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- The information presented today is not intended to and does not constitute legal advice, recommendations, or counseling under any circumstance. You should not act or rely on any information provided without seeking the advice of an attorney licensed to practice in your jurisdiction for your particular situation. In addition, the information presented during this session does not necessarily reflect the opinions of our clients.

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Case Law Update

Supreme Court and Beyond

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Comcast Corp. v. National Association of African American-Owned Media et al., March 23, 2020

- Clarifies the burden for plaintiffs to meet in discrimination claims under 42 U.S.C. § 1981
- Plaintiff's must prove that "but-for" the existence of a certain fact (ex. race), they would not have been subjected to some complained-of adverse treatment
- Employers should take preventative measures to defend against such claims

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Babb v. Wilkie, Secretary of Veterans Affairs, April 6, 2020

- Expands protections for federal workers under the Age Discrimination in Employment Act of 1967
- "Motivating factor" test instead of the "but-for" test for causation is now used when considering age discrimination claims for federal workers
  - "But-for" test still applies when obtaining remedies such as back pay, compensatory damages or reinstatement
- This decision does not apply to private employers

Bostock v. Clayton County, Georgia, June 15, 2020

- 3 consolidated cases, each of which alleged sex discrimination under Title VII for unlawful termination on the basis of being gay or transgender
- Court extended Title VII protections to sexual orientation and gender identity

Our Lady of Guadalupe School v. Morrison-Berry, July 8, 2020

- Narrowed employment protections to secular school teachers in religious schools
- Applied "ministerial exception," which bars ministers from suing churches and other religious institutions for employment discrimination, by extending it to lay schoolteachers, because they played a key role in teaching religion to their students.
- Court's decision makes clear that a variety of factors (and not a fixed formula) may be important to the analysis of whether an employee "performed vital religious duties" when allowing an employer to use the First Amendment to shield it from employment discrimination claims.

Equal Pay Act – Rizo v. Yovino (9th Cir)

- Quick background: Math consultant (with 2 master degrees) for County of Fresno. County sets salaries by evaluating last salary earned and then using a progressive pay step system. Rizo determined that her male colleagues made more than her.
- Trial Court: County moved for summary judgement, which was denied noting that prior salary can never alone qualify as a factor other than sex.
- Appeal: Prior salary cannot be the sole justification to explain a pay difference between sex as historically, women made less than men. One of the 9th Circuit Appellate Judges died 11 days before the Opinion issued.
- Supreme Court remanded case due to the from the Supreme Court due to the death of the Appellate Judge

Equal Pay Act – Rizo v. Yovino (9th Cir)

- 2/27/20 9th Circuit *en banc* decision: Appellate court, in essence , maintained the prior decision. "Setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination." This goes against the Equal Pay Act, which was enacted to eradicate women making less simply because they are women.
- Two concurring opinions maintain that prior wage can be a benchmark or a factor IF it does not encourage gender discrimination.
- 9th Circuit joins the 10th and 11th Circuit. However, the 7th and 8th Circuit differ noting that reliance on prior salary does not by itself violate the Act.

Religious Accommodation – EEOC v. Walmart

- Assistant manager candidate received an offer of employment to work at a 24 hour Walmart location that had one store manager and eight assistant managers. The assistant managers were required to work weekends. After receiving, the candidate advised Walmart that he could not work Saturdays due to his religion. Walmart withdrew the offer of employment, but, offered the candidate a non-managerial position as well as the assistance of Human Resources in his job search. Candidate filed suit alleging claims of religious discrimination and retaliation under Title VII.
- Title VII prohibits a prospective employer from refusing to hire an applicant in order to avoid accommodating a religious practice that could be accommodated without undue hardship.
- District Court granted Walmart's motion for summary judgment finding Walmart had offered a reasonable accommodation and that accommodating the candidate's request would have resulted in an undue hardship. Walmart did not need to create a permanent shift assignment for this candidate when the other assistant managers were not given the same benefit.
- A reasonable accommodation is one that eliminates the conflicts between employment requirements and religious practices. The offer of a non-exempt hourly position was a reasonable accommodation despite the difference in pay as it allowed the candidate to have Saturday off.

