First & Foremosts

Legal Update

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Legal Update: New State and Local Laws

DC Human Rights Enhancement Amendment Act

Amended the DC Human Rights Act to:

- Add homelessness as a protected classification
- Include unpaid intern and independent contractors as individuals who can bring claims of discrimination and harassment
- To eliminate the requirement that conduct be "severe or pervasive in order to constitute harassment"

  and set a non-exhaustive list of criteria for a fact finder to consider:
  - The frequency of the conduct;
  - The duration of the conduct;
  - The location where the conduct occurred;
  - Whether the conduct involved threats, slurs, epithets, stereotypes, or humiliating or degrading conduct; and
  - Whether any party to the conduct held a position of formal authority over or informal power relative to another party.

  The fact finder may find that conduct constitutes unlawful harassment ***regardless of the following circumstances***:
  - The conduct consisted of a single incident;
  - The conduct was directed toward a person other than the complainant;
  - The Complainant submitted in or participated in the conduct;
  - The complainant was able to complete employment responsibilities despite the conduct;
  - The conduct did not cause tangible physical or psychological injury;
  - The conduct occurred outside the workplace;
  - The conduct was not overtly directed toward a protected characteristic.

DC Law Bans Employers from Firing Workers for Positive Marijuana Tests

- Employers prohibited from taking adverse action against employee based on:
  - Their use of cannabis;
  - Their status as a medical cannabis program patient; or
  - The presence of cannabis in their system in any employer drug test without additional factors indicating they are impaired.

- Three exceptions:
  - Position is designated as safety sensitive by the employer;
  - Employer's actions are required by federal statute, regulation, contract, or funding agreement;
  - The employee used, consumed, possessed, delivered, sold or purchased cannabis at their job (**unless using medical marijuana to treat a disability**- see below).

- Act requires an employer to treat a qualifying patient's use of medical marijuana to treat a disability in the same manner as it would treat the legal use of a controlled substance prescribed by a health care professional as long as:
  - The medical marijuana is in a non-smokeable form;
  - The employee is not in a safety sensitive position;
  - The employer is not committing a violation of federal law, regulation, contract, or funding agreement

Overview of State Marijuana Law Protections for Employees

- Prohibition on taking an adverse action against a medical marijuana patient for a positive drug test (can't be impaired): Arizona, Delaware, Minnesota, Oklahoma
- Prohibition on taking adverse action against an employee for positive drug test for marijuana (recreational or medicinal): California (effective 2024), Connecticut (absent a written policy), Nevada, New Jersey
- Prohibition on discrimination based on status as a medical marijuana patient: Arkansas, Connecticut, Pennsylvania, Rhode Island, West Virginia, Illinois, Maine
- Prohibition against taking adverse action for use of medical marijuana: Virginia, New Mexico
- Prohibition against discrimination against employees for off-duty marijuana use: Illinois, Montana, New York, Rhode Island, New Jersey
- Cannot be denied any "right or privilege" for medical marijuana use: Maine, Massachusetts, Maryland, Michigan, Montana (MA court has said this language means ER has a duty to engage in interactive process to accommodate for off-duty medical marijuana use)
- Duty to engage in interactive process for off-duty medical marijuana use: Massachusetts, New Jersey, Nevada, New Hampshire
- Virginia law also prohibits employers from requiring applicants to disclose information concerning any arrest, criminal charge, or conviction for simple possession of marijuana in an application, interview, or otherwise.

** There are some exceptions to some of these laws**

DC Non-Compete Clarification Act Signed

- Bans non-competes for employees that:
  - Are ***not*** highly compensated; and
  - Spend more than 50% of their work for employer in the district or whose employment is based on the district and the employee regularly spends a substantial amount of work time for the employer in the District and not more than 50% of their work time for that employer in another jurisdiction.
- Highly compensated:
  - Earning at least $150,000 in a consecutive 12 month period; or
  - If a medical specialist, earning at least $250,000 in a consecutive 12 month period.

