The Labor & Employment Year in Review: Is It Over Yet?

Midwest Session

Legal Disclaimer

- 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

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.

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

- Clarifies the burden for plaintiffs 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

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

- Expands protections for federal workers under the Age Discrimination in Employment Act of 1967 (ADEA)
  - The Court's decision to apply the "motivating factor" test instead of the "but-for" test for causation is now used when considering age discrimination claims for federal workers
    - However, the but-for test still applies when obtaining remedies such as back pay, compensatory damages or reinstatement
  - For federal employees, an employer is liable if an employee proves age "taints the making of a personnel action" even if the agency would have reached the same outcome without considering age. Babb v. Wilkie, 140 S. Ct. 1168, 1181 (2020).
- This decision does not apply to private employers

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

- 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 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 offer, 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

FFCRA

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FFCRA Overview

- **Emergency Paid Sick Leave**
  - Up to 80 hours (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

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Emergency Family and Medical Leave Expansion Act

- Effective Period: April 2, 2020 – December 31, 2020
- Eligible employee for purposes of leave under this expansion means any employee who has been **employed for at least 30 calendar days**
- Covered employer for purposes of leave under this expansion is any employer with **fewer than 500 employees**

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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 the FFCRA?

- If you have *less* than 500 employees, you are a covered employer that must provide PSL 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 FFCRA 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 the FFCRA:
  - "Work availability" requirement
  - Definition of "health care provider"
  - Employer agreement for intermittent leave
  - Documentation requirements

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DOL Issues Revisions to Rule

- "Work availability" Requirement- 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.
  - Excluded employees from FFCRA benefits whose employers "do not have work" for them.
  - Limited to only 3 of 6 reasons for leave, rational for requirement deemed lacking.
- September 11, 2020 DOL issued new temporary rule addressing court decision, stands by "work availability" requirement, effective September 16, 2020

DOL Issues Revisions to Rule

- "Work availability"
  - Stands by "but for" causation interpretation… the qualifying reason must be the actual reason the employee is unable to work.
  - Clarifies that rule applies to all grounds for leave, not selectively to 3 of 6
  - Additional rationale and justification for regulation
    - Paid *leave* from work, very use of the term leave is best understood to require an employee is absent from work at a time when he or she would otherwise have been working
    - Consistent with DOL's interpretation of leave within the FMLA generally, when employer's operations not open, it does not count against an employee's FMLA leave entitlement.

DOL Issues Revisions to Rule

- Work availability caution
  - This requirement cannot be used by an employer to avoid granting FFCRA leave by purporting to lack work for an employee.
    - Not an hour by hour assessment as to whether the employee would have work to perform but rather whether the employee would have reported to work at all
  - The requirement should be understood in the context of the applicable anti-retaliation provisions, which prohibit an employer from discharging, disciplining or discriminating against employees for taking leave

DOL Issues Revisions to Rule

- "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.
  - FFCRA adopts the Family and Medical Leave Act's (FMLA), definition of "health care provider," which defines them as "a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate)," or "**any other person determined by the Secretary to be capable of providing health care services**."
- The rule, however, 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. 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.

DOL Issues Revisions to Rule

- "Health care provider" for purposes of the exclusion now defined to focus on the employee
- An employee is a health care provider if he or she is:
  - "capable of providing health care services."
  - "employed to provide diagnostic services, preventive services, treatment services, or other services that are integrated with and necessary to the provision of patient care and that, if not provided, would adversely impact patient care…"

DOL Issues Revisions to Rule

- "Health care provider" exemption
  - No longer enough for an employee to simply be employed by an entity that provides health care services
  - Definition includes nurses, nurse assistants, medical technicians and other persons who directly provide covered services
  - Those who provide covered services under the supervision, order or direction of or providing direct assistance to a covered health care provider (i.e. nurses, nurse assistants, medical technicians…)
  - Employees who are otherwise integrated into and necessary to the provision of health care services, such as lab techs who process results

DOL Issues Revisions to Rule

- Intermittent Leave- the original rule permitted employees to take FFCRA leave intermittently only if the Employer and Employee agree and only under a subset of qualifying reasons.
  - Limits the exercise of intermittent leave to "circumstances where there is a minimal risk that the employee will spread COVID-19 to other employees."
- DOL reaffirms its position that employer approval is required to take FFCRA leave intermittently. Adds expanded rationale and support tied to FMLA.

