Chicago, have enacted "Ban the Box" legislation prohibiting employers from even

inquiring about an applicant's criminal history until a conditional offer is extended and, in the case of New York City, prohibiting most employers from running credit checks or even considering an applicant's credit history. Further complicating the process of gathering information about job applicants, as of 2015, nearly two dozen states have enacted social media privacy laws that prohibit employers, at a minimum, from requesting access to employees' personal social media accounts as a condition of employment. It is, therefore, important that employers determine any potential vulnerability in their hiring processes sooner rather than later.

7. **Examine and, if necessary, restructure internship programs given decisions by a growing number of federal courts, including the Second Circuit Court of Appeals, rejecting the DOL's test for evaluating whether an intern is entitled to be paid as an employee under the Fair Labor Standards Act in favor of a more modern "primary beneficiary" test that focuses on who benefits most from the internship.** In 2015, the Second and Eleventh Circuit Courts of Appeals announced internship-related decisions rebuffing the DOL's six-factor "economic realities test." Instead, those Courts adopted a more flexible approach to be used in their jurisdictions that weighs an internship's benefits to the intern against those to the employer to determine employee status. While such decisions may offer some more breathing room to employers in New York, Connecticut, Vermont and a limited number of other states, employers should monitor developments in their locales and approach internships with caution.

8. Review and update employee confidentiality, separation/severance and similar agreements in light of growing scrutiny of such agreements by the Security and Exchange Commission's (SEC) Office of the Whistleblower (OWB) for potential interference with employee ability to report potential wrongdoing to the SEC. In 2015, the SEC brought its first enforcement action against a company for its use of overly broad confidentiality agreements with employees that the Commission viewed as interfering with its enforcement jurisdiction. The case was ultimately settled by the company agreeing to pay $130,000 and to amend its confidentiality statements to comply with SEC guidance. After this success, the SEC reported that its assessment of confidentiality agreements will be a top priority for the OWB in 2016.

9. For employers that are subject to the federal Family and Medical Leave Act (i.e., 50 or more employees within a 75-mile radius), review and update your family and medical leave policies and procedures to provide for leave for same-sex spouses in light of the DOL's final rule revising the definition of "spouse" under the FMLA to cover all legally married, same-sex spouses regardless of where they live. Although several states sought an injunction against the DOL's enforcement of the new rule, in one case successfully, it is unlikely that there will be any impediment to enforcement following the Supreme Court's June 2015 decision in *Obergefell v. Hodges*, in which the Court found that the 14th Amendment's equal protection and due process clauses guaranteed same sex couples the right to marry.

10. Scrutinize agreements and relationships with staffing firms and other entities that provide temporary workers or other integral services and support to your business to assess whether there is vulnerability to a finding of joint-employer status under the National Labor Relations Act in light of the National Labor Relations' Board new, expansive test for determining "joint employment." In a troubling 2015 decision issued in the matter of *Browning-Ferris Industries of California,* a sharply divided Board discarded its decades-old definition of "joint employer" to include employers that do not actually control essential employment terms and conditions of a third-party's employees — but, rather, may affect or have the authority to affect such terms and conditions, even if indirectly. As a result of this ruling, employers that rely on temporary or contingent workers and outsourcing arrangements, as well as franchisors, are at

increased risk of being deemed joint employers under the NLRA for collective bargaining and other purposes. Given that Section 7 of the NLRA applies to almost all employees, whether unionized or not, all employers should pay close attention to this crucial development. Among other things, a joint employer could be held liable by the NLRB for overly broad employer policies or for discipline or termination decisions made in response to employee complaints about the terms and conditions of their employment.

11. Review workplace safety protocol and procedures in preparation for the Occupational Safety and Health Administration's (OSHA) final "Improve Tracking of Workplace Injuries and Illnesses" rule expected in March 2016. The final rule will likely add new electronic reporting obligations to most employers that are required to keep OSHA 300 Logs. In addition, employers with 20 employees or more at any time in the previous calendar year will be required to electronically submit to OSHA the information provided on OSHA Form 300A on a yearly basis. The OSHA 300 Logs and Form 300As will be posted on OSHA's website and be publicly available to anyone who would like to review them. In addition to electronic recordkeeping, the rule is further expected to make certain safety "incentive" programs illegal and subject to OSHA citations if such programs are deemed to "discourage" employee reporting of injuries and illnesses.

12. Review and update arbitration agreements in light of the Supreme Court's recent decision in *DIRECTV, Inc. v. Imburgia, et al*., in which the Court overturned a holding by the Court of Appeal of California, Second Appellate District, that an arbitration agreement was unenforceable due to the alleged invalidity of a class action waiver under California law. The Supreme Court found that, although the agreement provided that the entire arbitration clause would be unenforceable if "the law of the state" prohibited class arbitration procedures, the phrase unambiguously meant valid state law that was not preempted by the Federal Arbitration Act (FAA). In its 2011 decision in *AT&T Mobility LLC v. Concepcion*, the Court found that the FAA preempted California precedent that class arbitration clauses were unenforceable. Thus, the Supreme Court held that the California court could not rely on the same preempted law in the *DIRECTV* case. While this decision specifically concerned consumer contracts, the same reasoning should apply to employment agreements and, accordingly, employers that include class action waivers in their arbitration agreements should, at a minimum, specify that the FAA governs the agreement, to have the best possible chance of being enforced in state court.

