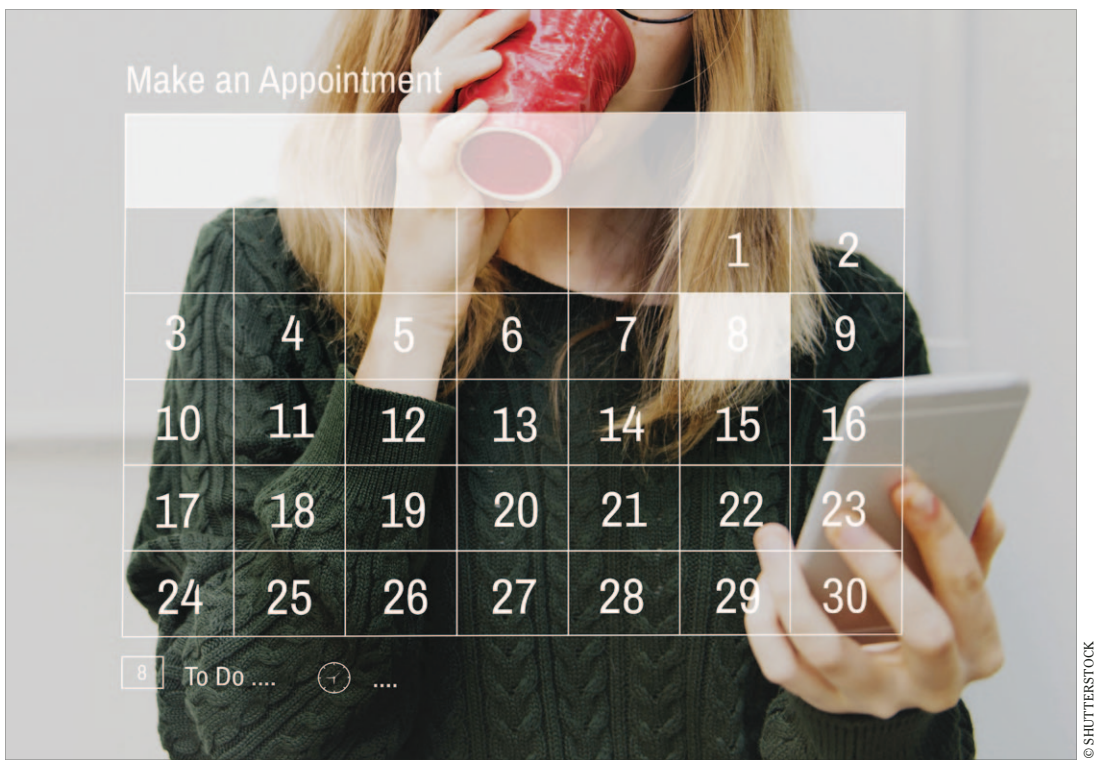
Labor & Employment

Could **Predictive Scheduling** Spread Across the Nation?

BY APRIL BOYER AND YAMILET HURTADO



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A new trend is spreading across the nation. Legislators and employee rights advocates call it "predictive" scheduling. Employers often refer to it as "restrictive" scheduling. For employers (especially in the food service, hospitality, and retail sectors), whatever you call these new scheduling laws, the question is whether the legal trend of mandating how employers schedule employees will spread across the country.

The answer is maybe—so it is a trend worth following closely.

What is predictive scheduling? It is a type of legislation that is being introduced at the federal, state, and local levels to change the ways employers schedule workers. These bills or laws attempt to provide increased predictability to workers' schedules by requiring employers to give employees advance notice of work schedules, pay employees for schedule changes or cancelled shifts, and provide "predictability" pay for on-call employees not called into work. To date, these efforts have largely targeted the food service, hospitality, and retail sectors where fluctuating work schedules are common. However, there are efforts to expand such measures more broadly.

What Is Driving the 'Predictive Scheduling' Movement?

Many employers, particularly in the retail and service industries, do not provide consistent schedules to employees. Businesses often schedule workers on a weekly basis, and schedules vary significantly for workers. Other employers have employees "on-call" with no guarantee of shifts, instead requiring employees to check in shortly before a shift begins and only report to work if needed.

Critics of unpredictable scheduling argue that "unstable" work schedules unreasonably interfere with the lives of workers by impairing their ability to predict income, to secure transportation and care for relatives, and to plan for educational courses or another job.

Unions in particular have been pushing for legislation that requires greater predictability in scheduling and pay. Retail and hospitality employers and industry groups, however, have contrary interests, given the unpredictability and variances in their customer flow. They argue that such restrictive scheduling measures would unnecessarily burden their businesses, removing their ability to be flexible, increasing costs by requiring them to pay employees for cancelled shifts, and unreasonably interfering in relationships with employees—many of whom specifically took these jobs for the scheduling flexibility they provide.

