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ACC Association of Corporate Counsel
NATIONAL CAPITAL REGION

The 2020 Employment Law Year in Review

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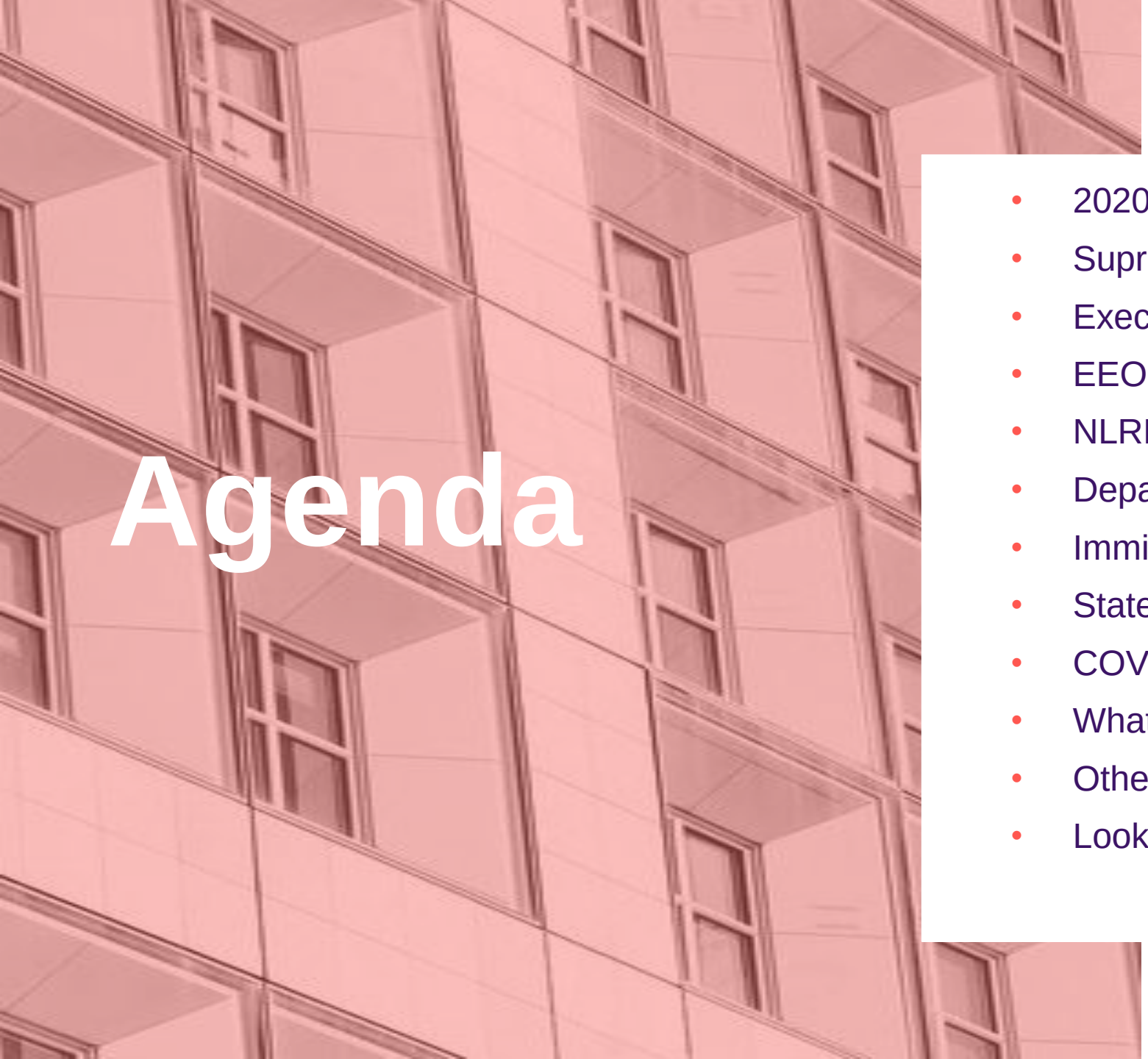

Agenda

- 2020 Predictions Recap
- Supreme Court Roundup
- Executive Orders
- EEOC Developments
- NLRB Developments
- Department of Labor Developments
- Immigration
- State and Local Legislation
- COVID-19 Issues are not Going Anywhere
- What to Expect From the Biden Administration
- Other Trends to Look Out For
- Looking Ahead

Five Issues to Monitor in 2020 How Did We Do?