FEDERAL PAID LEAVE UPDATE

FAMILIES FIRST

Families First Overview

- Emergency Paid Sick Leave
  - Up to 80 hrs (first 10 days)
  - 6 reasons
  - Full pay for first 3 reasons, 2/3 pay for last 3, subject to caps
- Emergency FMLA
  - Up to 12 weeks, first 2 unpaid
  - 1 reason only
  - Weeks 3-12 at 2/3 pay, subject to caps

Emergency Paid Sick Leave: 6 Reasons

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

Calculating Pay for EPSL

- Full pay for first 3 reasons
- 2/3 pay for last 3 reasons
- Subject to caps
  - Leave taken for employee's own condition, paid at regular rate, capped at $511 per day ($5,110 aggregate)
  - Leave taken to care for others, paid at two-thirds of regular rate, capped at $200 per day ($2,000 aggregate)

Emergency FMLA: 1 Reason

- The child's school or place of care is "closed" or the childcare provider is unavailable due to a public health emergency.

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How you Calculate Pay for FMLA

- The first 2 weeks (usually 10 days) are unpaid
- Last 10 weeks are paid at 2/3rds the employees average rate of pay, subject to a statutory cap
  - Capped at $200 per day; $10,000 in aggregate per employee
- Emergency FMLA is another form of FMLA leave

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Emergency Family and Medical Leave Expansion Act

- Effective Period: April 2, 2020 – Dec. 31, 2020
- Eligible employees are those **employed for at least 30 calendar days**
- Covered employer is any employer with **fewer than 500 employees**
- When is a school is “closed” for purposes of EPSL and EFMLA leave?

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Emergency Paid Sick Leave Act

- Effective period: April 2, 2020 – December 31, 2020
- Eligible employees includes any individual employed by an employer (FLSA), no exclusion based on date of hire
- Covered employer for purposes of leave under this law is any employer with **fewer than 500 employees**

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Is my business an employer subject to Families First?

- If you have *less* than 500 employees, you are a covered employer that must provide EPSL and EFMLA leave.
  - Health Care Provider Exemption
  - Small Business Exemption (fewer than 50) employees

If I have less than 50 employees, can I deny all Families First leave requests?

- No. If you have less than 50 employees, you may be eligible for the small business exemption which allows you to deny leave only when the basis for leave is due to the need to care for a son or daughter due to the closure of school/childcare.
- You must meet the requirements of § 826.40(b)

Requirements of § 826.40(b)

- Must confirm that the imposition of the leave would jeopardize the viability of the business by having an authorized officer of the business determine:
  - The leave would result in the expenses and financial obligations exceeding available business revenues and cause the business to cease operating at minimal capacity;
  - The absence of the employee would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge or responsibilities; OR
  - There are insufficient workers able, willing and qualified who will be available at the time/place needed to perform the services provided by the employee requesting leave and these services are needed for the business to operate at minimal capacity.

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State of NY v. US DOL

- Federal court in the Southern District of NY struck down four key aspects of the DOL Final Rule implementing provisions of Families First:
  - "Work availability" requirement
  - Definition of "health care provider"
  - Employer agreement for intermittent leave
  - Documentation requirements

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DOL Revisions: Work Availability Requirement

- The EPSL and EFMLA grant paid leave to employees who are "unable to work (or telework)" due to a need for leave because of a specific COVID related circumstance.
- Previously excluded employees from Families First benefits whose employers "do not have work" for them.
  - The court in State of NY v. US DOL deemed a rational for the requirement was lacking.
- DOL revises "work availability" requirement.

DOL Revisions: Health Care Provider

- The EFMLA and PSL both provide that an employer may elect to exclude an employee who is a "health care provider or emergency responder" from the benefits provided under the statutes.
- Previously, the rule provided a broader definition and included **anyone employed at** any… hospital,… nursing facility, retirement facility, nursing home, home health care provider, … or similar institution, Employer or entity. It also included anyone that the highest official of a State determines is a health care provider necessary for the response to COVID-19.
- Revised rule adopts a narrower definition of health care provider, focusing on the role and job duties of those employees.

DOL Revisions: Intermittent Leave

- The original rule permitted employees to take Families First leave intermittently only if the Employer and Employee agree and only under a subset of qualifying reasons.
- DOL reaffirms its position that employer approval is required to take Families First leave intermittently. Adds expanded rationale and support tied to FMLA.
- Intermittent leave exists only when an employee is taking partial day increments of Families First leave.