DOL Issues Revisions to Rule

- Intermittent leave approval caution with hybrid school plan
  - FFCRA leave in full-day increments to care for a child whose school is operating on an alternate day (or other hybrid-attendance) basis is not considered an intermittent leave.
  - Per the DOL, in an alternate day/hybrid-attendance schedule implemented due to COVID-19, the school is physically closed with respect to certain students on particular days as directed by the school, not the employee.
  - Each day of school closure constitutes a separate reason for FFCRA leave that ends when the school opens the next day. The employee may take leave due to a school closure until that qualifying reason ends (i.e., the school opened the next day), and then take leave again when a new qualifying reason arises (i.e., school closes again the day after that).
  - Intermittent leave is not needed because the school literally closes (as that term is used in the FFCRA and 29 CFR 826.20) and opens repeatedly.

DOL Issues Revisions to Rule

- The FFCRA 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).
- 3102(b) of the FFCRA requires employees taking EFMLA to provide their employers with notice of leave as practicable, when the necessity for such leave is foreseeable.
- Documentation requirement- despite the above, the DOL rule required employees to submit documentation to the employer “prior to taking [FFCRA] leave” ...

DOL Issues Revisions to Rule

- Revised regulations clarify that the documentation need not be given "prior to" taking FFCRA leave, but may be given as soon as practicable, which in most cases will be when the employee provides notice to the employer
- For EFMLA, advanced notice is required as soon as practicable. If the need for leave is foreseeable, that will generally mean providing notice before taking the leave.

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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Employee Screenings

- ✓ Temperature checks
- ✓ Maintaining log of checks

- ✓ Monitoring for COVID-19 Symptoms
- ✓ Requiring symptomatic or potentially exposed employees to remain home

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

- https://www.dol.gov/agencies/whd/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

NLRB: New Joint Employment Rule

- Issued on 2/26/20, Effective 4/27/20
- A business must possess and exercise such **substantial direct and immediate control over one or more essential terms and conditions of employment** of another employer's employees as would warrant a finding that the business meaningfully affects matters relating to the employment relationship.

Illinois Updates

Wage & Hour Considerations

Minimum Wage Increases

- Illinois
  - July 1, 2020 effective date for increase to $10/hr statewide
- City of Chicago
  - July 1, 2020 effective date for increase to $14.00/hr ($13.50 if 4-20 employees)
- Cook County (opt-in jurisdictions only)
  - July 1, 2020 effective date for increase to $13.00/hr

Wage & Hour Considerations

- Mandated employee screenings may result in compensable time to employees
- Mandating self-screening at home or on-site?
- Duration of time to complete screening process before logging/clocking in?

Local Public Health Orders

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Chicago Public Health Order No. 2020-10

- Quarantine restrictions for all persons entering Chicago from identified “hot zone” states
- Effective July 6, 2020 until further notice
- Order updated every Tuesday with any additional states going into effect the Friday after addition
- www.chicago.gov/city/en/sites/covid-19/home/emergency-travel-order.html

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Chicago Public Health Order No. 2020-10

- Requires all persons entering Chicago from an identified state to be subject to a mandatory self-quarantine for 14 days (or, if shorter, the duration of presence)
- Duty is on the individuals subject to the order
- Individuals found in violation of the Order are subject to fines of $100 - $500 per day, up to $7,000.

Chicago Public Health Order No. 2020-10

- FAQs confirm this applies to those residing in Chicago, those residing outside of Chicago but commuting into the City, and those arriving in Chicago (travel) while in the city limits
- Employer responsibilities tied to non-retaliation for employee's compliance with order, FFCRA implications
- Employees returning from one of the designated states are not exempted in order to go to work

Chicago Public Health Order No. 2020-10

- Limited exemption for "essential workers" ***if*** they are traveling for work purposes under two circumstances:
  - A non-resident of Chicago is traveling from a designated state for the primary purposes of carrying out primary work in Chicago and who needs to be physically present in Chicago in order to carry out the work
  - A resident of Chicago is returning from a designated state and was in the designated state for the primary purpose of carrying out primary work in that state and who needed to be physically present in that state in order to carry out the work

Employer Responsibilities

- Anti-Retaliation Ordinance
- Prohibits employers from retaliating against employees for obeying an order issued by the Mayor, Governor, Chicago Department of Public Health, or healthcare provider having to do with COVID-19.
- Employers are also prohibited from taking any adverse action against an employee for caring for someone who has been issued certain orders having to do with COVID-19.
- https://www.chicago.gov/city/en/depts/bacp/supp_info/antiretaliationordinance.html#:~:text=Anti%2DRetaliation%20Ordinance-,Anti%2DRetaliation%20Ordinance,to%20do%20with%20COVID%2D19.

Cook County

- CCDPH “recommends” 14 day quarantine measure for persons entering the region (excluding Evanston and Skokie) from the designated states
- Essential workers with verification from employer, and those traveling for medical care or parental custody are exempt from recommendations
- Essential workers is defined as any person who works in critical infrastructure as designated by the Cybersecurity and Infrastructure Security Agency

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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