> Whatever you call these new scheduling laws, the question is whether the legal trend of mandating how employers schedule employees **will spread across the country.** The answer is maybe—so it is **a trend worth following closely.**

New Scheduling Practices Take Hold

In January 2015, San Francisco became the first U.S. jurisdiction to pass predictive scheduling legislation, implementing the "Predictable Scheduling and Fair Treatment for Formula Retail Employees Ordinance" as part of the city's larger "Retail Workers' Bill of Rights" aimed at chain stores and restaurants. The expansive legislation requires, among other things, that employers pay employees for cancelled on-call shifts, provide notice to workers of their biweekly schedules, give new hires written estimates of expected hours and schedules, and offer extra hours to current part-time employees before hiring new workers or utilizing a staffing agency.

Not long after San Francisco's ordinance went into effect, New York State Attorney General Eric Schneiderman issued information request letters to 15 large retail chains regarding their respective "on-call" scheduling practices. The letters expressed the attorney general's concern about unpredictable work schedules and requested information from the businesses about how they schedule their workers. No action has yet been taken by New York state as a result of the letters, but several nationwide retailers have chosen to phase out on-call scheduling in the wake of the publicity following the inquiry.

In September 2016, Seattle became the latest city to pass predictive scheduling legislation, with a unanimous vote on its Secure Scheduling Ordinance, which mirrors the San Francisco ordinance in many ways, but imposes additional requirements on employers. For instance, the ordinance seeks to restrict "clopenings" (i.e., scheduling employees to work both closing and opening shifts with fewer than 10 hours between the two shifts). Employers are required to pay time-and-a-half for any hours that reduce an employee's 10-hour rest period. The most significant differences between the Seattle ordinance and other predictive scheduling measures are the provisions allowing employees to request input into their schedules and requiring employers to engage in a timely, interactive process to address employee requests. An employer must have a "bona fide business reason" for denying scheduling requests related to an employee's serious health condition, changes in transportation or housing, caregiving, education, or second job responsibilities. Unfortunately, the ordinance provides minimal guidance to human resources personnel for handling what likely will be inevitable scores of competing requests.

Legislative Efforts Expand Across the Country

Predictive scheduling legislation currently is pending at the federal level as well as a the state level in California, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, and Rhode Island.

In July 2015, Congressional Democrats introduced Schedules That Work Act bills in both the U.S. House of Representatives and Senate. There are many parallels between the bills and the recently enacted Seattle ordinance. If enacted, the bills would provide employees nationally the right to request changes to their required number of work or on-call hours, work location, timing of assignment notification, and schedule fluctuations. Employers would be required to engage in an interactive process to address such requests. In order to deny a request related to such important life events such as an employee's serious health conditions, caregiving responsibilities, education, or a second job, the employer must have a bona fide business reason.

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Why NY's New **Pay Equity** Law May Be a **Game-Changer**

BY BRUCE R. MILLMAN

I remember the lawyer, half a generation older than I, describing how, as a recent law school graduate she struggled even to get an interview for a job as a lawyer. When an offer came, she eagerly accepted, even though the firm's senior partner told her that, "of course" she would be paid less than the male associates, because she was married and they "had families to support."

The Equal Pay Act, 29 U.S.C. §206(d), was enacted in 1963 "[t]o prohibit discrimination on account of sex in the payment of wages."[1] But half a century later statistical disparities still exist between men and women's pay, although the reasons and size of the gap are often debated.[2]

New York is one of several states[3] that have recently enacted legislation to address the lingering gender pay disparity. In October 2015, as part of the broader "Women's Equality Agenda" that expanded protections for women in several other respects, Gov. Andrew Cuomo signed the Achieve Pay Equity Law (S.1/A.6075), which makes significant changes to New York's own equal pay act, N.Y. Labor Law §194.

Effective Jan. 19, 2016, the law has received little attention even though its changes to New York's standards for determining whether women and men are receiving equal pay for equal work will likely require employers to modify or abandon many common compensation practices. And with 300 percent liquidated damages available to prevailing plaintiffs, the law presents a substantial risk to employers who fail to examine closely their existing pay scales and their compensation practices and policies (as well as presenting an incentive for employees to test the meaning and bounds of the new law).[4]

Under the state Equal Pay Act before the amendment, women and men were to receive equal pay for equal work unless the difference was attributable to a seniority system, a merit system, a system that measure earnings by quantity or quality of production, or any factor other than sex. Under the new statute, employers can no longer rely on "any factor other than sex" to justify a pay difference. Instead, unless one of the other justifications apply, the employer must demonstrate a "bona fide factor other than sex, such as education, training and experience."[5]

Further, the bona fide factor cannot be based on or derived from a sex-based differential in payment, must be job-related to the position in question, and must be consistent with "business necessity." Business necessity is "defined as a factor that bears a manifest relationship to the employment in question."[6]

However, even such a bona fide factor will not provide justification for the wage difference if an employee demonstrates that it has a disparate impact on the basis of sex, that an alternative employment practice exists that would serve the same business purpose, and that the employer has refused to adopt the alternative practice.

