First & Foremosts

Legal Update

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rise to every challenge

EEOC updated Section L: Vaccinations- Title VII Religious Objections to COVID-19 Vaccination Requirements of COVID-19 Technical Assistance

- The EEOC updated Section L of its COVID-19 technical assistance which addresses Title VII Religious Objections to COVID-19 Vaccination Requirements.
- The EEOC clarified:
  - Overlap between a religious and political view **does not place it outside the scope** of Title VII's religious protections, as long as the view is part of a comprehensive religious belief system and is not simply an isolated teaching.
  - An employer's proposed accommodation **will not** be "reasonable" if the accommodation requires the employee to accept a **reduction in pay** or **some other loss of a benefit or privilege of employment** (for example, unpaid leave) and there is a reasonable alternative accommodation that does not require that and would not impose undue hardship on the employer's business.

EEOC Adds New Section Clarifying When COVID-19 May be a Disability, Updating Technical Assistance

- The EEOC updated its COVID-19 technical assistance adding a new section to clarify under what circumstances COVID-19 may be considered a disability under the Americans with Disabilities Act and the Rehabilitation Act.

- COVID-19 can meet the definition of “actual” disability, “record of” a disability, and “regarded as” disabled under the ADA and the Rehabilitation Act.

- For an “actual” disability, the EEOC clarified that a person infected with the virus causing COVID-19 who is asymptomatic or a person whose COVID-19 results in mild symptoms similar to those of the common cold or flu that resolve in a matter of weeks—with no other consequences—will not have an actual disability.

- The EEOC also clarified that a condition caused or worsened by COVID-19 can be a disability under the ADA or the Rehabilitation Act.

DC Enacts COVID-19 Vaccination Leave Temporary Amendment Act

- Amends the Accrued Sick and Safe Leave Act and the DC FMLA.
- Effective from February 18, 2022 until October 1, 2022.
- Requires employers to provide COVID-19 Vaccination Leave and unpaid COVID-19 FMLA Leave
- COVID-19 Vaccination Leave
  - Employees are entitled to
    - Up to 2 hours of paid leave per vaccine dose to receive a COVID-19 vaccination and up to 8 hours of paid leave per vaccine dose to recover from side effects of receiving a COVID-19 vaccination
    - Up to 2 hours of paid leave per vaccine dose for an employee's child to receive a COVID-19 vaccination and up to 8 hours of leave per vaccine dose to care for an employee's child recovering from side effects from a COVID-19 vaccination
  - Leave capped at 48 hours per year
- DCFMLA COVID-19 Leave
  - 16 weeks of unpaid leave
  - Eligibility requirements: Employed for 30 days for an employer with 20 or more employees
  - Reasons for leave:
    - Positive Test Result
    - Isolation or Quarantine
    - Care for Other
    - Childcare Closure

Updated List of States with Laws Restricting or Prohibiting Employer-Mandated COVID-19 Vaccinations

- Currently, Alabama, Arkansas, Florida, Indiana, Iowa, Kansas, Montana, Nebraska, North Dakota, Tennessee, Texas, Utah, and West Virginia each have laws restricting or prohibiting employer-mandated COVID-19 vaccinations.
- Arizona and South Carolina also have bills awaiting to be voted on.
- Virginia introduced bill in its state senate that would prohibit discrimination against employees based on vaccination status.
- Virginia Occupational Safety and Health Program adopted a proposed revocation of its Standard for Infectious Disease Prevention of COVID-19.

CDC Updates Masking Guidance

- Uses Community Levels to determine what COVID-19 prevention steps are necessary.
  - Low: wear a mask based on personal preference, informed by your personal level of risk
  - Medium:
    - If immunocompromised or at high risk for severe illness
      - Talk to healthcare provider about wearing mask or taking other precautions
    - If live with or have social contact with someone at high risk for severe illness consider wearing mask indoors with them
  - High:
    - Wear a well-fitting mask indoors, regarding of vaccination status or individual risk
    - If immunocompromised or at high-risk for severe illness, wear a mask or respirator

OSHA Enforcement Effort for Increased Inspections at Hospitals and Nursing Care Facilities with COVID-19 patients

- OSHA initiating inspections to emphasize monitoring for current and future readiness to protect workers from COVID-19 in hospitals and skilled nursing care facilities that treat or handle COVID-19 patients.

- Will conduct follow-up inspections at sites with previous OSHA COVID-19 related citations and first-time inspections at sites where complaints were receive.

- Intends to conduct inspections from March 9, 2022 to June 9, 2022.