2020 Predictions – How Did We Do?

1. Coronavirus Pandemic Grips Nation
2. Biden Wins Presidency
3. Capitol Stormed during counting of Electoral College Votes
4. Financial Tip: Short Game Stop

2020 Predictions – How Did We Do? *(For Real)*

1. Decision on sexual orientation and gender identity discrimination
2. Continued uncertainty regarding worker classification
3. States continue to act
   - New paid leave statutes
   - Action in Virginia
   - Non-compete reform and efforts to curb no-poach agreements
   - Continuing responses to #MeToo (carve out in agreements, criminal laws)
   - More data privacy laws

Supreme Court Roundup

Bostock v. Clayton County (June 15, 2020)

- **Title VII covers sexual orientation and gender identity discrimination**
  - The majority first considered what was meant by "sex" and "discriminate" in 1964 and concluded that the interpretation in 1964 is the same as in the present day.
- The Court notes:
  - Title VII explicitly prohibits discrimination "because of" a protected characteristic which "incorporates a 'simple' and 'traditional' but for causation standard"
  - "An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It doesn't matter if other factors besides the plaintiff's sex contributed to the decision.
  - "For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex."
  - Text trumps legislative intent

Department of Homeland Security v. Regents of the Univ. of Cal. (June 18, 2020)

- Trump Administration had not properly terminated Deferred Action for Childhood Arrivals
- Many believed DACA would remain intact and individuals who were eligible but had not previously applied would apply
- Administration issued a memo stating that DHS would not accept applications for initial DACA applications, renewals of DACA for current beneficiaries would be limited to one year, and Advance Parole would be issued only for urgent humanitarian reasons or for the sake of a significant public benefit
- Federal judge held that DHS's memo was invalid and that DACA should be fully implemented

Our Lady of Guadalupe School v. Morrissey-Berru (July 8, 2020)

- Expanded the scope of the “ministerial exception,” which precludes the application of Title VII employment discrimination laws to questions involving “the employment relationship between a religious institution and its ministers.

California v. Texas (oral argument November 10, 2020)

- Case challenges the constitutionality and ongoing viability of the ACA following the elimination of the penalty under the individual mandate
- The Court focused on 3 main issues: Standing, Severability and the Merits
- Based on the oral argument, it appears a majority of the Justices are inclined to allow the ACA to stand
- Decision to be released in the Spring
- It was not lost on the Court that a finding of unconstitutionality would result in tens of millions of Americans becoming uninsured in the middle of a pandemic and introducing chaos into the health insurance market.

Executive Orders

EO 13950 – Combating Race and Sex Stereotyping

- Prohibited federal contractors and subcontractors from using “any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating,” including a list of “divisive concepts.”
- OFCCP set up a hotline to receive complaints
- A clause implementing the requirements was to be inserted into new federal contracts
- December 23, 2020 nationwide preliminary injunction
  - Violates the First Amendment “because it impermissibly chills the exercise of the Plaintiffs’ constitutionally protected speech, based on the content and viewpoint of their speech.”
  - Parts are so vague that they violate the Fifth Amendment Due Process Clause because “it is impossible for Plaintiffs to determine what conduct is prohibited.”
- Revoked by EO January 20, 2021

President Biden EOs

- Advancing Racial Equity and Support for the Underserved Communities Through the Federal Government (EO 13985)
- Protecting and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (EO 13988)
- Protecting the Federal Workplace and Requiring Mask-Wearing (EO 13991)
- Revision of Civil Immigration Enforcement Policies and Priorities (EO 13993)
- Protecting Worker Health and Safety (EO 13999)
- Proclamation on Ending Discriminatory Bans on Entry to the United States
- Memorandum Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA)

EEOC Developments

Setting the Stage

- First time in 3.5 years, the Commission now has five (5) Commissioners: three (3) Republicans.
- Earliest expiring Republican is 7/1/2022.
- General Counsel's term expires 8/1/2023
- President Biden named Commissioner Charlotte Burrows as EEOC Chair and Commissioner Jocelyn Samuels as Vice Chair.

