MARSH JLT SPECIALTY

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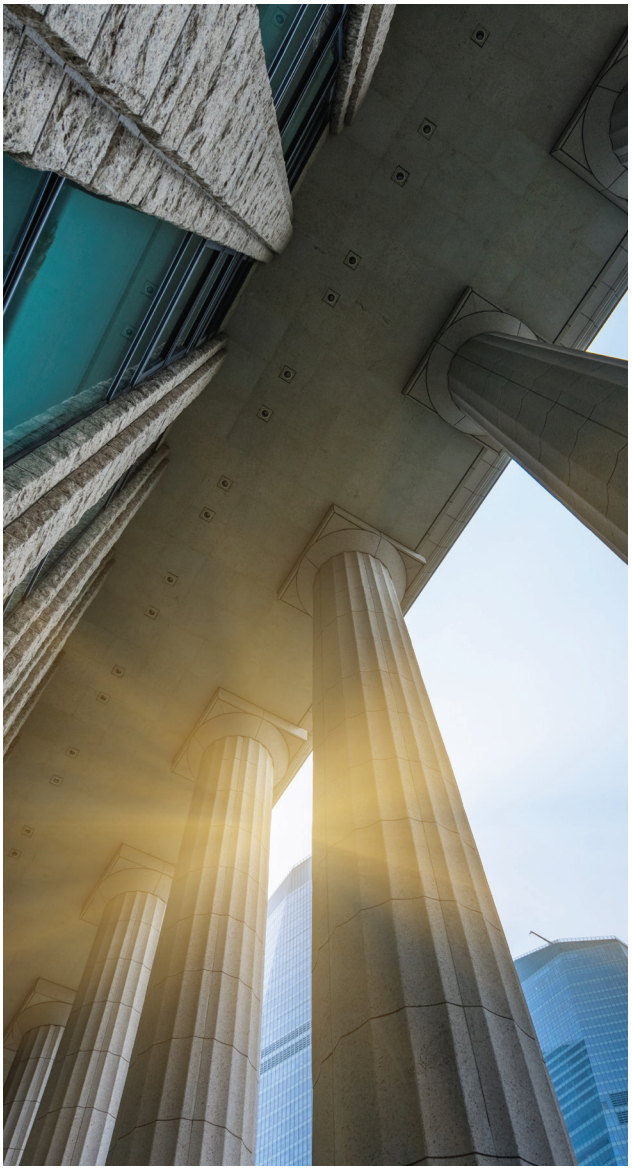
EPL and Wage and Hour Risks: 5 Trends for Employers to Watch

Expanded workplace requirements and employee protections. Court decisions. And new laws. Risks related to employment practices liability (EPL) and wage and hour are shifting, and only expected to continue on an upward trajectory. Before being able to take the necessary steps to limit their liability, employers must understand the source of their biggest risks. The following are the most pressing trends affecting employers today.



Clarity on LGBTQ Protections

Transgender discrimination has been a hot-button issue for a number of years, but soon the US Supreme Court will weigh in.

Oral arguments were held on October 8, 2019, in *Altitude Express Inc. v. Zarda*, *Bostock v. Clayton County*, and *R.G. & G.R. Harris Funeral Homes v. EEOC*. Together, these three Supreme Court cases will address whether workplace discrimination based on sexual orientation is covered by Title VII of the Civil Rights Act of 1964 — specifically its prohibition against bias "because of ... sex."

Although Title VII does not expressly include sexual orientation among its protections, the Equal Employment Opportunity Commission (EEOC) has investigated charges of sexual orientation discrimination and sued several employers over their treatment of transgender employees. On the other hand,

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the Department of Justice (DOJ) has taken the position that Title VII protects only biological sex, and does not provide protections against discrimination based on sexual orientation or gender identity.

At present, only 22 states prohibit employment discrimination based on sexual orientation and only 21 prohibit discrimination based on gender identity. For example, the California Fair Employment and Housing Council passed regulations in 2016 defining an array of employment practices that constitute discrimination against transgender applicants and employees. Examples of such practices include requiring applicants or employees to state whether they are transgender, and to dress or groom themselves in a manner inconsistent with their gender identity or expression. Legal protections for millions of LGBTQ workers in states and localities without similar protections will hinge on the Supreme Court's ruling, which is expected in mid-2020.

