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# COMPASS

INSIGHTS AND DIRECTION FOR EMPLOYERS

## NEW DIRECTIONS: WELCOME TO COMPASS A NOTE FROM OUR EDITOR

Jansen A. Ellis, *Editor-in-Chief*

Welcome to the inaugural issue of our new quarterly newsletter, **OGLETREE DEAKINS COMPASS**. We hope you enjoy the publication, which contains some of the familiar features of the *Employment Law Authority*, but also has a few new

additions—all of which are focused on providing practical tips, tools, and insights for today's employers.



In this last quarter of 2018, there is plenty on the horizon for employers. The midterm elections on November 6 could result in significant changes for employers. Also, the new U.S. Supreme Court term—which began with just eight justices—could bring additional uncertainty for employers.

We look forward to providing you with valuable insights on the impact of coming changes and developments to help guide you in your workplace. As always, we welcome your feedback, ideas, and comments on our new publication. We hope you find **COMPASS** helpful and enjoy the fall season.

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by James J. Plunkett (Washington, D.C.)

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AN INSIDE LOOK  
AT KEY ISSUES  
FROM CAPITOL HILL



### SCOTUS Nominee Hearings

In early September, the Senate Judiciary Committee held confirmation hearings for Supreme Court nominee Brett Kavanaugh. The final confirmation vote has been held up pending an FBI investigation that concludes the first week of October. The Court's term kicked off on October 1.

### OFCCP Update

The Office of Federal Contract Compliance Programs (OFCCP) has recently issued several new directives. In Directive 2018-04, OFCCP announced its plans to schedule "focused reviews" of federal contractors regarding their compliance with Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and Section 503 of the Rehabilitation Act of 1973. In addition, OFCCP announced an overhaul of its process for investigating compensation discrimination, as well as a new directive intended to ensure that federal contractors have complied with their annual affirmative action program requirements.

### Busy Days at the DOL

There has been no shortage of news emanating from the U.S. Department of Labor (DOL). The DOL's Wage and Hour Division (WHD) issued six new opinion letters—four involving the Fair Labor Standards Act (FLSA) and two involving the Family and Medical Leave Act (FMLA). The WHD also announced that it would conduct five listening sessions to solicit feedback regarding potential revisions to the FLSA's overtime regulations. Finally, the DOL announced the formation of the Office of Compliance Initiatives (OCI) to "promote greater understanding of federal labor laws and regulations."

### USCIS Expands Premium Processing Suspension for H-1B Petitions

U.S. Citizenship and Immigration Services (USCIS) announced the extension of its suspension of premium processing for all H-1B cases subject to the annual quota (also known as "cap cases") for fiscal year 2019. The suspension was initially slated to end on September 10, 2018, but the end date has been pushed back until February 19, 2019, to help USCIS reduce the current H-1B backlog. USCIS also announced that, as of September 11, 2018, it will be expanding the suspension to include certain H-1B petitions that were not covered by the original suspension.

### NLRB Member Renominated

NLRB member Mark Gaston Pearce was nominated to a third term on the Board just days after his term ended on August 27, 2018. During his years on the Board, Pearce was instrumental in rolling out some of the Board's most controversial initiatives, such as the "ambush" election regulations, the Specialty Healthcare decision that allowed unions to gerrymander bargaining units, and the dramatic expansion of the Board's joint-employer standard. Traditionally, presidents do not rush to fill minority-party vacancies at the Board, but Pearce's nomination is reportedly part of a larger package deal in the Senate that would clear at least some of the current nominee logjam. At this time, there is no word on which nominees might be included in the package.

### Association Health Plan Rule Issued

The DOL's Employee Benefits Security Administration issued a regulation that loosens the restrictions on association health plans. The new rule allows small employers to join together through shared geographic or industrial characteristics in order to obtain health insurance as though they were one large employer. Under the final rule, the DOL will look at two key factors when determining whether a group or association of employers that sponsors an association health plan is a single "employer": 1) whether the employers share a "commonality of interest"; and 2) whether the employer members have control over both the association that sponsors the plan and the benefit plan itself.

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## CALIFORNIA

[California's pay equity law has been amended](#) to clarify certain ambiguities regarding proper interview questions, disclosure of pay scales, and the application of the law to existing employees. The amendments will become effective on January 1, 2019.



## CONNECTICUT

A Connecticut federal court judge provided further clarification for employers concerning Connecticut's Palliative Use of Marijuana Act (PUMA). In its second decision in [Noffsinger v. SSC Niantic Operating Company, LLC \(Noffsinger II\)](#), the court further defined the contours of a PUMA discrimination claim, holding that federal law does not negate PUMA's anti-discrimination protections and that certain damages are not recoverable under PUMA.



