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COVID-19 and Beyond: The Top Labor and Employment Law Issues of 2020

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Topics

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1. COVID Legislation
2. Mandatory Flu and COVID Vaccinations
3. Politics in the Workplace
4. DE&I: Hiring Goals v. Quotas
5. Joint Employer: the NLRB's Rule, the DOL's Rule, and the Maryland Court of Special Appeals' Opinion
6. Maryland Laws Taking Effect on October 1

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COVID Legislation

COVID Legislation

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Federal:

- FFCRA
- CARES
- Agency Guidance
- Presidential Memoranda

Maryland:

- COVID-19 Public Health Emergency Protection Act
- Governor's Executive Orders
- Agency Guidance

FFCRA Revised Regulations

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On August 3, 2020, a NY federal court vacated 4 provisions of the DOL's Final Rule:

- The work-availability requirement
- Employer approval of intermittent leave
- The documentation requirement
- The broad exemption for health care providers

FFCRA Revised Regulations

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On September 10, 2020, the DOL issued revised regulations in response to the Court's ruling:

- Reaffirming the work-availability requirement
- Reaffirming the employer approval of intermittent leave
- Modifying the timing requirement for documentation
- Scaling back the broad exemption for health care providers

FFCRA Revised Regulations

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Retroactive?

- EPSL – Portal to Portal Act defense
- EFMLA – Good faith reliance

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Maryland Workplace Standards?

- Virginia implemented them
- General Assembly wants them
- Governor says no

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Mandatory Flu and COVID-19 Vaccinations

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Considerations When Adopting a Mandatory Vaccination Program

- Americans with Disabilities Act
- Title VII (religious exemptions)
- OSHA's General Duty Clause
- Special Considerations for Unionized Employers

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Background

- Timing of COVID-19 vaccine
- EEOC Guidance on flu vaccines and past pandemics
  - H1N1 Pandemic (though not labeled a “direct threat”)

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Americans with Disabilities Act

- Employers must make reasonable accommodations for employees with disabilities from mandatory flu vaccine programs.
- But (unlike the flu or H1N1) the EEOC declared COVID-19 a "direct threat."
  - How does that change the analysis?

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Title VII/Religious Accommodations

- Unlike reasonable accommodations under the ADA, a religious accommodation is unduly burdensome if the burden is *de minimus*.

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EEOC's Religious Exemption Litigation

- *EEOC v. Saint Vincent Health Center* (December 2016): $300,000 settlement.

- *EEOC v. Memorial Healthcare* (June 2019): $74,418 settlement.

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OSHA's General Duty Clause

The General Duty clause requires employers to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

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Considerations for Unionized Employers

- Vaccination policies are mandatory subjects of bargaining.
- First, a unionized employer should review its CBA to determine if it is privileged to act unilaterally.
- Second, a unionized employer should examine its past practice, if any, concerning the implementation of mandatory vaccination programs.
- Even if an employer may act unilaterally, the employer must still bargain the effects of the decision if the Union requests (e.g., cost, frequency of vaccination, and whether employees may use working time).

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Politics in the Workplace

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Current State of Affairs

- Unprecedented times
- Pandemic
- Social Unrest
- Upcoming Presidential Election
- Social Media

➢ All of these things have impacted employees' lives, and feelings, beliefs, ideas, and positions often spill over into the workplace. What can employers prohibit when it comes to political activity/speech in the workplace?

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First Amendment Protection?

- First Amendment does not apply to **Private Employers**
  - Employees generally "at-will."
  - Private employers not government actors.

- **Public Employees** are only protected by the First Amendment when they are speaking as private citizens. If their speech is part of their official job duties, then they can be fired or disciplined for it.
  - *Garcetti v. Ceballos,* 47 U.S. 410 (2006).

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Private Employers

- Generally, federal discrimination laws do not cover political speech.
- But, it is not always clear what "political speech" means.
- If the speech involves other "protected activity," employers must be careful about taking adverse employment action.

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National Labor Relations Act

- Under the NLRA, employees are permitted to engage in "protected, concerted activity."
- PCA involves discussions about terms and conditions of employment, including wages, benefits, hours of work, working conditions, etc.
- To the extent that political discussions relate to the terms and conditions of employment, they are protected.

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State Laws Cover Political Activity

- Some states have passed laws that protect employees from being terminated for political activity.
- For example, California has a law that protects employees when they express political positions at work. Maryland does not have such a law.
- Also, keep in mind:
  - Lawful off-duty statutes.
  - Anti-discrimination and retaliation statutes (political opinions/political activity).

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What Issues May Arise?

- Attendance Issues: employees may take time off from work for protests or to engage in political activity.
- Speech: employees may make comments or statements in the workplace to coworkers.
- Social Media: employees may post on their personal social media sites about their political position or ideology (Twitter, Facebook, etc.).
- Dress Code: employees may wear clothes/buttons with political statements.