Status of Permanent OSHA Vaccination or Testing Rule

- On January 26, 2022, OSHA withdrew its Emergency Temporary Standard requiring employers with 100 or more employees to mandate COVID-19 vaccination or testing.
- However, OSHA did not withdraw the ETS to the extent it served as a proposed permanent rule.
- OSHA could still issue permanent rule requiring vaccination or testing.
- Rule is currently in “Final Rule Stage”

Wage & Hour

DOL Rescinds Trump Era Joint Employer Rule for FLSA

- DOL issued a Final Rule rescinding the standard for classifying two separate companies to be a worker's employer for the same work
- Rescission effective October 5, 2021
- No replacement guidance in effect at this point: "The Department will continue to consider legal and policy issues relating to FLSA joint employment before determining whether alternative regulatory or sub-regulatory guidance is appropriate."

DOL to update the Davis-Bacon and Related Acts Regulations

- On March 11, 2022, DOL announced the publication of the proposed rule amending Davis-Bacon regulations pertaining to determination of the prevailing wage rates for federal and federally assisted construction projects.
- Proposed changes include:
  - Creating efficiencies so that prevailing wages keep up with actual wages, resulting in higher wages for workers over time
  - Periodically update prevailing wage rates to address out-of-date wage determinations
  - Broader authority to adopt state or local wage determinations
  - Issuing supplemental rates for key job classifications when no survey data exists
  - Updating the regulatory language to better reflect modern construction practices
  - Strengthening anti-retaliation provisions, including debarment

DOL to Hire 100 New Wage and Hour Division Investigators

- February 1, 2021, DOL announced that it would add 100 new investigators to support enforcement efforts in protecting worker's:
  - wages
  - right to family and medical leave
  - prevailing wage requirements for federal contractors

- DOL further noted that these investigators would be:
  - Supporting efforts to combat worker retaliation
  - And worker misclassification as independent contractors

- In January, DOL and the NLRB announced they had signed an MOU to collaborate on investigations and share information on potential violations of law, specifically targeting independent contractor misclassifications and retaliation against workers

DOL Announces New Resources to Combat Retaliation Against Workers

- On March 10, 2022, DOL's Wage and Hour Division issued Field Assistance Bulletin Focused on Protecting Workers from Retaliation
- The Announcement shows that Retaliation against workers who assert their rights is a top priority for the Wage and Hour Division
- The Field Assistance Bulletin provides an overview of the anti-retaliation provisions under the various laws that the DOL's WHD enforces
- Includes GREAT examples that you can use in training HR teams and managers.

Raise of Minimum Wage for Federal Contractors

- New Minimum wage of $15.00 per hour
- Effective January 30, 2022 for:
  - New contracts entered into on or after January 30 2022 or
  - Existing contracts that are renewed or extended on or after January 30, 2022

- The minimum wage will be increased annually thereafter as determined by the Secretary of Labor.
- DOL Fact Sheet

Title VII & Discrimination Laws

EEOC Weighs Tracking Nonbinary Worker Data at U.S. Companies

- The EEOC is exploring ways to collect nonbinary gender data from employers.
- Currently the agency does not have authorization to require employers to collect that information in their annual EEO-1
- To begin such collection on the EEO-1 would require a full Commission vote and approval of an information collection request by OMB
- Currently an Employer can voluntarily report data to the agency in the comment section of their EEO-1 forms
- Similarly, in November of 2021, OFCCP said that it is considering options to allow employees of federal contractors to self-identify as nonbinary.
- Federal law protects gay and transgender workers from job discrimination and also prohibits discrimination on the basis of gender roles and sex stereotyping

Forced Arbitration of Sexual Assault and Sexual Harassment Claims has Ended

- On March 3, 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act
- The Act invalidates predispute arbitration agreements that preclude a party from filing a lawsuit in court involving sexual assault or sexual harassment, at the election of the party alleging such conduct.
- Thus, the party filing the claim can choose arbitration if they prefer
- Forced arbitration requires an employee to incur greater cost and keeps the information out of the public record.

EEOC Issues New Guidance on COVID-19 Pandemic and Caregiver Discrimination

- EEOC issued new guidance "The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Law," and updated its COVID-19 "What You Should Know" guidance explaining discrimination against employees and job seekers with family caregiving responsibilities.

- Caregiver discrimination is unlawful when it is based on:
  - Employee's sex, race, religion, national origin, age, disability or genetic information
  - Employee's association with an individual with a disability or on the race, ethnicity, or other protected characteristic for the individual for whom care is being provided.

- Under federal law, employees do not have rights to reasonable accommodations because they are caregivers. But, they may have rights under other laws, and employers may choose to provide accommodations at their discretion, as long as they do not do so in a discriminatory manner.

- Federal employment discrimination laws do not prohibit employment discrimination based solely on caregiver status. But, some state or local nondiscrimination laws might.
  - Example: DC Human Rights Act prohibits discrimination based on family responsibilities.