## ILLINOIS

On August 26, 2018, [Illinois amended the Wage Payment and Collection Act](#) to include the requirement that employers reimburse employees for all expenses within the scope of their employment that are "directly related to services performed for [their] employer[s]." The new law goes into effect on January 1, 2019.



## MASSACHUSETTS

On August 10, 2018, Governor Charlie Baker signed a [noncompete reform measure](#) into law. The law will codify existing Massachusetts case law and go much further in regulating the enforceability of noncompete agreements, including limiting who may be subject to such agreements. The law applies to agreements entered into after October 1, 2018.



## MICHIGAN

On September 5, 2018, the [Michigan Senate and House of Representatives adopted a citizen-initiated paid leave ballot proposal](#) that was supposed to be put to a vote in the November 2018 general elections. Unlike the ballot initiative, which would have had immediate effect, the adopted proposal will not go into effect until 90 days after the end of the current legislative session, on or about April 1, 2019.



## NEW JERSEY

The [New Jersey Department of Labor and Workforce Development recently issued proposed regulations to implement the New Jersey paid sick leave law](#), which goes into effect on October 29, 2018. The proposed regulations address many questions New Jersey employers have about the new law, but other areas of uncertainty remain.



## NEW YORK

New York State and New York City each [recently passed aggressive laws](#) to combat sexual harassment in the workplace. On October 1, 2018, the New York State Department of Labor released final materials (including a model sexual harassment prevention policy and training program) in addition to supplemental information to aid in compliance with the new state law, which becomes effective on October 9, 2018.



## OKLAHOMA

Oklahomans recently voted 57 percent in favor of State Question 788, resulting in the passage of the [Oklahoma Medical Marijuana Act](#). Many experts consider the new law to be one of the broadest medical marijuana laws in the United States. The law went into effect on July 26, 2018.



## TENNESSEE

Tennessee property owners, including employers, are generally authorized to prohibit the possession of weapons by any person at meetings conducted by an employer or on property owned, operated, managed, or under the control of an employer. [Tennessee has adopted very specific requirements](#) for how employers and other property owners must notify employees and visitors when they seek to prohibit firearms on their properties.



## TEXAS

On August 16, 2018, [San Antonio adopted a paid leave ordinance](#) requiring employers to provide paid leave to employees in certain situations. The next day, a Texas appellate court temporarily enjoined a similar ordinance in Austin. In Dallas, a petition to put a similar measure on the ballot came up short of the required number of signatures, but proponents are pushing the Dallas city council to adopt the ordinance without an election. The next legislative session begins January 8, 2019, and some state representatives intend to introduce a bill prohibiting local governments from enacting paid sick leave ordinances.



## VIRGIN ISLANDS

In [Whyte v. Bockino](#), the Supreme Court of the United States Virgin Islands recently held that the Federal Arbitration Act (FAA) applies to contracts in the Virgin Islands and concluded that the claims of a former employee were arbitrable.



## WASHINGTON

On June 12, 2018, Governor Jay Inslee issued an [executive order](#) that directs Washington agencies to favor government contractors that do not require employees to submit to individual arbitration of claims. The executive order is Governor Inslee's response to the recent Supreme Court of the United States' decision in [Epic Systems Corporation v. Lewis](#).



## FIVE KEYS TO IMPLEMENTING AN EFFECTIVE DIVERSITY & INCLUSION INITIATIVE

by Kimya S.P. Johnson (Philadelphia)

Changing demographics, highly publicized negative incidents, poor diverse employee representation, and/or an increased sensitivity to workplace cultural dynamics have propelled employers to heavily invest in their diversity and inclusion (D&I) initiatives. But even the most sophisticated and well-intentioned companies are recognizing that D&I in practice is far more challenging than most would think. Below are five foundational keys to implementing an effective D&I initiative.

# PERSPECTIVES

### 1. Create a Strategic and Action-Oriented D&I Plan

A prime obstacle to successful implementation of D&I initiatives is the lack of a well-thought out and defined plan of action. Effective D&I initiatives start with strategic planning and an understanding of how D&I fits into the overall goals of the business. In order for the D&I vision to move into execution, there should be workable action plans with articulated deliverables and timelines. Organizations with the most effective initiatives have D&I action plans that all can follow. Taking the time to prepare a strategic and action-oriented D&I plan will provide practitioners with the necessary guidance and definition to execute more successfully.