What Has the EEOC Been Doing?

- EEOC's mission statement changed under the Trump administration from "Stop and Remedy Discrimination in the Workplace" to "Prevent and Remedy Discrimination in the Workplace"
- Emphasis on education and training (not enforcement)
- Pre-lawsuit resolutions
  - Recovery of $333.2 million
  - ADR Pilot program
- Commissioners vote on all recommendations to litigate
- Help for "Religious" Employers and Employees

Updated Compliance Manual on Religious Discrimination

- Proposal was open for public comment through December 17, 2020
- Approved by the EEOC January 15, 2021
- The guidance
  - Explains the variety of issues applicable to religious discrimination claims
  - Discusses typical scenarios in which religious discrimination may arise
  - Provides guidance to employers on how to balance the needs of individuals in a diverse workplace
  - Discusses the religious organization exemption in Title VII and the ministerial exception
  - Discusses reasonable accommodations
    - Including the cooperative information-sharing process similar to the interactive process

Proposed New Approach to Wellness Programs

- The EEOC proposed two sets of regulations:
  - ADA proposed rule
    - Employers may offer no more than de minimis incentives to encourage employees to participate
  - GINA proposed rule
    - Permit an employer to provide an incentive to employees in return for their *family members'* providing information about the family members' manifestation of diseases or disorders

Telehealth and Telework Field Assistance Bulletins

- Electronic posting is acceptable
  - Inform employees of where and how to access the notice electronically.
  - For employers with workers split between on-site and remote work, both hard-copy and electronic posting.
- Telemedicine visit may qualify as an “in-person visit” for purposes of the FMLA if the following criteria are met:
  - (1) the telemedicine visit must include an examination, evaluation, or treatment by a health care provider;
  - (2) the telemedicine visit is permitted and accepted by state licensing authorities; and
  - (3) generally, the telemedicine visit should be performed by video conference.

Pregnancy Workers Fairness Act

- Passed by U.S. House of Representatives in September 2020
- Eliminates discrimination
- Reasonable accommodation
- Clarifies standards for analyzing claims under the PDA

NLRB Developments

The Current Board

- Four current members of the National Labor Relations Board (one vacancy)
  - William Emanuel – August 27, 2021: Republican
  - John Ring – December 16, 2022: Republican
  - Lauren McFerran – December 16, 2024: Democrat
  - Marvin Kaplan – August 27, 2025: Republican
  - Vacancy: Democrat filled by President Biden
- 3-2 Republican majority through August 27, 2021
- 3-2 Democratic majority thereafter
- President Biden has referred to himself as “the strongest labor president supporters have ever had.”
- Replaced John Ring as the chairman with member Lauren McFerran

What Can We Expect?

- **Bargaining unit determinations** – a return to the extremely difficult *Specialty Healthcare* micro-unit bargaining unit determination standard
- **Revision of Trump Board representation case rulemaking** – a return to the rules that existed prior to the Trump Board's rulemaking – e.g. rules that limited employers' ability to challenge unions' unit requests and communicate important information about unions to its employees. Expect a return to "quickie elections"
- **Rules and Policies** – a return to workplace rules being found to violate the NLRA because they could be "reasonably construed" by an employee to prohibit the exercise of NLRA rights (e.g. social media, etc.)

What Can We Expect? *(cont.)*

- **Joint employer test** – a return, through rulemaking, to the *Browning-Ferris* test governing determination of joint-employer status which made it easier for unions to prove that two or more companies were the employer
- **Independent contractor status** – a return to the more employee-friendly traditional common-law test for determining whether an individual is an employee or an independent contractor under the NLRA
- **Use of employer email for personal reasons** – a return to a requirement that employers allow employees who have access to their email systems for work-related purposes be allowed to use that email for personal reasons, on non-work time

What Can We Expect? *(cont.)*

- **Confidentiality of workplace investigations** – a return to an approach under which an employer's blanket approach to maintaining confidentiality with respect to an internal investigation is illegal
- **Employee "abusive" conduct during Section 7 activity** – a return to a standard permitting employees leeway to use profanity and engage in "abusive" conduct in connection with Section 7 activity without losing the protection of the Act
- **Access to private property** – a return to standards under which a property owner may not limit the circumstances under which it may exclude the off-duty employees of its on-site contractors (or licensees) from accessing its private property to engage in Section 7 activity