DC Non-Compete Clarification Act Signed

- Non-competes permitted for highly compensated employees if it:
  - Specifies the functional scope of the competitive restriction;
  - Specifies the geographical limitations of the restriction;
  - If the employee is **not** a medical specialist, the term of the non-compete does not exceed 1 year; and
  - If the employee is a medical specialist, the term of the non-compete cannot exceed 2 years.
- Notice requirement
  - "The District's Ban on Non-compete Agreements Amendment Act of 2020 limits the use of non-compete agreements. It allows employers to request non-compete agreements from highly compensated employees as that term is defined in the Ban on Non-compete Agreements Amendment Act of 2020, under certain conditions. Employer has determined that you are a highly compensated employee. For more information about the Ban on Non-Compete Agreements Amendment Act of 2020, contact the District of Columbia Department of Employment Services (DOES). "
- For any employee, law does not prohibit:
  - Confidentiality agreements; or
  - Agreements prohibiting employee for performing work for another person during their employment when the employee reasonably believes employee's other employment will:
    - Result in disclosure or use of confidential information
    - Conflict with the employer, industry, or professions established rules regarding conflicts of interest,

Proposed New Jersey Non-compete Law Requires Payment for Non-Compete

- Proposed bill requires full pay plus benefits during the restrictive period of any non-compete, no-poach, or non-solicitation agreement
- Prohibits non-competes for non-exempt and low wage workers as well as employees terminated due to lay off or without misconduct
- Prohibits an employer selecting the law of another state to apply to the agreement where employee is working in New Jersey
- Follows a trend of state restriction and prohibition of non-compete agreements

Legal Update: NLRA

First Three Quarters' of 2022 saw an increase in activity at the NLRB

- Union Election Petitions Increased 58%
- Unfair Labor Practice Charges have increased 16%
- NLRB's resources are currently very low
- Nonetheless, the General Counsel and Board are proposing broadened regulations on Joint Employers:
  - General Counsel issued Memorandum GC 22-06 which reiterated the instruction that Regions seek settlement agreements securing the full panoply of remedies available to ensure that victims of unfair labor practices are made whole for losses incurred from unlawful conduct
  - The memo identified various types of remedies that Regions had secured and a reminder to include language resulting in default judgement for noncompliance with the settlement agreement's terms and excluding non-admission clauses

Labor Board Proposes Broadened Regulation on Joint Employers

- In Early September, the NLRB issued a proposed regulation to determine what constitutes a joint employer under the NLRA
- Joint employers share liability for unfair labor practices and responsibility for bargaining with a union
- Under the proposed rule, two or more employers would be considered joint employers if they “share or codetermine those matters governing employee’s essential terms and conditions of employment, such as wages, benefits and other compensation, work and scheduling, hiring and discharge, discipline workplace health and safety supervision, assignment, and work rules.”

Tesla Illegally Restricted Union T-Shirts, Labor Board Rules

- Tesla Dress Code: production associates and leads were required to wear Company-provided black shirts and pants. Could wear alternative clothing, if approved by supervisor. Leads and supervisors wore red shirts, and line inspectors wore white shirts.
- Production associates, began wearing black shirts with union logo and campaign slogan.
- Tesla started to strictly enforce its dress code policy, informed associates that they would be sent home if they wore union shirt. But, allowed associates to wear union stickers.
- Employer prohibition on display of union insignia on apparel (regardless if policy is facially neutral) is unlawful, unless employer can demonstrate special circumstances to justify policy, which include:
  - When display jeopardizes employee safety, equipment, or product safety; or
  - Unreasonably interferes with a public image which the employer has established as part of its business plan.

Offensive language may violate anti-harassment policy and be protected under Section 7 of the NLRA if Employer inconsistent in discipline

- ***Constellium Rolled Products Ravenswood v. NLRB***
  - Employees protested new overtime procedures implemented by employer
  - 6 months later employee fired for labeling overtime sign up sheet the “Whore Board”
  - Employer terminated employee for violation of anti-harassment policy
  - NLRB determined Employer disciplined employee in violation of Section 7 because his language was connected to the protest on new overtime procedures
  - On first appeal, court sent case back to Board to address potential conflict between the Anti-harassment obligations and NLRA employee protections
  - Board concluded employer’s actions were in violation of Section 7
  - Employer appealed and earlier in September the Court of Appeals for the DC Circuit held that
  - The company’s “failure to enforce its code of conduct or anti-harassment policy dooms its assertion that it would have fired [the employee] for use of the phrase or for an offensive writing.”