How does "salary history" play out in this new landscape? After all, employers often use applicants' current salary or salary demands as a guide to what they will pay a new hire: Why pay an employee more than he or she asks for or more than the minimum necessary to hire the employee. "Salary history" is a "factor other than sex." But is it a "bona fide factor other than sex, such as education, training or experience"? Does it meet the "business necessity" definition? Salary history may or may not correlate to these factors. But a priori it is a factor that perpetuates existing pay gaps. And there is some survey evidence (disputed, of course), that women simply don't "ask" for as much as men.[7]

How about an apparently gender-neutral policy that an employer won't cut an employee's base salary when he or she moves laterally to another job? The following hypothetical is based on a situation that recently confronted one of our clients: Sarah and Sam both graduated in 1993 from similar schools. Both were hired in 2007. Sarah was most recently a highly successful salesperson, selling the company's manufactured products to retail outlets, for which she earned $80,000 base salary plus commission. Sam was also a highly successful salesperson, most recently manager of a small institutional sales team, earning $110,000 base salary because of his managerial role, plus commission. Two national account manager positions opened up (for similar accounts), due to the retirement of two male employees who had each held that position for several years. Due to their tenure in the position, the two recent retirees were earning higher base salaries than either Sarah or Sam (plus commissions and bonuses), although both had started in the position with much lower base salaries. Sarah and Sam both applied

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Employee **Arbitration** Agreements And **Class Action** Waivers

BY CHRISTOPHER D. DURHAM

Class action waivers are an important tool for employers with employee arbitration agreements to limit their exposure to proceedings initiated by employees or former employees on a classwide basis.

Class action arbitration waivers have taken on even greater significance in recent years with the proliferation of collective actions under the Fair Labor Standards Act (FLSA), as such actions can be burdensome and costly to defend, even in an arbitral forum

In the first days of 2012, the National Labor Relations Board (NLRB or the Board) shocked the employer community when, in *D.R. Horton*, 357 NLRB No. 184 (2012), it held that class action waivers by employees in arbitration agreements with their employers violated the National Labor Relations Act (NLRA). Nearly five years after *D.R. Horton*, employers face considerable uncertainty as to the legality of class action waivers in employee arbitration agreements. However, with a recently emerged circuit court split between appellate courts siding with and against the NLRB's invalidation of employee class action arbitration waivers, it is more likely than at any point since *D.R. Horton* that employers finally will get legal clarity on this key issue.

NLRB's Invalidation Of Employee Class Action Arbitration Waivers

In *D.R. Horton*, the NLRB held that the arbitration agreement D.R. Horton required its employees to sign interfered with the exercise of employees' rights under §7 of the NLRA, which among other things, grants to employees the right "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. §157. The Board reasoned that the NLRA protects the right of employees to "join together to pursue workplace grievance, including through litigation" and arbitration, and that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7," which conduct the Board described as "central to the [NLRA's] purposes." 357 NLRB No. 184, at 2279. Accordingly, the NLRB held that class action waivers in arbitration agreements constitute an unfair labor practice under §8(a)(1) of the NLRA [29 U.S.C. §158(a)(1)], which forbids employers to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed" by §7 of the NLRA.

Since *D.R. Horton*, undeterred by circuit court holdings to the contrary, the Board has doubled down on its invalidation of employee class action arbitration waivers. See *Murphy Oil USA*, 361 NLRB No. 72 (2014).

Emerging Split Amongst U.S. Circuit Courts of Appeal

The results of litigation on this issue at the U.S. Court of Appeals level is less clear-cut. The Fifth Circuit Court of Appeals twice has rejected the NLRB's position that class action waivers in employee arbitration agreements violate §7 of the NLRA. In a late 2013 decision, the Fifth Circuit refused to enforce the Board's holding in *D.R. Horton* that employee class

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Inside

New **FLSA Overtime** Regulations: Planning For **Costs of Compliance**

BY BRIAN D. MURPHY

The new overtime regulations under the Fair Labor Standards Act's "White-Collar Exemptions" will be effective Dec. 1, 2016, barring action on recently proposed legislation and recently filed lawsuits. The minimum salary necessary for an employee to qualify for exemption from overtime will be $913/week or $47,476/year, and will increase every three years.

Appropriate business planning requires employers to understand the math and associated costs to inform decision-making and achieve compliance.

The requisite analysis must be undertaken with respect to all U.S. employees currently classified as exempt but earning less than $47,476 per year. Employers must either adjust the salary of target employees to try to maintain their exempt classification or reclassify target employees as non-exempt and overtime eligible. The anticipated costs will vary based upon this threshold decision and as the result of the different options for structuring compensation within each category.

With respect to employees as to whom exempt status is sought to be maintained, employers have three primary options for structuring pay. Irrespective of the method chosen, an employer must nevertheless ensure that the new salary is paid on a "salary basis," and that the employee satisfies either the executive, administrative or professional "duties tests."

1. Raise the salary of any employee earning less than $47,476 per year to an amount equal to or in excess thereof. For employees who are compensated by salary alone, the math and overall cost is straightforward: An employer will realize a cost of $7,476 with respect to an employee earning $40,000 per year.