Presumably, the ruling will provide employers with clear guidance on the rights of transgender individuals in the workplace. For now, however, this issue is far from settled, and is rife with potential for claims activity. If they do not already do so, employers and businesses that serve the public should consider establishing comprehensive nondiscrimination policies and including components on sensitivity to transgender rights in their management and staff training programs to mitigate this risk.

More Employees Eligible for Overtime

On September 24, 2019, the US Department of Labor (DOL) finalized a new rule that addresses the salary level needed for so-called "white collar" workers to be considered "exempt" and therefore not entitled to overtime pay. Under the updated rule, the salary threshold will increase from $455 a week ($23,660 annually) to $684 a week ($35,568 annually).

An earlier version of the rule was issued in 2016, but was blocked from taking effect by a federal court. This would have raised the salary threshold to $47,476, meaning that 4.2 million more Americans would be covered by the Fair Labor Standards Act (FLSA). According to the DOL, the new rule will extend overtime protection to 1.3 million additional workers when it takes effect January 1, 2020.

Unlike the 2016 final rule, the new final rule does not implement automatic increases every four years. It does, however, allow employers to include "certain nondiscretionary bonuses and incentive payments" amounting to a maximum of 10% of the $684 per week threshold, and sets the total annual compensation requirement for the highly compensated employee exemption at $107,432 per year, a relatively modest increase from the current level of $100,000 per year.

Despite a drop in claims frequency over the last three years, wage and hour lawsuits continue to outpace all other types of workplace class-action litigation. These pernicious claims by employees include allegations that employers failed to pay overtime, did not provide adequate meal and rest breaks, or misclassified employees as exempt or as independent contractors.

Regardless of any changes employers may have already made pending earlier proposals, employers should now:

- Conduct robust internal audits to identify affected employees, ensure compliance with current requirements, and take a forward-looking view in light of the potential for future increases every four years.
- Determine whether to convert salaried employees making less than $35,568 per year to hourly employees, implement raises, or restrict the amount of overtime they are permitted to work.
- Consider an insurance solution to address the claims that are expected to follow this change in employment compliance.

An Epic Decision

In May 2018, the Supreme Court ruled — in *Epic Systems Corp. v. Lewis* — that companies may limit their employees' ability to participate in class action litigation. The 5-4 decision resolves a tension between two important labor laws. The Federal Arbitration Act (FAA) permits parties to have an arbitrator, rather than a court, hear their claims, while the National Labor Relations Act (NLRA) protects workers who engage in protected concerted activity. The Supreme Court ruled that the FAA supersedes the NLRA, which means there is no longer any impediment to employers requiring employees to waive their ability to bring class or collective actions under US employment laws.

The decision has already limited class and collective action litigation, particularly under the FLSA. But California employees who have entered into class waivers may still assert actions under the state's Private Attorneys General Act, and other states could seek to pass similar laws in light of the decision. The ruling also has no impact on litigation pursued by the DOL and EEOC. And the prospect of a series of single-claimant arbitration matters might leave some employers questioning whether "death by a thousand paper cuts" is actually better.

Epic is one of the most important Supreme Court decisions affecting employment in the last two decades, and undoubtedly a win for employers. Still, they must remain vigilant: Although we expect to see modest decreases in claim severity as a result of the decision, claim frequency is likely to increase. Claims asserted by applicants who were never hired, such as those alleging "ban the box" and Fair Credit Reporting Act violations, are likely to gain traction. And an arbitrator is just as apt as a jury to issue a "runaway" award.

Federal legislation could serve to undo *Epic*, but with Congress divided, that seems unlikely in the near-term. Employment law observers expect to see plaintiffs' counsel become more creative in challenging arbitration agreements on grounds related to unconscionability. Moreover, a number of prominent tech companies have since ended forced arbitration for sexual assault and harassment claims of their own accord, with one going so far as to end forced arbitration of all workplace disputes.

Employers that had been awaiting the Supreme Court's ruling in *Epic* before implementing their own arbitration programs with class waivers should carefully balance the benefits of such actions with potential drawbacks. Those employers that already have arbitration programs in place should consult with outside counsel to ensure their wording is sufficient, especially considering the prospect of greater scrutiny.

IN FOCUS

#MeToo's Lasting Impact, From Courtrooms to State Legislatures

Sexual harassment has been a mainstay of EPL claims for almost three decades. But since #MeToo went viral in October 2017, sexual harassment claims have increased in frequency and severity and remain at heightened levels.