Legal Update: Wage and Hour Laws

Maryland Construction Workers Win Revival of Bus Time Wage Suits

- *A reminder to consider state wage and hour law as well as federal*
  - the Maryland Court of Appeals concluded that the federal Portal to Portal Act was not adopted by Maryland's wage and hour law.
  - Portal to Portal Act is the law that makes home to work and work to home travel non-compensable.
  - Instead Maryland law defines compensable work time as time where workers are either required by their employer to report during work hours to a location hat is the employer's premises, be on duty or report to a prescribed workplace.
  - Reminder to check state wage and hour law. Don't just rely on federal law.
  - *Amaya v. DGS Constr. LLC , Md., No. 14, 2021, 7/13/22 and Rojas v. F.R. Gen. Contractors Inc., Md., No. 17, 2021, 7/13/22*

Legal Update: FMLA

Employers be aware that use of social media to communicate with employees regarding FMLA may become "usual and customary" method of communicating notice of absence.

- Employer policy for absences was to notify manager through call in system 30 minutes before the start of any shift
- Employee communicated absences to manager though the Facebook Messenger app on several occasions
- After returning to work he was out again for 4 days and reported the absences through Facebook Messenger The manager reported the absences to HR because employee had failed to use call in procedures. Employer terminated for job abandonment for failure to use call in procedures.
- Employee sued for FMLA interference, retaliation and wrongful discharge.
- On appeal the 4th Circuit held that "usual and customary" as set forth in the FMLA does not require adherence to the notice procedure in an official written policy to fulfill the FMLA notice requirements when an unwritten and typically followed procedure exists.
- The Fourth Circuited concluded that in this case because the manager previously accepted the other notices of absence through Facebook Messenger, this became "usual and customary" notification practice of the Company.

  – *Roberts v. Gestamp W. Virginia, LLC*, 45 F.4th 726, 729 (4th Cir. 2022).

Legal Update: Americans with Disabilities Act

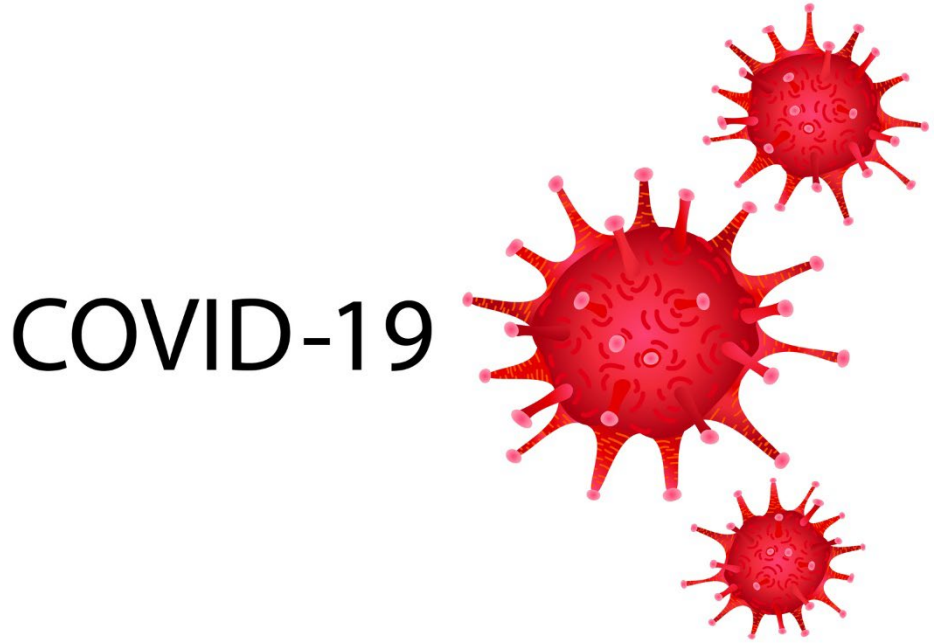
Employers take your time with the Interactive Process & Communicate Clearly

- Employee requested intermittent leave as an accommodation for cancer treatment and AIDS
- Employer engaged in the interactive process with employee and his doctor for clarification on need for leave
- Then Employer drops the ball… failed to communicate approval or denial of leave request
- Employee believes leave request approved, informs supervisor who simply shrugs his shoulders in response
- Employee takes leave he believes is approved and Employer fires him.
- Court holds employer failed to engage in the interactive process.
  - *Dansie v. Union Pac. R.R. Co.*, 42 F.4th 1184 (10th Cir. 2022) .