2. Explore a reconfiguration of compensation if the employee earns a salary in addition to other pay (i.e., an annual bonus). For example, if the employee earned a $10,000 bonus in addition to the $40,000 annual salary, the employer can reduce the bonus by $5,000 and add this amount to the employee's salary. The employer would thus realize a cost of only $2,746 to achieve compliance. Commission plans, incentive pay schemes, and benefit structures can also be adjusted to similar effect.

3. Take advantage of a provision in the new regulations that allows up to 10 percent of the $47,476 salary to be met by other compensation such as non-discretionary bonuses, incentive pay or commissions. Thus, an employer can increase the salary to $42,728.40, provided the employee earns an additional $4,747.60 through these other means. Note, however, that if this provision is relied upon, these supplemental payments must be made on at least a quarterly basis.

With respect to employees an employer decides to reclassify as non-exempt overtime eligible, an employer has three primary options for structuring pay.

1. Convert the weekly salary into an hourly rate and pay overtime for hours worked in excess of 40 on the basis of that rate.

The simplest conversion method is to divide the employee's current weekly salary by 40 hours. Assuming an $800 weekly salary, this would result in a $20 "regular rate" and a $30 overtime rate. The anticipated cost increase will vary based on overtime hours worked, from $0 if the employee consistently works 40 hours per week to $300 if the employee works 50 hours per week. This conversion method is potentially the most costly and should be used only where expected overtime hours are close to zero.

A more complicated conversion method is to divide the weekly salary by regular hours and expected overtime hours. Under this method, if the employer expects that 10 overtime hours will be worked, the $800 weekly salary will be divided by 55. The 55 consists of 40 regular hours and 10 overtime hours, with the latter multiplied by 1.5 to account for the time-and-a-half premium. The regular rate would be $14.54 and the overtime rate would be $21.82, resulting in roughly equal earnings if the expected overtime hours are worked. This method is the most cost neutral and can be used to approximate total weekly earnings prior to reclassification provided the employer gains an accurate understanding of total hours worked.

2. Choose a new hourly rate altogether upon which overtime would be paid. The only restriction is that the employee continues to earn at least the applicable minimum wage. An hourly wage of $17, roughly midway between the two prior examples, results in total weekly earnings of $935 if 10 overtime hours were worked. While this method allows for controlled cost increases or savings, it lacks an objective rationale and may prove difficult to communicate to affected employees.

3. Convert the employee to non-exempt status, but continue to pay the employee on a salary basis. An employee treated in this matter will, however, be eligible for overtime. As above, there are various manners in which to proceed, each of which have different cost outcomes.

Employers can divide the $800 weekly salary by 40 hours to achieve a regular rate of $20/hour, and pay for any overtime at the rate of $30/hour. This is the simplest, but most expensive, approach. The expense is compounded by the payment of the weekly salary even if the full 40 hours are not worked.

Alternatively, in most states, including New York, employers can utilize a weekly calculation to determine a variable overtime rate that will decrease as the number of hours worked increases. Specifically, employers can divide the weekly salary by actual hours worked in a given workweek and multiply that by 1.5 to determine the overtime pay rate at which any overtime hours worked will be paid. Thus, if the employee earning $800/week works 48 hours in one week, the overtime rate for that week is $25/hour, resulting in an additional cost of $200. If the employee works 56 hours in the next week, the overtime rate will decrease to $21.42, but the total additional cost will increase to $342.85. While less costly than the first method, this approach carries administrative challenges because of the necessity of a weekly calculation.

> With respect to employees as to whom exempt status is sought to be maintained, employers have **three primary options for structuring pay.**

Finally, most states permit employers to use the "fluctuating workweek" method for calculating overtime. Pursuant to this method, an employer and employee agree that a weekly salary constitutes "straight time" pay for all hours worked in a workweek, such that only a "half-time" premium is due for overtime hours rather than time-and-a-half. Using the example above, if the employee worked 48 hours, the "straight time" rate for all hours would be $16.67/hour. The additional "half-time" premium due on the eight overtime hours would be $8.33/hour, for a total cost of $66.67. This approach is the most cost effective for salaried non-exempt employees, but is fraught with pitfalls and should be used cautiously.

There are various considerations beyond cost—such as employee morale, corporate culture, wage compression, policy changes, and training—that employers should evaluate as part of its compliance efforts. Cost is often, however, paramount and, as set forth above, employers have the power to manage it.

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Public Sector Pensions Under Attack

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BY ALAN M. KLINGER, DINA KOLKER AND DAVID J. KAHNE

Around the country, despite an improving economy, state and local governments are struggling to balance budgets and have taken aim at public employee pensions.

Although New York has well-funded and well-protected public pension plans, this national pressure, and the upcoming referendum on a state Constitutional Convention—which carries the threat of stripping safeguards against unfair impairment—will likely bring renewed attention to the level of benefits and the legal protections public employees possess.