For the year ending September 30, 2018, sexual harassment charges filed by employees with the EEOC increased 14%. Monetary benefits (excluding those obtained through litigation) increased 30% during the same period. And plaintiffs' attorneys have been emboldened to seek larger damages, often multiples of what similar claims would have previously warranted, as cases have garnered more media attention and defendants have sought quick and quiet claims resolutions.

Government enforcement of sex-based discrimination under Title VII also increased, as did the number of EEOC lawsuits that included sexual harassment claims.

FIGURE 1

Sexual Harassment Charges Filed with the EEOC, FY 2014 through FY 2018

SOURCE: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

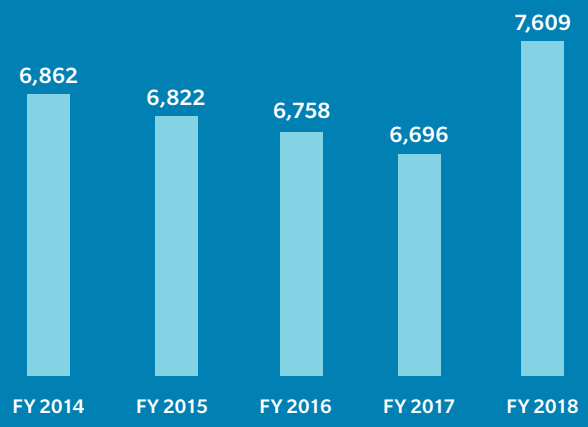
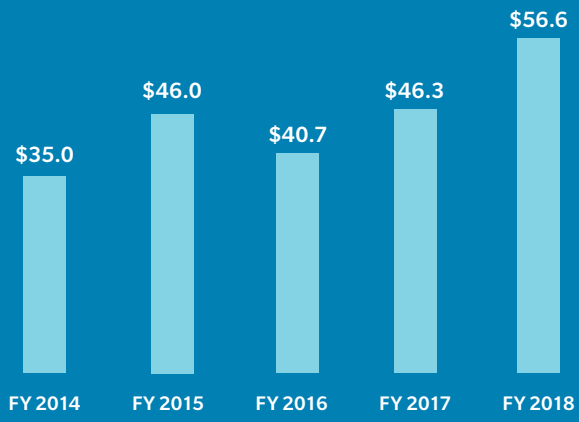


FIGURE 2

Monetary Benefits from EEOC Sexual Harassment Charges, FY 2014 through FY 2018 (millions)*

SOURCE: EQUAL EMPLOYMENT OPPORTUNITY COMMISSION



*Excluding benefits obtained through litigation.

Litigants, meanwhile, are forcing courts to decide whether the #MeToo movement alters the analysis of sexual harassment claims. For instance, the "Faragher/Ellerth" affirmative defense, which employers have long relied on to avoid vicarious liability, has recently been called into question. In July 2018, the Third US Circuit Court of Appeals held that an employee's failure to report alleged sexual harassment occurring over four years was negated by the employer's knowledge of her supervisor's course of prior conduct. That same month, the District Court for the District of New Jersey denied a plaintiff's motion to set aside the dismissal of her sexual harassment claims because of alleged societal changes brought about by #MeToo.

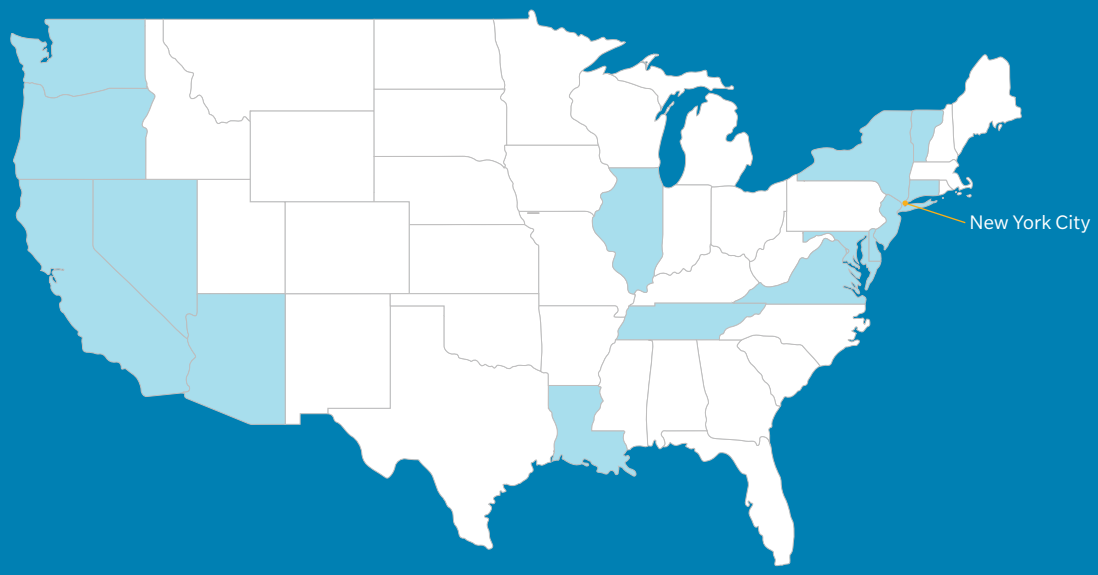
#MeToo has also prompted action at the state and local levels. According to the National Women's Law Center, 15 states — along with the City of New York — have passed new protections against workplace harassment and discrimination since the start of 2018. Among other actions, these laws limit or prohibit the signing of nondisclosure agreements in sexual harassment settlement agreements, expand workplace harassment protections to include contractors and others, extend the statute of limitations for filing harassment and discrimination claims, and require mandatory training.