Gender Dysphoria is a disability according to the 4th Circuit.

- An incarcerated transgender woman whose gender identity differed from that she was assigned at birth filed suit against several employees of the prison for discrimination
- The defendants challenged inclusion of gender dysphoria in definition
- Fourth Circuit held that gender dysphoria met the definition of a disability under the ADA and was not excluded
- Same definition of disability included in ADA's protections for employees
  - *Williams v. Kincaid*, 45 F.4th 759, 763 (4th Cir. 2022)

Legal Update: COVID Rules & Guidance



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EEOC Updated COVID Technical Guidance

- Under the ADA, employers can only administer mandatory COVID-19 testing when evaluating an employee's initial or continued presence in the workplace if the testing **is job-related and consistent with business necessity**.
  - Employer use of a COVID-19 test to screen employees who are or will be in the workplace will meet the "business necessity" standard when it is consistent with CDC guidance or other state/local public health authorities
  - Meeting standard based on relevant facts
- Employers do not have to accommodate medical conditions designated by CDC as likely to cause severe illness in people if they get COVID if the condition does not qualify as a "disability" under the ADA.
- https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#A.6

CDC Updates Quarantine Guidance

- Regardless of vaccination status, an individual exposed to COVID-19 does **not** have to quarantine (unless they develop symptoms or test positive)
- CDC says if exposed, must:
  - mask for 10 full days when around others at home and indoors in public; and
  - get tested at least 5 full days after exposed.

Biden Allowed to Impose Vaccine Mandate for Some Contractors

- New Federal Court of Appeals Decision lifts nationwide injunction of Biden's COVID-19 vaccination requirement for federal contractors in new or existing contracts

- Vaccine mandate ***cannot*** be enforced in Alabama, Alaska, Arkansas, Arizona, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, South Dakota, Ohio, South Carolina, Tennessee, Utah, West Virginia, Wyoming, and federal contracts/subcontracts with members of the Associated Builders and Contractors

- BUT, Biden Administration says (for now) no action will be taken to implement or enforce the COVID-19 vaccination requirement for federal contractors.

Legal Update: Title VII & Discrimination Laws

Rare Caste Bias Case Advances

- California has filed suit against Cisco Systems alleging caste discrimination in a first of its kind lawsuit
- The case is brought under the protection of employees based on ancestry found under federal law
- Calls for federal protection against discrimination on the basis of caste.

  – Department of Fair Employment and Housing v. Superior Court, H048962, California Court of Appeals, Sixth District (San Jose).

EEOC Adds X Gender Marker to Voluntary Questions During Charge Intake

- The EEOC has added an option to select a nonbinary "X" gender marker during two critical stages of the intake and charge filing process:
  - The EEOC has updated the voluntary demographic questions relating to gender in the online public portal that members of the public use to submit inquiries about filing a charge of discrimination, as well as the Online Spanish Initial Consultation Form and Pre-Charge Inquiry Form that are sometimes used in lieu of the portal.
  - The EEOC has also modified its charge of discrimination form to include "Mx." in the list of prefix options.

EEOC Sues Safelite Autoglass for Sex Discrimination

- Safelight refused to hire a female applicant for a repair technician position.
- The female applicant had two years of experience including lifting and moving heavy furniture
- Manager expressed concern regarding female applicant's ability to lift heavy weight and suggested a lower paying position would be a better fit
- Two male trainees with less experience were hired instead of the female applicant
- EEOC has filed suit alleging sex discrimination. "The applicant in this case was qualified for the position and deserved the opportunity to be judged based on her abilities instead of her sex," said EEOC Trial Attorney Esha Rajendran.

Thank You!

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