States, including New Jersey, California and Illinois, continue to face challenges in paying for perennially underfunded pension liabilities. Public employee pensions, designed to attract and retain quality employees to long-term public service, have increasingly been in the crosshairs of budget-trimming legislators unwilling to explore other (often politically risky) fixes. Since 2009, nearly every state has enacted some type of public pension "reform," including increased eligibility requirements, higher employee contributions, and limiting cost-of living increases.

These legislative changes have spurred pension-related litigation, with the Contracts Clause of the Federal Constitution often serving as the principal shield against reductions or eliminations of promised pension rights. U.S. Const. art. I, §10, cl. 1 ("No State shall … pass any … Law impairing the Obligation of Contracts.") This provision was designed to safeguard legitimate expectations of contracting individuals, like public employees, against repudiation by a state government. Courts applying the Contracts Clause look to whether (1) the challenged law impairs a contractual relationship, (2) the impairment is substantial, and (3) it is necessary to serve an important public purpose.

Under numerous state constitutions, public pensions are deemed contracts. When a state impairs its own contracts, as is often the case with pensions, the impairment is scrutinized more closely. Review is also heightened if the impairment is severe. Only in dire economic circumstances, and only as a last resort, may governments completely abrogate their contracts. The bankruptcy in Detroit is a notable example of a fiscal crisis requiring a municipality to cease paying its pension obligations.

The situations in New Jersey and California typify more recent attacks and prompt concern. For over a decade, New Jersey made less than half its required annual state pension fund contributions. Last June, in a narrow decision, the N.J. Supreme Court held the Governor's failure to make contributions required by state law did not violate the Contracts Clause. The court found in *Burgos v. State* that the law requiring annual payments did not create an enforceable contract, because it violated another constitutional provision prohibiting the legislature from incurring large debts. Despite the ruling, the court made clear that whether New Jersey's "men and women must be paid their pension benefits when due [was] not in question." Whether that promise will carry weight if the state continues to shirk its contributions was left unanswered.

As part of the same effort to minimize required contributions, New Jersey also passed a law freezing cost-of-living adjustments (COLA) for retired workers. A group of state prosecutors sued under the Contracts Clause. The N.J. Supreme Court found in *Berg v. Christie* that under the relevant retirement system enabling acts and the separate Pension Adjustment Act (where the COLA is codified), COLAs were not part of "core," non-forfeitable pension rights. Therefore, the COLA suspension did not impair protected pension rights.

Against a similar budgetary backdrop, a California Court of Appeal in *Marin Assoc. of Public Employees v. Marin County Employees' Retirement Association [MCERA]*, recently allowed the diminution of pensions. At issue were portions of the 2013 California Pension Reform Act (PRA), which changed the pension formula for compensation earned post-2013. Under PRA, MCERA adopted a policy excluding standby, administrative response, callback, and other payments in lieu of benefits earned after Jan. 1, 2013 from the calculation of final compensation. A group of employees and unions sued, claiming the policy was an unconstitutional impairment of their vested pension rights.

As in New Jersey, the court allowed the reductions. Emphasizing the limited nature of its ruling, the court held the PRA and policy constitutional because they were prospective in nature, modest in scope, and (according to the court) did not have an immediate adverse financial impact on employees. Importantly, in California, unlike in New York, pension rights are not granted contract status at the state level. Employees do not have a right to any fixed or defined benefits, but only to a "substantial" or "reasonable" pension. The California Supreme Court has held that the government may make reasonable modifications to the pension system until the pension becomes payable (provided changes are accompanied by new advantages for employees).

> Legislative changes have spurred **pension-related litigation**, with the **Contracts Clause** of the Federal Constitution often serving as the principal shield against reductions or eliminations of promised pension rights.

New York public employees should take heed. In New Jersey, in approving current reductions and condoning actions likely to necessitate future impairments, the court took pains to sidestep the central question of whether public employees' pension rights had been violated. In California, the courts have minimized the impact of legislation, while emphasizing the necessity of reform.

Because of its stronger constitutional protections, New York public employees have had more security. New York's Constitution contains a non-impairment clause, providing that membership in a public pension system is "a contractual relationship … which shall not be diminished or impaired." N.Y. Const. art. V, § 7. The consequence of the provision is two-fold: (1) by its terms, it prevents any diminishment and fixes the rights of employees at the time of entry into a retirement system, and (2) it creates a contract, bringing it within state and federal contracts clause protection. As each of these protections emanate from the state Constitution, both are at risk in a Convention.

Thus, the types of shaving down of rights accomplished in California and New Jersey should be more difficult in New York. Although non-impairment and contracts clause cases as they relate to public sector pensions in New York are relatively sparse and dated, they generally protect public pensions from being reduced and limit any modifications to prospective application. Starting with *Birnbaum v. New York State Teachers Retirement System*, the Court of Appeals has invalidated an updated mortality table that would have diminished members' benefits; held unenforceable an attempt to calculate teachers' annuities on actuarial values in use at the time of retirement; and rejected the elimination of payments for accumulated vacation credit from the final average salary of current members.