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DE&I: Hiring Goals v. Quotas

DE&I: Affirmative Action

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Supreme Court:

- *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S.273 (1976).
  - Title VII prohibits "discriminatory preference for any [racial] group, minority or majority."
- *United Steelworkers of America v. Weber*, 443 US 193 (1979).
  - Some voluntary affirmative action plans are permissible.
- *Johnson v. Transp. Agency, Santa Clara County, Cal.*, 480 US 616 (1987).
  - Same.

Voluntary Affirmative Action Plans

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1) The plan must be designed to eliminate a conspicuous racial imbalance in traditionally segregated job categories;
2) The plan may not trammel the interests of the non-minority employees; and
3) The plan is temporary in nature, intended to eliminate a manifest imbalance and not to maintain balance.

Hiring Goals v. Quotas

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- Quotas: Rigid requirements
  - Only rarely permitted
  - Ordered by court
  - Negotiated as remedy in consent decree or settlement agreement
- Goals: Aspirational
  - May be acceptable
  - Broader than traditional characteristics?

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Thoughts on Goals

- Identify barriers (may vary from job to job)
- Identify solutions
- What are the number and kind of opportunities expected to be available?
- What is the availability of qualified/qualifiable applicants?

Inclusion Riders

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- Rooney Rule/Mansfield Rule
- Requires inclusion of underrepresented groups at the interview stage
  - Can set numerical requirements
  - Legally permissible – diversify candidate pool, not set aside position
  - All candidates must be qualified

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Joint Employer: the NLRB's Rule, the DOL's Rule, and the Maryland Court of Special Appeals' Opinion

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NLRB Joint Employer Rule

- Took effect April 27, 2020.
- Joint employment is only found "if two employers share or codetermine the employees' essential terms and conditions of employment."
- "The entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of [the purported employees'] employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees."

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DOL Joint Employer Rule

- Took effect March 16, 2020.
- Was not meaningfully revised for over 60 years.
- Generally made findings of joint employment less likely.
- The Final Rule does not constitute law, but rather is generally considered by courts as "persuasive" authority.

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DOL Joint Employer Rule, cont.

The Final Rule contemplates two joint employment scenarios under the FLSA:

- Scenario One: Where the employee's hours worked for one employer simultaneously benefits another employer.
- Approach: The DOL examines whether the potential joint employer acts indirectly or directly in the interest of the employer in relation to the employee, using a four-factor test.

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DOL Joint Employer Rule, cont.

- Scenario Two: Where the employee works separate sets of hours for different employers in the same workweek.
- Approach: The DOL did not make any substantive changes to the existing standard. If the employers are sufficiently associated, they will be joint employers.

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State of New York et al. v. Scalia

- The four-factor ("vertical") test in the Final Rule was vacated because it unlawfully limited the factors the DOL would consider in a joint employment inquiry.
- The three-factor ("horizontal") test remains.
- The court issued an injunction that is not limited to any particular jurisdiction.

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What now?

- Appeal or potential revision of the Final Rule.
- Fourth Circuit employers should follow the expansive joint employment test set forth in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2015).
- *See also Uninsured Employers' Fund v. Tyson Farms, Inc.*, 243 Md. App. 406 (Md. 2019).

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Maryland Laws Taking Effect on October 1

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Maryland Legislative Activity

- The Maryland General Assembly passed over 600 bills in 3 days before the session's early adjournment.
- A few significant employment bills.
- Became law on May 7, 2020.
- Effective date is October 1, 2020.

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Mandatory State WARN Act Requirements

- Maryland has its own version of the federal Worker Adjustment and Retraining Notification ("WARN"), also known as the mini-WARN law.

- Maryland now mandates advance notice of certain layoffs.

- Law takes effect on October 1, 2020, but the Maryland Department of Labor has said that it will not seek to enforce the law until final regulations are issued.

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Mandatory State WARN Act Requirements (cont'd)

- Applies to employers with 50 or more employees operating industrial, commercial or business enterprises in the state.

- Do employees outside Maryland count toward the 50?

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Mandatory State WARN Act Requirements (cont'd)

- Some employees do not count toward the 50:
  - Those who average fewer than 20 hours per week.
    - *See* Federal Formula.
  - Those who have worked for the employer for less than 6 of the proceeding 12 months.
    - *See* Federal law that calculates numbers 60 days before the reduction in force.

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Mandatory State WARN Act Requirements (cont'd)

Reductions in Force:

- Employer must provide 60 days' written notice.

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Mandatory State WARN Act Requirements (cont'd)

Mass Layoff vs. Reduction in Operations:

Reduction in Operations is:

a. The relocation of a part of an employer's operation from one workplace to another existing or proposed site.
b. The shutdown of either:
    i. A workplace; or
    ii. A portion of the operations of a workplace that reduces the number of employees by the greater of (1) at least 25 percent or (2) at least 15 employees, over any 3-month period.