13. Reexamine classifications of consultants and other workers as independent contractors in light of the DOL Wage and Hour Division Administrator's Interpretation No. 2015-1 advocating that most workers are employees covered by the FLSA and that many employers throughout the country are improperly misclassifying workers as independent contractors. The Interpretation loosely addressed various aspects of the six-factor "economic realities" test relied upon by the DOL and many courts when determining whether an employment relationship exists for purposes of the FLSA. Among other things, the Interpretation noted that a worker's services are likely to be an "integral part" of an employer's business, thereby suggesting an employment relationship, if they relate to the employer's actual services or products. The Interpretation further noted that the DOL would consider "opportunity for profit or loss" as reflecting independent contractor status only where such opportunity is dependent on the worker's managerial skill and that the worker's investment in facilities and supplies must be significant when compared to that of the employer.

14. Review and update employee policies and procedures to ensure compliance with expanding protections against workplace discrimination. In 2015, we saw key legal developments in a number

of areas of anti-discrimination enforcement, including:

- **Pregnancy Discrimination:** In 2015, the EEOC revised its Enforcement Guidance on Pregnancy Discrimination to reflect the Supreme Court's decision in *Young v. UPS* that women may be able to prove pregnancy discrimination if an employer's "neutral" light duty policy accommodated a large percentage of non-pregnant workers, but did not accommodate a large percentage of pregnant workers with similar work restrictions. While the decision in *Young* did not address the specific extent to which employers must accommodate pregnant workers, the EEOC guidance makes clear that employer policies that are facially neutral and not intended to discriminate on the basis of pregnancy may, nonetheless, be found to violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.

- **Religious Discrimination:** In a nearly unanimous landmark decision, *EEOC v. Abercrombie & Fitch Stores, Inc*., the Supreme Court ruled in 2015 that Title VII of the Civil Rights Act prohibits an employer from refusing to hire an applicant if that refusal is motivated by the desire to avoid accommodating a religious practice, even if the employer has "*no more than an unsubstantiated suspicion* that an accommodation would be needed." This decision means that it is no longer necessary for an employee to demonstrate that the employer had actual knowledge of the employee's desire for a religious accommodation if the surrounding circumstances should have alerted the employer to such need or the employer otherwise suspected that there was a need.

- **Sexual Orientation Discrimination:** In July 2015, the EEOC published a groundbreaking decision, ruling that sexual orientation discrimination is a form of "sex" discrimination prohibited by Title VII of the Civil Rights Act. Although federal courts have yet to adopt this expansive view of Title VII, a recent decision by a federal district court in California that sexual orientation discrimination is considered prohibited sex or gender discrimination under Title IX (governing discrimination in schools and colleges) signals that it shouldn't be long before the courts take up the issue. Employers should also be aware that they may be found liable for sexual orientation discrimination under state and local laws, as demonstrated by a 2015 decision from a federal district court for the Eastern District of New York in the matter of *Roberts v. United Parcel Serv., Inc.*, in which the Court upheld a jury's $100,000 verdict for an employee on her sexual orientation discrimination/hostile work environment and retaliation claims under the NYC Human Rights Law.

- **Gender Identity and/or Expression Discrimination:** As of 2015, at least 19 states (CA, CO, CT, DE, HI, IL, IA, MA, MD, ME, MN, NV, NJ, NM, OR, RI, UT, VT and WA) and the District of Columbia have enacted laws prohibiting discrimination in employment based on a worker's gender identity or expression. In addition, more than 200 cities and counties have passed such laws. Governors in a number of other states, including Missouri, Kentucky, New York and Pennsylvania have signed executive orders prohibiting such discrimination against state workers. Notwithstanding the recent revocation of the Houston city law prohibiting gender preference discrimination, signs indicate that this trend will continue. For example, New York's Governor Cuomo announced in October 2015 that, in 2016, New York State will start

including gender identity and expression protections under the state's current prohibitions on discrimination in employment based on "sex."

15. For employers with 50-99 full-time employees, prepare for final implementation of the Affordable Care Act's "shared responsibility" requirement to provide affordable health insurance to eligible employees and related reporting requirements in 2016 or face penalties. Among other things, affected employers should take steps to:

- Identify employees who average 30 hours of work per week based on a monthly measurement method or the "look back" method permitted by the ACA;
- Consider modifications to work schedules and, where appropriate, special classifications such as independent contractors and temporary employees;
- Update plan documents and summary plan descriptions, if necessary, to track ACA eligibility requirements;
- Determine how the company will demonstrate the affordability of benefits provided, whether based on employees' W-2 or rate of pay, or federal poverty line; and
- Complete a Form 1095-C for each full-time employee and distribute the form to full-time employees by February 1, 2016, transmitting all such forms to the IRS on paper by February 29, 2016 or electronically by March 31, 2016. Although the IRS had indicated that it will not impose penalties on a filer for reporting incorrect or incomplete information if the filer made good faith efforts to comply, the failure to file an information return or furnish a statement in a timely manner will not justify such relief.

16. Schedule an internal compliance audit of your labor and employment law policies and procedures with counsel, being careful to maximize the protection of the audit results by the attorney-client privilege.

While we try to make this list comprehensive, it is simply not possible to include all major issues affecting employers today, and we encourage all employees to reach out to their counsel to ascertain what issues might affect their workplace.

The failure to comply with new and existing legal requirements could cost your organization monetary penalties and other sanctions, on top of back pay liability to employees, where applicable. It also could yield negative publicity that could result in damaging reputational loss.

Schnader attorneys can assist you and your organization to implement these resolutions – to identify risks and take important preventive steps – to help you avoid sanctions, penalties and litigation in the New Year. Have a happy and proactive 2016! ◆

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