Department of Labor Developments

Independent Contractor Rule

- Published 1/7/21, effective 3/8/21

Identifies two “core factors” that are the most probative of economic dependence and should be afforded greater weight

1. The nature and degree of the individual’s control over the work; and
2. The worker’s opportunity for profit and loss

The other three (less probative) factors can help guide the analysis:

3. The amount of skilled required
4. The degree of permanence of the parties’ work relationship
5. An analysis of whether the work is “part of an integrated unit of production”

Regular Rate Final Rule

- Clarifies that payments for paid time off (PTO), when not worked, as well as payouts for unused PTO need not be included in the regular rate because this is pay for non-working time
- Addresses an apparent contradiction in the current regulations surrounding whether pay for bona fide meal periods is excludable from the regular rate
- Clarifies what constitutes a reasonable expense and excludable from the regular rate
- Elaborates on the types of bonuses that are and are not discretionary and therefore excludable from the regular rate calculation
- Adds more examples of the types of modern benefit plans that may be excludable from the regular rate of pay

Joint Employer Standard

- Reiterates the DOL's longstanding position that a business model — such as the franchise model — does not itself indicate joint employer status
- Four-factor balancing test assessing whether the purported joint employer
  - Hires or fires the employee;
  - Supervises and controls the employee's work schedules or conditions of employment;
  - Determines the employee's rate and method of payment; and
  - Maintains the employee's employment records

Immigration

Immigration

- Biden has announced he will make significant changes expanding refugee processing
- Most consulates remain closed to routine visa processing and many are becoming more restrictive in granted exemptions for urgent business travel
- Trump had issued an order rescinding the so called “Schengen” COVID-19 travel ban, but Biden administration overturned that and at present it is very difficult to get any exemptions for travelers from covered countries
- The H1B lottery changes from last year are still in effect, but proposed additional changes are being reviewed and may not be in effect for this year’s visa lottery
- ICE is still allowing the remote I-9 procedures at this time

State & Local Legislation

Virginia Passed a *Bunch* of Laws!

- **Significant changes to the Virginia Human Rights Act (the "VHRA")**
  - New protections against discrimination based on gender identity, sexual orientation, and veteran status
- **Expanded applicability**
  - Covers all employers with more than 15 employees
  - Employers with more than 5 employees continue to be covered by the VHRA for the purposes of unlawful discharge on the basis of race, color, religion, national origin, status as a veteran, sex, sexual orientation, gender identity, marital status, pregnancy, or childbirth or related medical conditions including lactation (this number is more than five but fewer than 20 employees for unlawful discharge based on age)
- **Private rights of action and expanded penalties**
  - Private cause of action
  - Potential damage awards now include compensatory and punitive damages (with no statutory cap, differentiating the VHRA from its federal analog), reasonable attorney fees and costs, and other non-monetary remedies such as injunctions

Virginia Passed a *Bunch* of Laws! *(cont.)*

- **"Nondisclosure or Confidentiality Agreements; Sexual Assault, Condition of Employment" (Va. Code § 40.1-28.01)**
  - Employers may not require job applicants or current employees to execute nondisclosure agreements that would conceal the details of any "sexual assault" claim an employee may have against the employer
  - Does not restrict nondisclosure or confidentiality agreements with former employees
- **Amended the Virginia Wage Payment Act (VA Code 40.1-29)**
  - Private right of action
  - Court may award wages owed, liquidated damages (double damages for all violations and treble damages for "knowing violations"), 8% prejudgment interest, reasonable attorneys' fees and costs, civil penalty of up to $1,000 per violation
  - 3-year statute of limitations

Virginia Passed a *Bunch* of Laws *(cont.)*

- **New Restrictive Covenant Law**
  - "No employer shall enter into, enforce, or threaten to enforce a covenant not to compete with any low-wage employee."
    - Moving target
    - Drafting implications
  - A *"covenant not to compete"* shall not restrict an employee from providing a service to a customer or client of the employer if the employee does not initiate contact with or solicit the customer or client
    - Note: This language appears in the definition section!
- **New Pay Transparency Law**
  - Prohibits employers from discharging or taking any other retaliatory action against an employee for discussing wages or compensation with another employee
  - Not for HR…