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Mandatory State WARN Act Requirements (cont'd)

Maryland Law v. Federal Law

- Maryland law requires Notice for a Reduction of at least 25 percent or 15 employees, whichever is greater.

- Federal law requires Notice for a Reduction of at least 33 percent and 50 employees.

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Mandatory State WARN Act Requirements (cont'd)

Maryland Law v. Federal Law (cont'd)

- Federal law covers employers with 100 or more employees; Maryland covers employers with 50 or more employees.

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Mandatory State WARN Act Requirements (cont'd)

Maryland Law v. Federal Law (cont'd)

- Maryland law does not have a minimum distance requirement or number of employees to trigger the relocation prong of its law.

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Mandatory State WARN Act Requirements (cont'd)

Notice must be given to:

- All employees at the workplace subject to the reduction;
- Any exclusive representative or bargaining agency (e.g., a union) of the affected employees;
- State agencies (such as the Maryland Department of Labor's Division of Workforce Development and Adult Learning's Dislocated Worker Unit); and
- All elected local officials in the area of the affected workplace (as opposed to the federal law which requires only that notice be given to chief elected official).

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Mandatory State WARN Act Requirements (cont'd)

Contents of Notice:

- Name and address of workplace (slightly more extensive than federal law);
- Supervisor's contact information (more extensive than federal law and includes e-mail);
- Statement explaining whether the reduction is permanent or temporary and whether the workplace is expected to shut down;
- The date when reduction in operations is expected to begin.

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Mandatory State WARN Act Requirements (cont'd)

What if an employer violates Maryland's requirements?

- Civil penalty of up to $10,000 per day (assessed by the Maryland Secretary of Labor).
  - Federal penalty is $500.00 fine.
- Maryland penalties issue for failure to provide any required notice (as opposed to the federal law which applies only for failure to give notice to chief elected official).

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Mandatory State WARN Act Requirements (cont'd)

- In determining the amount of the penalty, the DOL will assess:
  - (1) the gravity of the violation;
  - (2) the size of the employer's business;
  - (3) the employer's good faith; and
  - (4) the employer's history of violations under this subtitle.
- Subject to the notice and hearing requirements.

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Hair Textures and Hairstyle Discrimination Ban

- Several states and local jurisdictions have passed legislation, including Maryland and Montgomery County.

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Hair Textures and Hairstyle Discrimination Ban (cont'd)

- Maryland House Bill 1444 / Senate Bill 531
  - Amends Maryland's FEPA (Title 20 of State Government Act).
  - "Race" is defined to include traits historically associated with race, including hair texture, afro hairstyles, and protective hairstyles.
  - "Protective hairstyles" means braids, twists, and locks.
- Applies to employers with at least 15 employees.
- Enforced through the MCCR.

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Hair Textures and Hairstyle Discrimination Ban (cont'd)

- Montgomery County Council unanimously passed a version of the CROWN Act in 2019
- Effective as of February 6, 2020.
- Similarly expands the definition of "race."
- Applies to any person employing 1 or more individuals in the County.

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Salary History Ban

- Maryland House Bill 123 / Senate Bill 217.
- Amendment to Maryland's Equal Pay for Equal Work Act.
- Restricts what an employer can ask about an applicant's wage history.
- Intended to address long-term impact of gender wage gap.

Salary History Ban (cont'd)

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- It **requires an employer to provide the wage range** for the position in question upon an applicant's request.
- It **prohibits an employer from relying upon an applicant's wage history** in screening, hiring, or determining wages.
- It also **prohibits an employer from asking for wage history,** whether orally, in writing, or through an employee or agent, or from a current or former employer.
- It **prohibits an employer from retaliating** against, or refusing to interview, hire, or employ an applicant who did not provide their wage history or who requested the wage range for the position in question.
- It acknowledges that **an applicant may voluntarily provide their wage history**.
- After a conditional offer of employment is made, **it permits the employer to confirm and to rely on voluntarily-provided wage history to support a higher wage offer** than initially offered, as long as the higher wage does not create an unlawful pay differential based on sex or gender identity.

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Salary History Ban (cont'd)

- Applicants can report violations to the Commissioner of Labor and Industry

- What penalties can the Commission impose?
  - The Commission must issue an order compelling compliance.
  - May issue a letter to the employer compelling compliance for the first violation.
  - May impose a civil penalty of up to $300 per applicant for a second violation.
  - May impose a civil penalty of up to $600 per applicant for each subsequent violation occurring within 3 years of a prior violation.

- The Commission will consider the following factors when imposing a penalty:
  - The gravity of the violation;
  - The size of the business;
  - The employer's good faith;
  - The employer's history of prior violations.

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QUESTIONS?

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