### 2. Engage Leadership to Communicate the Importance and Value of D&I

If any D&I initiative is going to be successful, leadership must be engaged. Leaders—from the CEO to daily operations managers—must be prepared to communicate that D&I is important to the business, to the company culture, and to them. Often employers focus on the message that will be communicated to the workforce, the customer, or the public. But equal if not more focus should be devoted to identifying and preparing the messenger to deliver that message.

### 3. Ensure Legal Compliance and Risk-Reduction Measures are Incorporated

Effective D&I plans begin by incorporating legal compliance and risk-reduction measures into the structures of programming, systems, and processes. D&I practitioners are navigating complex legal issues involving discrimination/EEO laws, affirmative action/federal contractor reporting, and industry-focused statutory requirements, among other things. The legal landscape surrounding D&I is tricky. Employers will be well-served to engage employment-focused legal counsel who is experienced with D&I execution challenges in the discussion of the D&I strategic plan, initiative, or program—and to do so early.

### 4. Recognize the Importance of “EQ” or Soft Skills in D&I Delivery

A Deloitte report, “Soft skills for business success,” presented the argument that, in addition to technical skills, developing soft skills is increasingly important for successful workplace outcomes. According to the report, soft skills refer to those skills that allow for greater communication, understanding, and fluidity in the workplace. Some believe the term is antiquated and prefer the term “EQ” (emotional quotient). Nonetheless, most agree that the ability to get along with others, exercise emotional judgment, show empathy, and learn new things are now core business competencies of increasing value. And in the D&I arena, which fundamentally requires the ability to bring people together, having practitioners and leaders with a high EQ are a necessity in implementing the D&I plan.

### 5. Prepare Organizational Systems for D&I Integration

Some organizations that are readying for changing demographics and desire a competitive, global advantage in the marketplace are focused on fostering a workplace culture that embodies D&I. These organizations have already recognized D&I not as a stand-alone program, but as a strategically-integrated business practice. And these companies pursue means to foster cross-department and systems integration, ensuring the D&I department is working with marketing/communications, human resources, talent management, recruiting, business groups, operations, and others. Forward-moving organizations are readying D&I practitioners with a working knowledge of organizational systems and processes well beyond the D&I department.

*Kimya Johnson is Co-Chair of Ogletree Deakins’ Diversity & Inclusion Practice Group. Her practice focuses on helping clients strategize, build, and implement effective and legally-compliant diversity and inclusion initiatives.*

# NAVIGATIONAL TOOLS



## CHECKING IN ON THE FMLA AT 25

by Michael M. Shetterly (Greenville)



The Family and Medical Leave Act (FMLA) went into effect in 1993, and over the past 25 years its protections for employees have expanded. The increased protections of the statute, coupled with the complex issues of notice, coverage, eligibility, and documentation, put the FMLA at the top of many employers' list of challenges.

Despite these complexities, there are some aspects of the FMLA that are straightforward. In honor of the FMLA's 25th birthday, below is a quick reference to some of the key rights and responsibilities for both employers and employees under the Act.

### EMPLOYER OBLIGATIONS (EMPLOYEE RIGHTS)

#### EMPLOYERS MUST:

- ✓ Post the FMLA poster and have a family and medical leave policy that is distributed to each employee via a handbook or otherwise
- ✓ Establish protocols/procedures that allow an employee who articulates a qualifying reason for leave (even if they do not use the words FMLA) to get protected leave (or start the process)
- ✓ Advise employees who are seeking leave for a qualifying condition of their eligibility within five business days of the request for leave (if the employee is eligible, it must be in writing)
- ✓ Document any discussion with an employee about whether a condition is covered under the FMLA
- ✓ Maintain healthcare benefits and reinstate an employee to his or her original position (or an equivalent position with equivalent benefits, pay, and other terms and conditions of employment) at the conclusion of the leave
- ✓ Not impose roadblocks aimed at an employee who is seeking FMLA leave (e.g., don't remove essential job functions or change scheduled hours to make the employee work instead of taking leave)

### EMPLOYEE OBLIGATIONS (EMPLOYER RIGHTS)

#### EMPLOYEES MUST:

- ✓ Adhere to the company's uniform call out rules
- ✓ Give timely notice (as soon as possible and practicable, unless the company's call out rules ask for less) of the need for leave and sufficient facts to notify the employer that the leave is for an FMLA-qualifying reason
- ✓ Submit proof (if requested) that the leave is for a qualifying condition. Proof must be timely (i.e., absent extenuating circumstances, within 15 calendar days from receipt of request)
- ✓ Submit proof of ability to return to work if the employee was on FMLA leave due to his or her own serious health condition (and there are limitations on how frequently an employer can request such documentation)
- ✓ Be honest about the reason for leave and take FMLA leave for its intended purpose