DOL Revisions: Notice Procedures

- Before the District Court's opinion, the DOL required employees to submit documentation to the employer "prior to taking [Families First] leave" ...
- Families First permits employers to require employees to follow reasonable notice procedures to continue to receive paid sick leave after the first workday (or portion thereof) of leave. Sec. 5110(5)(E).
- And section 3102(b) of Families First requires employees taking EFMLA to provide their employers with notice of leave as practicable, when the necessity for such leave is foreseeable.

NY Paid Sick Leave Law

- Went into effect on Sept. 30, 2020 but employees may not take leave until Jan. 1, 2021
- 40-56 hours of paid leave per year
- All private and nonprofit employees regardless of industry, occupation, part-time status, overtime exempt status, and seasonal status
- Out-of-state employers must provide NYSPSL to employees who physically work in New York State

MA Paid Family Leave Law

- Employees may not take leave beginning Jan. 1, 2021
- Up to 12 weeks of paid family leave and 20 weeks of paid medical leave
- Contributions to program began in October 2019
- Applies to all employers

EEOC UPDATE

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Opioid Use & Accommodation

- EEOC issued guidance this month on opioid-related disability issues and reasonable accommodation
  - Employers dealing with opioid use in the workplace have the right to assess whether the use is pursuant to a prescription, a medically-assisted treatment (MAT) program, or unlawful use, which includes the non-prescribed abuse of controlled substances, including codeine, oxycodone, and other opioids.
  - Opioid addiction ("opioid use disorder" or "OUD") is itself a diagnosable medical condition that can be an ADA disability requiring reasonable accommodation.
  - Employees lawfully taking opioids because they have a prescription, are entitled to reasonable accommodation, so long as it does not pose a significant cost or an unreasonable burden on the operations of the employer or fellow employees.
  - An employer may deny an accommodation if the employee is using opioids illegally, even if the employee has an OUD. Further, employers are able to terminate employees for the unlawful use of opioids, even if there are no performance or safety problems.

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What About Use of Medical Marijuana?

- The current federal illegal status of marijuana means that patients who use medical marijuana are not protected under the ADA, even when state law authorizes the use of the drug for medicinal purposes, because the ADA does not protect illegal drug use.

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Employee Screenings

- ✓ Temperature checks
- ✓ Maintaining log of checks
- ✓ Monitoring for COVID-19 Symptoms
- ✓ Requiring symptomatic or potentially exposed employees to remain home

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ADA & Employee Screenings

- ✓ COVID testing

x Anti-body testing, however, is not deemed sufficiently accurate or reliable to meet the ADA standards for medical exams of employees

ADA Compliance Beyond the Basics

- Any logs maintained are confidential health records under the ADA and must be handled as such.
- An employer's obligations for non-discrimination and reasonable accommodation remain in force, so do not lose sight of compliance

DOL UPDATE

DOL Issues New FMLA Forms

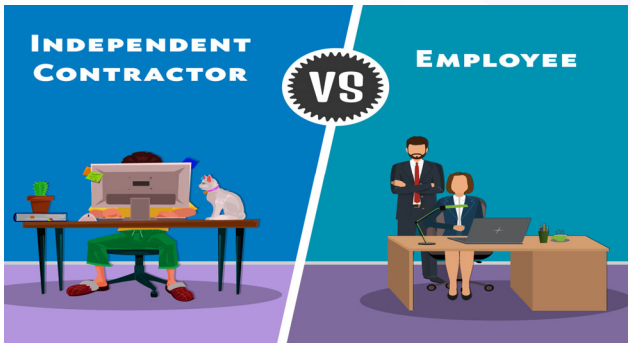
- Issued July 17, 2020
- DOL forms remain optional, but include information that must be communicated to the employee
  - Notice of Eligibility & Rights and Responsibilities
  - Designation Notice
  - Certifications of Health Care Provider for Serious Health Condition and Military Family Leave

DOL: Independent Contractor Proposed Regulations

"Core Factors"

- The nature and degree of the worker's control over the work; and
- The worker's opportunity for profit or loss based on initiative and/or investment

- Additional "Guideposts"
  - The amount of skill required for the work;
  - The degree of permanence of the working relationship between the worker and the potential employer; and
  - Whether the work is part of an integrated unit of production