As policymakers continue targeting public pensions, employees in New York have found comfort in their layered constitutional rights. But, as we approach the 2017 referendum on whether New York should hold a Constitutional Convention, unions and employees cannot lose sight of the significance of the Non-Impairment Clause, and the attempts to impair pension protections that a Convention might bring.

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Keys to an Effective **Global Employment Strategy**

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BY BRIAN ARBETTER

It too often happens that U.S.-based multinational companies develop their global employment strategy by happenstance. Typically, they grow over time through acquisition, and rarely focus sufficient attention at the time of purchase on true and proper integration of their differing global workforces, policies and practices.

Needless to say, this leads to frequent mistakes over time, and in some cases, significantly adverse (yet avoidable) legal liabilities and payouts. This article highlights a few of the key issues for multinational employers to focus on when growing their global workforces so as to develop and implement a good global employment strategy. Issues discussed include: (1) Consolidation of global employment policies and documents; (2) independent contractors versus employees under varying global standards; and (3) proper global and local employer entity structuring.

Global Policies

Even the most sophisticated of global companies often find their employment policies and documents to vary around the world. This usually is the result of non-integrated growth over time, either due to mergers and acquisitions or due to tolerance of locally autonomous cultures within the corporate organization.

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From a global employment law standpoint, it is generally better practice to coordinate and consolidate policies across the world in order to achieve better organizational efficiencies. The less variation, the less likely that an employer will have to confront employee morale issues arising from one jurisdiction getting better terms or benefits than another, and the less likely that the employer will make mistakes administering its human resources practices by possibly missing a local difference. Because there are in reality certain legally required practices that may be unique in a particular jurisdiction, recommended best practice is to create a common global set of policies and documents, and then implement local addendum to accommodate only those locally required variations. The goal again is to maintain as much consistency around the world as legally allowed.

Independent Contractor Versus Employee

It has become way too common for multinational companies to start up operations in a new jurisdiction by attempting to engage individuals as independent contractors, rather than employees. This is often a legal mistake.

Most U.S. employers know that it is difficult legally to engage a worker to perform services in a way other than having them be an employee. To have a relationship where instead the individual is an independent contractor requires proving a set of 20 factors. Key among these is that the person not be directed or restricted in judgment by the employer and that the manner and means performed be completely up to the individual—including not using the employer's equipment or space or tools.

Outside of the United States, most countries follow a similar legal analysis on this issue. For this reason, employers who assume that because they are engaging someone in another county they can easily label them as an independent contractor and avoid local employment law obligations make a significant legal mistake. The costs for this can include obligations to pay back pay, back contributions to various local public social funds, and back taxes—plus penalties and interest. Liability for this mistake can also include owed corporate tax liability on profits earned by the company locally, and in some instances worldwide. This is because where a non-local employer directly employs someone, that employer is typically subject to the local laws, including the local tax laws, since the entity is acting de facto as a local employer although not properly registered as one.

In today's world of governments aggressively looking for tax revenue wherever available, it is common that a local taxing authority will attempt to tax the foreign entity under local corporate tax rates. In a worst case situation, this can result in the foreign company being taxed at a local rate on its worldwide profits because the company does not have a proper local entity to be taxed on only local profits. For these reasons, it is crucially important that U.S. companies giving overseas avoid improperly engaging local workers as independent contractors.

Employer Entity Structuring

Key to employment outside of the United States is choosing the correct employment entity. A mistake on this choice can be difficult to correct after the fact. Common structuring choices include a representative or branch office, a subsidiary, using a third-party employment company, or a joint venture.

> From a **global employment law standpoint,** it is generally better practice to **coordinate** and **consolidate policies across the world** in order to achieve better organizational efficiencies.

A representative or branch office is best for the situation where a company is exploring whether or not to establish an operating business in a local country. Typically, a representative office can have a few employees engaged to conduct exploratory activities such as looking at office space or engaging in preliminary market research; however, this type of structure cannot engage in profit making activities. This type of entity generally does not require capitalization. In contrast, a subsidiary structure is generally similar to the same in the United States; it can engage in sales and profit making activities and can employ local employees without restriction. As at home, this type of entity generally requires registration, capitalization, and compliance with all local laws and tax obligations. Where a non-local employer plans to employ people but does not want to commit to a direct local operation, it can engage a local third-party employment company to act as the local employer and payroll provider. This is a good solution for companies that wish to avoid the risks of non-compliance with local employment and tax laws yet want to engage in broad based activities locally. Finally, the joint venture works similarly overseas as it does in the United States. This type of entity is good generally in markets where a locally knowledgeable partner is necessary for effective sales and marketing or where a country's laws require local entity ownership or participation.

Because of all of the above, it is important that a company engaging workers overseas pays close attention to the manner and method of its operations in this regard. Choices that may seem obvious from a U.S. standpoint can end up costing the company significant dollars and administrative losses if implemented the same overseas.

