2020—what to expect???

Blockbusters for 2020
- Independent Contractors/Wage and Hour/Arbitration
- Election Year Issues -- Politics in the Workplace
- Marijuana
- Pay Equity
- Title VII and the EEOC

Independent Contractors
Who is an Employee?
AB5 in California! Earthquake for Gig Economy?

ABC Test from California Supreme Court applies to all aspects of the Labor Code for businesses not exempted.

ABC Test from CA Supreme Court

AB5 codifies ABC Test as law for CA

What next for gig economy companies?

Independent Contractors in the Carolinas

- North Carolina Employee Fair Classification Act (NC agency sharing, disclosure and posting)
- Fourth Circuit (NC and SC) uses six factor economic realities test

1. Control
2. Permanency
3. Investment
4. Skill Indicators, Judgment, Farsight
5. Opportunity for Profit/Loss
6. Integration with Business

Coming Attractions: What to Watch for in 2020
What to Watch for in 2020 cont.

What Should You Do Now?

- Know what you’ve got. Review, analyze and audit your ICs. If you have significant numbers of ICs, the odds are the model will be attacked at some point — so be prepared!
- Be realistic in assessing the risks and gains in using the IC model, and bank that reserve.

Class and Collective Actions
High Risk Areas for Class Actions in 2020

Year in Review - Litigation Statistics

- Wage and Hour Settlements increased by 50%
  - $449.05 million in 2019
  - $253 million in 2018

High Risk Areas for Class Actions in 2020

<table>
<thead>
<tr>
<th>Common Issues</th>
<th>Emerging Issues</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Wage and Hour</td>
<td>• Job Search</td>
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<tr>
<td>- ICs</td>
<td>- Discrimination</td>
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<td>- Misclassification</td>
<td>- Parental Leave Discrimination</td>
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<td>- Off the Clock Work</td>
<td>- Equal Pay</td>
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<td>• ERISA</td>
<td>- Background Checks</td>
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<td>• Other Employment Discrimination</td>
<td>- Website Access</td>
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<td></td>
<td>- COBRA</td>
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<td></td>
<td>- Testing</td>
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</table>
Arbitration Issues for 2020

- Pro-Arbitration Supreme Court – Epic Systems: Class/collective waivers are valid and enforceable
- State law legislative challenges – impact of FAA preemption to be litigated; California statute
- The risk of mass arbitration and filing fees
- Beware of New Prime for transportation workers
- Consider third party implications – covering your clients or having your clients cover you (e.g., joint employment claims).

Political Speech In An Election Year

- 80% of employees believe political speech in the workplace is protected by law
- 72% of employers discourage political activity in the workplace
- 4% of employers encourage workplace political activity
Politics in the Workplace

- Workplace issues:
  - Discrimination, harassment, and retaliation claims based on political affiliation, activities and expression (consider adverse impact on race and related characteristics)
  - Unfair labor practice charges based on Section 7 rights under the NLRA
  - Workplace bullying
  - Decreased employee morale and productivity

Politics in the Workplace—North Carolina

- North Carolina: prohibit employers from restricting employees’ off-duty use of “lawful products”—this can include social media platforms, signage and other products used to deliver political speech
  - Employer defense: the employer must show the activity adversely affects the employee’s ability to fulfill her job responsibilities

Politics in the Workplace—South Carolina

- South Carolina prohibits discrimination on the basis of political activity or beliefs. S.C. Code Ann. 16-17-560.
- "It is unlawful to ... discharge a citizen from employment or occupation ... because of political opinions or the exercise of political rights ... guaranteed to every citizen by the Constitution and laws of the United States or by the Constitution and laws of [South Carolina]."
2020 Issues to Consider

- Be Proactive—What is the going to be the Company’s stance on political speech?
- Is the Company going to be involved in taking corporate stands on political issues?
- Be aware of differences in geography and demographics at your workplaces.

Marijuana

Reefer Madness: Rapid Changes in State Laws
Budding Issues:

- Resolving tension with federal law
- Anti-discrimination
- Testing at work
- Carolinas—no protection for weed

Pay Equity
Pay Equity – Through the Looking Glass

State and Local Legislation
Expand Rights and Remedies

Pay Transparency?

Salary History Inquiries are Still under Attack.

Proactive Steps to Take

• Review compensation processes
  - How are decisions made
  - How are decisions documented

• Review compensation data
  - Monitor starting pay, current pay, promotional pay, bonuses, and other compensation
  - Review raises: consistent with evaluations?
  - Understand the factors behind pay

Additional Practical Tips

• Written policies for pay increases and bonuses
  - Guidelines based on objective, quantifiable factors
  - Limit subjectivity with objective factors

• Ensure job titles and descriptions are accurate

• Document pay decisions
• Assess performance evaluation process
• Train interviewers and decision-makers
Title VII and 2020 Expectations with EEOC

Title VII Landmark Supreme Court Cases

- Threshold Issues of LGBT Rights in the Workplace
  - Bostock v. Clayton County, Georgia: Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination 'because of sex' within the meaning of Title VII.
  - R.G. & G.R. Harris Funeral Homes v. EEOC: Whether discriminating against an employee or applicant on the basis of gender identity violates Title VII.

Continued Proliferation of State and Local Protections

- Equal Pay/Pay Equity
- Paid Family and Sick Leaves
- Ban the Box
- Salary History Restrictions
- Hairstyle Protections
- Victim Protections
All Charges Decline

<table>
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<tr>
<th>FY</th>
<th>Receipts</th>
<th>Settlements</th>
<th>No Reasonable Cause</th>
<th>Reasonable Cause</th>
<th>Merit Resolution</th>
<th>Monetary Benefits (Millions)*</th>
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<td>$3531.9</td>
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*Does not include monetary benefits obtained through litigation

Harassment Suits Increase...

- ADA Lawsuits Up
  - 84 ADA lawsuits based on 199 merits lawsuits filed by EEOC in FY 2018 – 41% of all lawsuits
  - 75 ADA lawsuits based on 184 lawsuits filed by EEOC in FY 2017 – 41% of all lawsuits
  - 35 ADA lawsuits based on 86 lawsuits filed by EEOC in FY 2016 – 40.6% of all lawsuits
  - 53 ADA lawsuits based on 142 lawsuits filed by EEOC in FY 2015 – 37% of all lawsuits
  - 49 ADA lawsuits based on 133 lawsuits filed by EEOC in FY 2014 – 36.8% of all lawsuits
LGBT/Sex Charges Up

<table>
<thead>
<tr>
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<th>FY 2013*</th>
<th>FY 2016</th>
<th>FY 2017</th>
<th>FY 2018</th>
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<tr>
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<td>94.4</td>
<td>95.3</td>
<td>96.1</td>
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*The data for FY 2013 is for the last three quarters only.

Questions

Presented by:
Elizabeth R. Gift (Charlotte)
704.405.3115
elizabeth.gift@ogletree.com
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Presented by:
Elizabeth R. Gift, Charlotte