Worker Misclassification Laws

- An individual not properly classified as an employee can bring a civil action for damages
- Presumption that an individual performing services for renumeration is an employee, unless it is shown that the individual is an independent contractor as determined under the IRS guidelines
- Court may award
  - Damages in the amount of any wages, salary, employment benefits, or other compensation lost to the individual
  - Reasonable attorneys' fees, and costs incurred

Virginia's Newest Marijuana Laws exceed DC and MD

Marijuana possession decriminalized, but still *not* legal (yet)

Civil penalty of no more than $25 for possession of up to an ounce of marijuana, with no jail time. (Is/was misdemeanor with first offense maximum fine of $500 and 30-day jail sentence or both)

Industrial Hemp products (e.g., CBD Oil) OK with low THC

Restrictions on asking about marijuana convictions

An employer or educational institution shall not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning any arrest, criminal charge, or conviction against him when the record relating to such arrest, criminal charge, or conviction is not open for public inspection.

Virginia's New Whistleblower Law

Protected conduct by employee (or person acting on behalf of employee) includes:

- Reporting in good faith a violation of any federal or state law or regulation to a supervisor or to any governmental body or law enforcement official;
- Being requested by a governmental body or law enforcement official to participate in an investigation, hearing, or inquiry;
- Refusing to engage in a criminal act that would subject the employee to criminal liability;
- Refusing an employer's order to perform an action that violates any federal or state law or regulation when the employee informs the employer that the order is being refused for that reason; or
- Providing information to or testifying before any governmental body or law enforcement official conducting an investigation, hearing, or inquiry into any alleged violation by the employer of federal or state law or regulation.

Virginia Legislation

Pending

- Paid sick leave
- Paid family leave
- Prohibit discrimination on basis of person's status as active military or military spouse
- Workers' compensation – presumption of compensability for COVID-19
- Prohibit discrimination in employment based on a person's vaccination status with respect to any COVID-19 vaccine

Virginia Litigation Impact

- Summary Judgment is very limited in state court
- State court judges are not familiar with these issues

Therefore…

- The ability to bring these claims in state court should increase the value of these cases for assessment/settlement purposes
- Starting to see this impact, but not an avalanche of claims yet

Maryland

Maryland's Mini-WARN Act

- Previously there were voluntary guidelines for employers undergoing a "reduction in operations"
- Now **requires** employers with 50 or more employees to provide 60 days' notice to impacted employees, union representatives, and various state officials.

Maryland *(cont.)*

New Employer Requirements Regarding Wage History and Wage Ranges

- Maryland employers are now required to provide to job applicants the wage range for the position to which the applicant applied, on request of an applicant
- Employers are prohibited from retaliating against an applicant who requests such wage information and who does not provide their own wage history or wage range
- Employers are likewise now prohibited from seeking an applicant's wage history either "orally, in writing, or through an employee or agent or from [an applicant's] current or former employer," and from relying on wage history for the purpose of determining fair wages in most circumstances

Maryland *(cont.)*

Other Employment-Related Laws Became Effective October 1, 2020

- Ban on discrimination based on hairstyles commonly associated with race
- Law expanding Maryland's equal pay statute to include ban on retaliation
- Ban on facial recognition technology used during job interviews

District of Columbia

Paid Family Leave

- On July 1, 2020, individuals became eligible to take paid leave under the District's Paid Family Leave Program
  - 8 weeks of paid leave per year to bond with a new child,
  - 6 weeks of paid leave per year to care for a family member with a serious health condition, and
  - 2 weeks of paid leave per year for the individual in connection with the individual's own serious health condition.
- From July 1, 2020- October 1, 2021, the maximum weekly paid leave benefit is $1,000 for a maximum of 8 weeks per year

District of Columbia *(cont.)*

Non-Compete Ban

- On December 15, 2020, the District of Columbia Council unanimously passed the Ban On Non-compete Agreements Amendment Act Of 2020
- The Act generally prohibits the use of non-compete provisions in employment agreements and workplace policies
- Applies to all employers in the District and nearly any employee working in the District regardless of how much they are earning
- Employers must provide written notice of the Act to all their employees
- Prohibits employers from retaliating (or threatening to retaliate) against employees for refusing to agree to a non-compete provision or other similar conduct