Pay Equity

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for the positions, because the bonus and commission opportunities were much greater than what they were earning in their current jobs. The company is prepared to offer them the positions. The company would ordinarily start these novice national account managers at $90,000 base salary, which would be a $10,000 increase for Sarah, but a $20,000 cut for Sam. However, the company's policy has been not to cut the salary of existing employees who move laterally or into "higher" positions, which this is considered. Can the company justify paying Sam $110,000 while paying Sarah $90,000? The wage differential is arguably due to experience, i.e., Sam's experience as a manager of a small team. But is that experience "job related *with respect to the position in question*" if the new position does not involve managing a team? Is it consistent with "business necessity"? Again, that requires that the factor bear a relationship "*to the employment in question*."

And what is the potential annual exposure to the company in the Sarah/Sam hypothetical? Not the $20,000 annual differential between Sarah, who would get a $10,000 raise, and Sam, who would get no raise. Rather, it would be $80,000, because the new law imposes liquidated damages of up to 300 percent on the unpaid wages for a willful violation of §194.[8]

So here we see two significant and common employment practices, neutral on their face, legal under the law prior to Jan. 19, 2016, and at least suspect, if not illegal, under the new law, that can result in extraordinary liability. Must employers ignore salary history altogether? The Massachusetts Act to Establish Pay Equity[9] will require just that, once the law becomes effective in January 2018. So too would a bill to amend the New York City Human Rights Law introduced before the New York City Council by Public Advocate Letitia James on Aug. 16, 2016.[10]

The law may affect employers' compensation policies in two other respects: First, gender differentials in pay are prohibited even if two employees whose pay rates are being compared work in different locations, if those locations are in the same geographic region no larger than a county, "taking into account population distribution, economic activity, and/or the presence of municipalities."[11]

Second, employers may not prohibit employees from sharing wage information.[12] While this protection is available to most employees under §7 of the National Labor Relations Act (NLRA), New York's Equal Pay Act now extends this protection to many others who are not "employees" under the NLRA, such as supervisors and managerial employees, so they may learn whether co-workers performing the same job are being paid more. The employer can establish reasonable limitations concerning the time, place and manner of such discussions, and the employee need not disclose his or her wages. The prohibition also does not apply to the disclosure of *other* employees' wages by employees with access to that information as part of their essential job duties. It therefore behooves employers to reexamine their policies concerning the sharing or disclosure of employee wage information, as well as their other compensation policies.

1. P.L. 88-38, June 10, 1963. The "purpose" of the Act does not appear in the codified version.
2. See, e.g., Robert J. Samuelson, "What's the Real Gender Pay Gap?" Washington Post, April 24, 2016; Janet Adamy and Paul Overberg, "Women in Elite Jobs Face Stubborn Pay Gap," Wall Street Journal, May 17, 2016; Bouree Lam, "What Gender Pay-Gap Statistics Aren't Capturing," The Atlantic, July 27, 2016.
3. Including California (Cal. Labor Code §1197.5), effective Jan. 1, 2016, and Massachusetts (Act to Establish Pay Equity, 2016 Mass. Laws Ch. 177), effective Jan. 1, 2018.
4. The California and Massachusetts statutes go further than New York's by prohibiting wage discrimination in "comparable" jobs. The Massachusetts law also prohibits employers from inquiring into an applicant's wage or salary history.
5. NY Lab. L. §194.1.d.
6. Id., §194.1.e.
7. See, e.g., Surveys reported in John Bussey, "Gender Wage Gap Reflects the 'Ask' Gap," Wall Street Journal, Oct. 10, 2014; Christina Lopez, "How Salary Negotiation Contributes to the Wage Gap," Monster.com.
8. NY Lab. L. §198.1-a.
9. Supra., fn. 3.
10. Int. 1253-2016.
11. NY Lab. L. §194.3.
12. Id. §194.4.a.

Waivers

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action arbitration waivers violate the NLRA. *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Central to the Fifth Circuit's decision was its conclusion that the Board's invalidation of class action arbitration waivers conflicted with the Federal Arbitration Act (FAA). Significantly, the court determined that "requiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 359-60 [quoting *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1748 (2011)]. The Fifth Circuit concluded that because the Board's interpretation of the NLRA did not fall within the FAA's "saving clause"—which requires enforcement of an arbitration provision "save upon such grounds as exist at law or in equity for the revocation of any contract (9 U.S.C. §2)—and "because the NLRA does not contain a congressional command exempting the statute from application of the FAA," the class action arbitration waiver at issue did not run afoul of the NLRA. 737 F.3d at 362. In so holding, the Fifth Circuit found, in stark contrast with the NLRB, that the "use of class action procedures … is not a substantive right." Id. at 357.

More recently, the Fifth Circuit reaffirmed its holding that employee class action arbitration waivers are not unlawful under the NLRA and refused to enforce the Board's decision to the contrary in *Murphy Oil USA v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), for the same reasons it had refused to enforce the Board's decision in *D.R. Horton*.