Leading the charge at the state level are California and New York. In 2018, California passed legislation to limit nondisclosure agreements, clarify the "severe or pervasive" standard for workplace harassment used by courts, and expand requirements for mandatory sexual harassment training. In 2018, New York required employers to implement mandatory anti-harassment policies and sexual harassment prevention. And in 2019, the Empire State passed new legislation that will dramatically weaken employers' defenses to hostile work environment claims while expanding the statute of limitations, potential damages available, and the classes of individuals protected by the state's harassment laws.

FIGURE 3

State and Local Governments Enacting New Legislation Spurred by #MeToo

SOURCE: NATIONAL WOMEN'S LAW CENTER



Illinois' Biometric Law Spurs Litigation

Over the last 18 months, scores of employers have been targeted with class action lawsuits alleging violations of Illinois' Biometric Information Privacy Act (BIPA), stemming from their use of "biometric time clocks" in the state. BIPA, which remains the only state biometric privacy law with a private right of action, contains notice and consent provisions that provide for steep, per employee, liquidated damages of $1,000 for negligent violations and $5,000 for intentional or reckless violations. A recent ruling by the Illinois Supreme Court held that an individual can obtain statutory damages when the only injury is a "bare" or "technical" violation of the notice-and-consent requirements under BIPA, so these claims are not going away.

Employers should strive to obtain informed consent from employees in Illinois — and elsewhere — before collecting their biometric data. BIPA is considered one of the most stringent data protection and privacy laws in the country and will no doubt remain a highly litigated statute.

Privacy issues are expected to remain front and center in the workplace in 2020 and beyond. With the California Consumer Privacy Act taking effect in January 2020, it's imperative for California employers to determine if the law applies to them. Employers that are the target of BIPA and other privacy laws should consult with their insurance advisors about potential coverage.

Managing Employment Practices Liability and Wage and Hour Risk

Employers can take several steps to reduce their potential liability stemming from these trends and to mitigate many of these risks. But now, more than ever, they also need robust EPL and wage and hour insurance programs to respond to the increasingly complex and costly claims they could face stemming from employment practices.

EPL insurance is designed to respond to claims alleging sexual harassment, discrimination, retaliation, and other employment-related wrongful acts defined under the policy. Third-party liability coverage is also an option under most EPL policies; this provides coverage for claims of discrimination and harassment asserted by non-employee third parties, including customers and vendors. Wage and hour liability insurance, meanwhile, protects against employee classification risks and provides coverage for defense costs, settlements, and judgments.

Given the persistent threats that employers continue to face, risk professionals should work with their advisors to consider their potential insurance options and ensure they have adequate protection against employment practices and wage and hour claims.

EMPLOYEE OR CONTRACTOR?
WHAT CALIFORNIA'S AB5 MEANS FOR WORKERS AND BUSINESSES

California's recently passed Assembly Bill 5 establishes a three-part test that a business must satisfy to maintain that a worker is an independent contractor for employment purposes in the state. The new law, which takes effect January 1, 2020, could significantly expand employment practices liability, wage and hour, and other risks for California businesses. Read Marsh's briefing to learn more.

For further information, visit marsh.com, contact your Marsh representative, or contact:

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