District of Columbia *(cont.)*

DC Tipped Wage Workers Fairness Amendment Act of 2018

- Became effective in full in 12/20 when the DC Council removed the funding requirement (wage-related measures took effective in 2018)
- The Act requires sexual harassment training for tipped employees
- It is somewhat unclear but appears to state that all employers must report on sexual harassment complaints annually
- There are also some posting requirements that appear to apply to all employers

State and Local Paid Sick Leave Law

- Colorado (effective 1/1/21)
- NY (use paid sick leave 1/1/21)
- Maine (use paid sick leave 1/1/21)
- Dallas, San Antonio and Austin, Texas (still in flux)

State Paid Family and Medical Leave

- Connecticut (wage deduction began 1/1/21)
- Massachusetts (benefit payments available 1/1/21)
- New York (period of leave increased to 12 weeks 1/1/21)
- Colorado (effective 1/1/24)
- Pending bills in:
  - Illinois
  - Pennsylvania
  - Ohio

Equal Pay and Wage Transparency Laws

- Over the past 24 months, several states, counties and cities have passed wage transparency laws
- States that have passed these laws include, but are not limited to, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New York, Oregon and Vermont. Numerous cities and counties in New York, as well as cities like San Francisco, Chicago and Pittsburg have also passed similar ordinances
- Employers in these jurisdictions may need to update their job applications to remove questions about pay history or change the way they set compensation

Natural Hair Laws and Grooming Requirements

- New York, California, New Jersey, Colorado, Washington, Virginia and Maryland as well as several city governments have passed laws making it illegal for employers to discriminate against black hairstyles like natural, braids, twists and locks
- Employers with strict grooming policies regarding hair length, facial hair, tattoos, etc. may wish to revisit their policies and assess how and why they are being implemented and enforced

Substance Abuse in the Workplace: Medical Marijuana and Beyond

A Quick Refresher

- Federal Law
  - Under the federal Controlled Substances Act, marijuana is a Schedule I illegal drug that may not be used, possessed, manufactured or distributed, even for medical purposes. Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. 21 U.S.C. § 812(b)(1).
- State Laws
  - 46 states (plus Washington D.C., Guam, Puerto Rico, and numerous native tribes) have laws permitting or decriminalizing marijuana or marijuana-based products
  - Arizona, Mississippi, Montana, New Jersey, and South Dakota approved laws to legalize marijuana on Election Day 2020

New Laws and Their Quirks

- Mississippi
  - Medical marijuana
  - Does not require “accommodation for the use of medical marijuana or require any on-site use of medical marijuana” in any place of employment
- Arizona
  - Recreational marijuana (medical marijuana law passed in 2010)
  - Generally does not restrict the rights of employers
- Montana
  - Recreational marijuana (medical marijuana law passed in 2004)
  - Does not impose restrictions on employers
- New Jersey
  - Recreational marijuana (medical marijuana passed in 2013)
- South Dakota
  - Medical marijuana
  - Does not require employers to permit or accommodate conduct authorized by the new law

Beyond Marijuana

- Oregon’s new law makes it the first state in the country to decriminalize possession of “hard” drugs, including heroin, cocaine, and LSD
- Those arrested with small amounts of hard drugs may avoid going to trial and possible jail time by paying a $100 fine and attending an addiction recovery program
- Also approved by Oregon voters: a measure to legalize the therapeutic use of psychedelic mushrooms

Ongoing Considerations

- There still isn’t a test for marijuana impairment
  - This makes it more difficult to determine whether someone was under the influence of marijuana at a specific time
- Potential changes for marijuana as a Schedule I substance?

COVID-19 Issues are not Going Anywhere

Workplace Safety – Federal

- VA, MD, and DC each remain under numerous restrictions of varying degrees
- CDC and state and local health guidance is still largely in place
- OSHA has issued guidance but has yet to issue a federal standard for dealing with COVID-19 at the workplace

Virginia Permanent Standard on COVID-19

General requirements for all employers

- Hazard assessment for all job tasks (“Very High,” “High,” “Medium” and “Low”)
- Policies/procedures for employees to report COVID-19 signs or symptoms
- Prohibit known/suspected cases at worksites
- Employers must assess risk levels of employees and suppliers before entry
- Building and facility owners must notify employer tenants of COVID-19 cases
- Mandatory handwashing stations and hand sanitizer “where feasible”

What is in the Virginia Standard?