Two other circuit courts of appeal have sided with the Fifth Circuit in rejecting the NLRB's holding in *D.R. Horton* and refusing to invalidate employee class action arbitration waivers. In *Sutherland v. Ernst & Young*, 726 F.3d 290 (2d Cir. 2013), the Second Circuit Court of Appeals upheld an arbitration agreement compelling employees to arbitrate FLSA claims on an individual basis. In its decision, the appellate court expressly declined to follow the Board's decision in *D.R. Horton*. The Eighth Circuit Court of Appeals also has rejected the NLRB's holding in *D.R. Horton*, upholding a class action arbitration waiver of FLSA claims in *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013). Just a few short months ago in June 2016, the Eighth Circuit reaffirmed its *Bristol Care* holding when it rebuffed the NLRB's direct challenge to a class action waiver in *Cellular Sales of Missouri v. NLRB*, 824 F.3d 772 (8th Cir. 2016).

Very recently, however, two other circuit courts—the Seventh Circuit and the Ninth Circuit—have sided with the NLRB and held that employee class action arbitration waivers are unlawful because they violate the NLRA. In late May 2016, siding with the Board's decision in *D.R. Horton*, the Seventh Circuit held that an employee arbitration agreement barring class or collective arbitration violated §7 of the NLRA. *Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. 2016). In its decision, the Seventh Circuit leveled pointed criticism at the Fifth Circuit's opinion in *D.R. Horton v. NLRB*, stating that the Fifth Circuit made "no effort to harmonize the FAA and NLRA" (id. at 1158) and holding that "there is no conflict between the NLRA and the FAA, let alone an irreconcilable one." Id. at 1157.

Similarly, in late August 2016, in *Morris v. Ernst & Young*, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), the Ninth Circuit agreed with the NLRB and the Seventh Circuit that an employee class action arbitration waiver violated §7 of the NLRA and therefore was unlawful. Notably, the court did not extend its holding beyond only mandatory class action arbitration waivers (i.e., waivers required to be signed as a condition of employment or continued employment), meaning that arbitration agreements with class action waivers that provide employees with the opportunity to opt out may currently be enforceable in the Ninth Circuit.

Where Do We Go From Here?

Ever since the NLRB's game-changing decision in *D.R. Horton* to ring in the new year in 2012, employers have been faced with the decision between ceding to employees the right to arbitrate claims in a class or collective action and potentially violating the NLRA. This decision has been particularly challenging for those employers who have geographically diverse businesses with employees located in multiple jurisdictions, and employers who find themselves in jurisdictions where federal courts have not yet weighed in on the issue.

However, this confusion seems likely to end in the near future. In early September 2016, both Epic Systems and Ernst & Young filed petitions for certiorari with the U.S. Supreme Court, asking the Supreme Court to review the recent decisions by the Seventh and Ninth Circuits invalidating employee class action arbitration waivers. The NLRB followed suit only days later, asking the Supreme Court to review the Fifth Circuit's decision in *Murphy Oil*.

Given the circuit split and the fact that parties on both sides of the issue are asking the Supreme Court to weigh in, it is likely that the court will take up the issue in the near future. How the Supreme Court will rule is much less certain. The late Justice Antonin Scalia arguably was the strongest pro-arbitration voice on the Supreme Court and authored the court's two most recent pronouncements upholding class action waivers in arbitration agreements: *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), and *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

That the NLRB—which has passed up previous opportunities to have the Supreme Court review the issue—has elected to seek Supreme Court review now appears to suggest that the Board sees an opening to obtain high court approval of its *D.R. Horton* decision, which would likely be detrimental to employers and immediately invalidate class action waivers in employee arbitration agreements across the country. Conversely, with the current 4-4 split on the Supreme Court, it is possible that the court may not reach a majority decision, leaving in place the current patchwork of appellate court decisions that, while vexing to some employers, may be viewed as a triumph for employers in the Second, Fifth and Eighth Circuits. It is also possible that the court rejects the reasoning of the NLRB and the Seventh and Ninth Circuits, in line with a series of decisions in which the court has expressed a strong preference for arbitration under the FAA.

This issue merits prudent monitoring by employers going forward. Particularly if the Supreme Court sides with the NLRB and invalidates countless existing class action arbitration waivers nationwide, affected employers will want to implement a game plan to deal with the potential implications of such a decision and take other steps to protect themselves against the threat of a class or collective arbitration.

Scheduling

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The U.S. Department of Labor's Wage and Hour Division has also indicated it is evaluating whether employees should be legally entitled to predictive scheduling under the Fair Labor Standards Act (FLSA).

Tips for Employers

While the predictive scheduling movement has not yet come to many states, the trend is expanding across the country, and federal legislation (if passed) could mandate predictive scheduling requirements for employers everywhere. Employers, especially those in the retail, food service, and hospitality industries, should educate themselves about and prepare themselves for the legal and practical challenges that changes in the law could present to their businesses.

Some employers also are taking a proactive approach by aligning themselves against potential legislation and actively lobbying decision-makers.

Additionally, employers in all industries should recognize that even if legislators do not take action on behalf of workers, predictive scheduling may become an employee relations issue that labor activists may utilize as a call to unionization in an effort to achieve the same effect through collective bargaining.