DOL: Fluctuating Workweek

- Fluctuating work week can be used to compute overtime if employee's hours vary from week to week and other factors are met.
- DOL issued opinion letter on 8/31/20 clarifying that an employee's hours do not need to fluctuate above and below 40 hours per week to use this method of calculation

DOL: Salary Basis

- Effective January 1, 2020
- Threshold for Executive, Administrative and Professional Employees under the FLSA now $684/week ($35,568 per year)
- "Highly compensated employees" at $107,432 per year

NLRB UPDATE

29 CFR § 103.40 Joint Employers - NLRB Final Rule

Browning-Ferris Industries of California, Inc. v. NLRB, 911 F.3d 1195 (2018) (Finalized 2/26/20)

In 2015, the NLRB issued a new joint-employer standard in ***Browning-Ferris Industries***, overruling cases holding that an entity must exercise direct and immediate control over the essential terms and conditions of employment of another entity's employees to be a joint employer under the National Labor Relations Act (NLRA). The board held that **indirect control or unexercised contractually reserved control alone could be enough**.

Upon review in 2018, the court of appeals held that unexercised reserved control and indirect control, analyzed as to the essential terms and conditions of employment, can be relevant factors in determining whether the entity is a joint employer.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(a) An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act, 29 USC §151 et seq.), may be considered a joint employer of a separate employer's employees **only if the two employers share or codetermine the employees' essential terms and conditions of employment.** To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, **the entity must possess and exercise** such substantial direct and immediate control over one or more essential terms or conditions of their employment as **would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees**. [¶ inserted]

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(a) continued

Evidence of the entity's **indirect control** over essential terms and conditions of employment of another employer's employees, **the entity's contractually reserved but never exercised authority** over the essential terms and conditions of employment of another employer's employees, or **the entity's control over mandatory subjects of bargaining** other than the essential terms and conditions of employment **is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment**. Joint-employer status must be determined on the **totality of the relevant facts** in each particular employment setting. **The party asserting that an entity is a joint employer has the burden of proof**. (Emphasis added)

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(b) ''Essential terms and conditions of employment'' means **wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction**.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(c) ‘‘Direct and Immediate Control’’ means the following with respect to each respective essential employment term or condition:

(1) Wages.

An entity exercises direct and immediate control over wages if **it actually determines the wage rates, salary or other rate of pay that is paid to another employer’s individual employees or job classifications**. An entity does not exercise direct and immediate control over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate).

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(2) Benefits.

An entity exercises direct and immediate control over benefits if **it actually determines the fringe benefits to be provided or offered to another employer’s employees**. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer’s employees. An entity does not exercise direct and immediate control over benefits by permitting another employer, under an arm’s-length contract, to participate in its benefit plans.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(3) Hours of work.

An entity exercises direct and immediate control over hours of work if **it actually determines work schedules or the work hours, including overtime, of another employer's employees**. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(4) Hiring.

An entity exercises direct and immediate control over hiring if **it actually determines which particular employees will be hired and which employees will not**. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(5) Discharge.

An entity exercises direct and immediate control over discharge if **it actually decides to terminate the employment of another employer's employee**. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(6) Discipline.

An entity exercises direct and immediate control over discipline if **it actually decides to suspend or otherwise discipline another employer's employee**. An entity does not exercise direct and immediate control over discipline by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(7) Supervision.

An entity exercises direct and immediate control over supervision by **actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals**. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(8) Direction.

An entity exercises direct and immediate control over direction **by assigning particular employees their individual work schedules, positions, and tasks**. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(d) ‘‘Substantial direct and immediate control’’ means direct and immediate control that **has a regular or continuous consequential effect on an essential term or condition of employment of another employer’s employees**. Such control is not ‘‘substantial’’ if only exercised on a sporadic, isolated, or de minimis basis.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(e) ‘‘Indirect control’’ means indirect control over essential terms and conditions of employment of another employer’s employees **but not control or influence over setting the objectives, basic ground rules, or expectations for another entity’s performance under a contract**.

29 CFR § 103.40 Joint Employers - NLRB Final Rule

(f) ‘‘Contractually reserved authority over essential terms and conditions of employment’’ means **the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer’s employees, but that has never been exercised**.

Questions?

Any questions not answered during today’s presentation will be addressed at our **Advice on Tap** session on **Friday, October 30** at **12:00 Noon Central**.

THANK YOU

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