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Labor and Employment Issues in the Healthcare Industry

2019 Employment Law Update

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While the past year has presented some noteworthy employment law developments for all employers, these developments may raise unique challenges in the healthcare industry. This paper is an overview of some key developments, their impact on healthcare employers in particular, and practical recommendations for employers to consider.

1. Money, Money, Money

a. Pay Data Reporting Requirements for EEO-1s

On March 4, 2019, the U.S. District Court for the District of Columbia gave the green light for the Equal Employment Opportunity Commission (EEOC) to collect employees' pay data. *Nat'l Women's Law Ctr. v. OMB*, 2019 U.S. Dist. LEXIS 33828, *1-2 (U.S. Dist. D.C. Mar. 4, 2019).

i. Background

As background, employers with 100 or more employees, and federal contractors with 50 or more employees, are required to submit Employer Information Reports (EEO-1 reports) disclosing their number of employees by job category, race, sex, and ethnicity on an annual basis. In 2016, the EEOC proposed a significant change to the EEO-1 report–the additional requirements that employers include employees' pay data and the number of hours worked for their workforces. The EEOC believed that the proposed changes would help the agency identify possible pay discrimination and would provide the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor (which sets affirmative action requirements for federal contractors) with "insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination." *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports*, https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm (Jan. 29, 2016). Specifically, the agency would use the pay data to (1) assess complaints of discrimination, (2) conduct more focused investigations, and (3) identify existing pay disparities for further examination. *Id.*

The Trump Administration brought these proposed changes to a halt. In August 2017, the White House's Office of Management and Budget (OMB) stayed the pay data requirements. In an August memo to Victoria Lipnic, the acting chair of the EEOC, the OMB wrote that it was initiating a review and immediate stay of the effectiveness of the EEO-1 form revisions regarding new requests for pay data on wages and hours worked. The OMB reasoned that "[a]mong other things, OMB is concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues." Rao, N., *EEO-1 Form; Review and Stay*, OMB Memo https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf (Aug. 29, 2017). Responsively, the National Women's Law Center and the Labor Council for Latin American Advancement filed suit.

The court in *National Women's Law Center v. OMB* rejected OMB's concerns and revived the pay data requirement, essentially finding that the OMB provided inadequate reasoning to support its decision to stay the pay data collection. *Nat'l Women's Law Ctr.*, 2019 U.S. Dist. LEXIS 33828, *52-53. The court determined that – between the time the proposed rule was finalized and the OMB's removal of the rule – nothing had change. *Id.* at *45. The court further held that the OMB's stay of the EEOC's collection of pay data was "arbitrary and capricious" because it "totally lacked the reasoned explanation" required by federal law. *Id.* at *51.

i. Practical Considerations

The court's decision in *National Women's Law Center* delivers more uncertainty for employers. One, there is question about when the pay data requirement will take effect. The EEOC will likely soon provide guidance about whether the 2018 EEO-1 reports, currently due May 31, will need to include pay data or whether employers will have additional time to submit their reports. Two, the OMB will likely appeal the court's decision and seek to stay the revised EEO-1's implementation while the appeal is pending. Three, the EEOC could go back to the drawing board and revise the regulations to potentially satisfy further judicial scrutiny.

Despite this uncertainty, employers should consider commencing review of pay data now. Healthcare employers, in particular, may want a head start in reviewing pay data before submitting it to the federal government, as health care includes a diverse and dynamic workforce with many nuisance factors impacting individuals' pay. A pay review may be particularly complex for organizations that employ physicians. Physician compensation models can be complex, from Relative Value Units (RVUs) to value-based factors such as productivity, cost of care, quality of care, coordination of care, and patient experience. Therefore, employers may want to consider a *privileged* audit of pay practices to be able to identify any pay disparities and make thoughtful decisions on whether they need to be addressed, and how, before the pay data undergoes agency scrutiny.

b. The Department of Labor Increases Salary Thresholds for Exempt Status

On March 7, 2018, the Department of Labor issued proposed regulations that, most notably, raise the salary threshold for certain Fair Labor Standards Act (FLSA) exemptions. The proposed regulations would increase the salary threshold for executive, administrative, and some professional exemptions from its current $455 a week ($23,660 per year) to $679 a week ($35,308 per year).

In 2016, the Obama Administration set out to increase the salary threshold to $913 a week, or $47,476 annualized. This was enjoined by a court and later rescinded by the Department of Labor (DOL). The DOL recognized that the standard salary level needed to exceed the current $455 per week to more effectively serve its purpose but found an increase to $913 per week to be inappropriate. The Department found middle ground by applying the 2004 methodology to 2017 data, and projecting to January 2020 (the projected effective date of a final rule). Consistent with the 2016 Obama-era regulations, the DOL would permit employers to count non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level test ($353), provided that the bonuses are paid annually or more frequently.

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