EEOC v. Kelley Williamson Company, Civil Action No. 22-cv-50033, N.D.Ill

- The EEOC sued Kelley Williamson Company in federal court in the Northern District of Illinois for sexual harassment
- Specifically, the EEOC alleges that the Company subjected a female employee working at a gas station and convenience store to sexual harassment when it failed to stop harassment by a male customer.
- The EEOC also alleged that the Company failed to keep the Employee's medical information confidential. Her supervisor unlawfully shared her private medical information with other employees who had no legitimate need to know it.
- The case is in litigation.

Worker's Religious Discrimination Claim Arising over Workplace Birthday Celebrations Allowed to Proceed in Court

- Employee claims she was badgered by supervisors and ultimately fired for declining to participate in office birthday celebrations because she is a Jehovah's Witness
- Employee's supervisor (Supervisor A) asked her to sign a birthday card for another of her supervisors (Supervisor B). The Employee claims that Supervisor A asked this despite knowing that her faith prevented her from celebrating birthdays and holidays.
- Several months later when Supervisor A's birthday came around, Supervisor B asked the Plaintiff to sign a birthday card, again allegedly despite knowing her religious vies
- Two days after that she received two impromptu negative performance reviews with Supervisors A and B.
- Plaintiff also alleged that Supervisors A and B "expressed exasperation and confusion" over her refusal to sign the birthday cards and gossiped about it to co-workers.
- District court said that these allegations were sufficient to proceed on a religious discrimination claim.

Employer's response to Harassment must be reasonably calculated to end harassment, but not required to be successful

- In Burns v. Berry Global, Inc. the Sixth Circuit Court of Appeals held that an employer was not liable for workplace harassment even though the steps that it took did not result in an end to the harassment.
- The Plaintiff reported racial harassment occurring in multiple different incidents to the employer.
- In response, the employer investigated by reviewing surveillance video, conducted interviews of employees, directed supervisors to monitor for future incidents, conducted Anti-harassment training, and attempted to create an employee group to address morale
- In addition, the Employer provided the plaintiff with access to the EAP for counseling, provided additional time off, and offered a transfer to another shift.
- Despite this, the employer could not identify the harasser and the harassment continued and the employee resigned. The Employee alleged the employer failed to appropriately respond.
- The Sixth Circuit held that the employer will be liable for co-worker (non-supervisor) harassment if the response shows indifference or is unreasonable. An adequate response is one that is prompt and reasonably directed at determining the source of the harassment so that it may end the harassment.

NLRA

Is the NLRB About to return to End to Trump Era in Handbook Rules?

- Currently the NLRB is reconsidering its standard for determining whether a work rule violates the NLRA's Section 7 that protects concerted activities for the purpose of collective bargaining or other mutual aid or protection.
- The NLRB's work rule standard applies to union or non-union workplaces
- In 2017 the NLRB issued the *Boeing* ruling that overruled a 2004 decision in *Lutheran Heritage Village-Livonia*
- The NLRB's General Counsel argued that the Boeing standard should be replaced with something based on the prior standard
- *Stericycle*, N.L.R.B., Case 04-CA-137660.

Leave Laws

DC Amends Universal Paid Leave Act and DC FMLA

- UPLA Amendments:
  - Increases medical leave from two weeks to six weeks
  - Miscarriage and stillbirth included as “qualified medical leave event”
  - Addition of two weeks of prenatal leave
  - Permits retroactive application for benefits for leave already taken

- DC FMLA Amendments:
  - Prior eligibility requirement: Employee had to work 1,000 hours during the prior 12-month period
  - Amended eligibility requirement: Employees are now eligible if they have worked at least 1,000 hours for the same employer over a period of 12 consecutive or non-consecutive months in the 7 preceding years

Non-Compete Laws

DC Non-Compete Law Further Delayed until October 1, 2022

- The DC Ban on Non-Compete Agreements Amendment was passed by the DC Council in January 2021.
- The Act generally prohibits all non-compete agreements
- In August 2021, Mayor Bowser set the applicability date of April 1, 2022 through legislation.
- However, Councilmember Silverman introduced a bill to amend the act in May of 2021.
- Council had not taken up the amendment act as of the effective date.
- So on March 1, 2022, the Council passed an amendment delaying the Act's applicability to October 1, 2022

Thank You!

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Nicole Behrman has represented clients before the DC Superior Court, District Court for the District of Columbia, the EEOC, DC Office of Human Rights, and DC Office of Administrative Hearings. She has litigated cases involving claims of discrimination, harassment, retaliation, FMLA interference and retaliation, wage and hour violations, breach of contract, and wrongful termination in violation of public policy.