# ON THE RADAR

## TOP 5 LABOR AND EMPLOYMENT ISSUES FOR MULTINATIONAL EMPLOYERS

by Diana J. Nehro (New York City/Boston)



Multinational employers (or those thinking about going global) have a number of labor and employment issues to consider—and compliance requires a careful balancing of a number of competing issues. Below we discuss some of the top concerns for multinational businesses and provide practical tips for tackling these challenges. To listen to an Ogletree Deakins podcast on this topic, click [here](#).

### 1 The Absence of At-Will Employment

U.S. employers generally can terminate a U.S. employee's employment for any reason or no reason at all, provided that it is not on the basis of illegal discrimination or retaliation. However, there is no concept of at-will employment outside the United States, and employers generally must have cause to terminate an individual's employment without having to make termination payments. The definition of "cause" varies from country to country, but in most jurisdictions includes conduct that U.S. employers consider to be gross misconduct. As a result, in many countries, in the absence of egregious behavior, employment relationships end largely by negotiation and a separation payment. Multinational employers should have (and in some cases are required to have) written employment contracts for non-U.S. employees and should be familiar with those employees' rights upon termination.

### 2 Conducting Cross-Border Investigations

An investigation can be "cross border" by virtue of the events taking place in a different location than headquarters, and/or because employees and conduct involved touch multiple jurisdictions. Companies must engage in a risk and cost-benefit analysis to balance potentially competing U.S. laws against those of the local jurisdiction. Timing is one key issue. When information that warrants an investigation is brought to the company's attention, employers often must act quickly as some countries require that any termination for cause take place within a certain time frame from learning about that information. In addition, some countries have specific procedural requirements, including the right of representation during the investigation. Finally, evidentiary privileges apply very differently outside the United States and the attorney-client privilege does not always translate in the cross-border context.

### 3 Globalizing Training and Policies

Globalizing discrimination and harassment policies across multiple jurisdictions is a challenging but necessary task. Definitions of discrimination and harassment may vary from country to country, so taking into account the local requirements, as well as cultural sensitivities, is essential. Further, many countries prohibit concepts like "moral harassment" and "mobbing," which are often akin to bullying and do not have to be on the basis of a protected class.

Key questions to consider include: 1) what are the protected characteristics in the relevant country and is the existence of such characteristic even necessary to have an actionable claim? and 2) what type of conduct is unlawful? When drafting global policies, employers may consider including country-specific addendums to address local requirements. Training employees and supervisors on the nuances of local laws is equally important to ensure compliance and avoid legal risk.

### 4 Global Mobility

Global mobility assignments—which include inbound assignments where a non-U.S. citizen is working in the United States, and outbound assignments where a U.S. citizen is sent to work abroad—are increasingly common in today's globalized corporate environment. The general rule is that the law of the place where the work is performed governs. In limited circumstances, it is possible to deviate from this rule by contract, but the longer an expatriate employee works in a jurisdiction, the more likely he or she is to have a valid claim under that country's labor laws, regardless of what is in the contract. Tax compliance is a major concern. In long-term assignments, expatriates are generally subject to local payroll taxation, but want to be kept on the home company payroll to maintain social security and pension-type benefits, so a good tax equalization plan is critical.

### 5 Collective Bargaining

Bargaining collectively means something quite different in the United States than it does abroad. Whereas collective bargaining agreements apply to relatively few U.S. employers, negotiation with employees collectively in much of the rest of the world is a fundamental part of doing business. Employers operating abroad should be familiar with the rights afforded employees by local works councils, trade unions, or other similar bodies. U.S. employers are often shocked by the amount of control works councils exercise over seemingly simple business decisions such as implementing a new HRIS system. In addition, collective bargaining agreements outside the United States often apply to an entire industry even in the absence of a specific agreement with the applicable union, governing areas such as minimum wages and separation benefits.

# ALONG THE ROAD

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STATS  
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TRENDS

- 1.** Sixty-five percent of children now entering primary school will hold jobs that currently don't exist.

*(Source: [World Economic Forum](#))*



- 2.** Approximately 5.9 million people were working in the United States "gig" economy as of May 2017. An additional 10.6 million people had jobs as independent contractors, on-call workers, temporary help agency workers, and contract firm workers.

*(Sources: [The Guardian](#) and [U.S. Bureau of Labor Statistics](#))*

- 3.** Average travel time to work for 2016: 26.1 minutes

*(Source: [U.S. Census](#))*



- 4.** The share of women in the workforce is projected to reach 47.2 percent in 2024, and the number of male workers is expected to slightly decrease to 52.8 percent in 2024.

*(Source: [U.S. Department of Labor](#))*

- 5.** Although automation will play a role in the future workforce, the future will hinge more on experts who wield smart technologies, with 78 percent of recent survey respondents citing that smart technologies will most significantly change the workplace by 2020.

*(Source: [HR.com](#))*

- 6.** Demand for higher cognitive skills, such as creativity, critical thinking, decision making, and complex information processing will also grow through 2030, by 19 percent in the United States and by 14 percent in Europe, from already sizable bases. The same research predicts the fastest rise in the need for advanced IT and programming skills, which could grow as much as 90 percent between 2016 and 2030.



*(Source: [McKinsey&Company](#))*

- 7.** Coworking is the new normal. There are currently 14,411 shared workspaces in the world today. The number of coworking members will rise to 3.8 million by 2020 and 5.1 million by 2022.

*(Source: [Allwork.Space](#))*

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Register early at [www.ogletree.com](http://www.ogletree.com).

October

Oct 2	Webinar	<a href="#">OFCCP on a Roll: What Contractors Need to Know About the Five New Directives</a>
Oct 2	Dallas	<a href="#">Advanced Workshop on FMLA/ADA Compliance</a>
Oct 3	Nashville	<a href="#">Employment Law Briefing</a>
Oct 9	Minneapolis	<a href="#">Sexual Harassment: What Should Employers Do Now?</a>
Oct 10	Seattle	<a href="#">Managing a Workforce in 2019</a>
Oct 11	Webinar	<a href="#">Shifting the Goalposts: How USCIS Guidance is Reshaping Business Immigration</a>
Oct 11	Columbia	<a href="#">Client Appreciation Briefing and Low Country Boil</a>
Oct 12	Greenwood, MS	<a href="#">All About Leave: From FMLA Requests to Benefit Plans, with ADA Obstacles in Between</a>
Oct 16	Webinar	<a href="#">Preparing for EEO-1 Season: Dos and Don'ts for Employers</a>
Oct 18	Webcast	<a href="#">It's All About Respect - California Harassment-Prevention Training for Supervisors</a>
Oct 18	Overland Park	<a href="#">Managing a Workforce in 2019</a>
Oct 22	Rockville, MD	<a href="#">The Capital Area Employment Law Conference: The Changing Landscape Facing Employers in 2018 and Beyond</a>
Oct 24	Meridian, ID	<a href="#">Employment Law Briefing</a>
Oct 25	Detroit (Metro)	<a href="#">Employment Law Briefing</a>
Oct 26	Atlanta	<a href="#">Managing a Workforce in 2018</a>
Oct 26	Phoenix	<a href="#">Managing a Workforce in 2019</a>
Oct 30	San Diego	<a href="#">Managing a Workforce in 2019</a>
Oct 30	Orange County	<a href="#">Managing a Workforce in 2019</a>
Oct 30	San Francisco	<a href="#">Managing a Workforce in 2019</a>
Oct 30	Tampa	<a href="#">Managing a Workforce in 2019</a>

November

Nov 1	Los Angeles	<a href="#">Managing a Workforce in 2019</a>
Nov 1	Sacramento	<a href="#">Managing a Workforce in 2019</a>
Nov 1	Oklahoma City	<a href="#">Annual Employment Law Seminar</a>
Nov 2	Austin	<a href="#">16th Annual Labor and Employment Law Update</a>
Nov 7-10	Palm Springs, CA	<a href="#">Corporate Labor and Employment Counsel Exclusive</a>
Nov 14	Dallas	<a href="#">"Reel" Ethics 2.0</a>
Nov 14	Houston	<a href="#">"Reel" Ethics</a>
Nov 15	St. Louis	<a href="#">Employment Law Briefing</a>

December

Dec 5	Chicago	<a href="#">Employment Law Briefing</a>
Dec 5-7	Nashville	<a href="#">Workplace Safety Symposium</a>
Dec 5-7	Las Vegas	<a href="#">Labor Law Solutions</a>
Dec 6	Oak Brook, IL	<a href="#">Employment Law Briefing</a>