General requirements for all employers *(cont.)*

- Employers must notify:
  - VA Dept. of Health of COVID-19 “outbreaks”; and
  - VA Dept. of Labor and Industry (DOLI) of “hot spots”
- System to receive reports of positive tests (within past 14 days) by:
  - Employees (including temps and contract employees)
  - Subcontractors
- “Good faith” if actual compliance with mandatory/nonmandatory provisions of CDC guidance (if equivalent/greater protection)
- Nondiscrimination for:
  - Raising/reporting concerns
  - Voluntary PPE use
  - Reasonable work refusals

Requirements for “Medium Hazard” Employers

- When feasible:
  - Eliminate personal meetings, travel
  - Physical barriers
  - Implement telework and staggered shifts
  - Social distancing
  - Deliver services/products remotely or by curbside pickup or delivery
  - Reconfigure spaces where employees congregate
- Identification/isolation of known/suspected cases
- Employee COVID-19 training within 30 days
- Prescreening/surveying before each work shift
- Provide face coverings to visitors with suspected cases and employees who can’t socially distance
- Infection prevention
  - Handwashing
  - Cleaning/disinfecting
  - Managing/educating visitors
- Infectious Disease Preparedness and Response Plan (exception for ten or fewer employees)

Virginia Permanent Standard on COVID-19

- No bar on prohibiting employees from coming to work after close contact with an individual who has tested positive for COVID-19
- Several of its provisions relating to return-to-work and close contact do not enable employers to benefit from continually evolving CDC guidance
- Includes whistleblower protections for employees who report concerns to the news media or social media, which may invalidate some employers' media policies
- Lacks "safe harbor" protections for employers that protect employees by following CDC guidance

Vaccinations

- So, we have COVID-19 vaccinations!
- Many employers asking whether they can or should require their employees get vaccinated.
- First, can employers mandate vaccinations?
  - Yes, with some exceptions and without states having weighed in yet

Vaccinations *(cont.)*

- On December 16, 2020, the U.S. Equal Employment Opportunity Commission issued guidance considering COVID-19 vaccination programs
- While the EEOC guidance does not directly state that mandatory vaccination policies are lawful, it does answer a series of questions predicated on the assumption that an employer has adopted such a policy
- Employers who adopt mandatory vaccination policies may be obligated to provide exemptions or accommodations to employees with religious objections to vaccines, pregnant workers, and employees with disabilities that may prevent them from obtaining a vaccination
- Employers should also be mindful of what questions they can ask employees about their health and vaccination status, and how they use the information obtained in response to those questions

Vaccinations *(cont.)*

- Second, should employers mandate vaccinations?
  - Employers likely will want to consider their work environment, whether they are providing care for others who may not be able to vaccinate, the risk of harm to others if they don't vaccinate, the culture in the environment and the disruption in the workplace if they mandate
  - Some individuals and companies likely will be concerned with mandating vaccinations when the vaccine is new
  - Many companies may face resistance from employees, which could lead to employee morale issues, dissension, union organizing or even litigation
  - Employers should also consider the potential workers' compensation or other liability exposure for injuries or illnesses resulting from adverse reactions or side effects from vaccinations it mandates

COVID-19 Leave

- The FFCRA expired after Congress took no action to extend it. As a result, job-protected leave for COVID-19-related reasons is no longer available to employees nationwide
- Although the federal appropriations bill passed by Congress on December 21, 2020, permits employers to take advantage of the FFCRA tax credit until at least March 31, 2021, this means employers *may*, but are not *required* to, continue to provide employees FFCRA-type leave
- Now, employers should ensure they are providing COVID-19-related leave to their employees where required by state and local laws

COVID-19 Leave *(cont.)*

- D.C. Paid Public Health Emergency Leave
  - Enforced by OAG and DOES, D.C. Paid Public Health Emergency Leave is available to covered employees who work in the District of Columbia for an employer that has between 50 and 499 employees and is not a healthcare provider
  - Employees must have been employed for at least 15 days to be eligible
  - Eligible employees are entitled to fully paid leave for up to two full weeks, or a maximum of 80 hours (prorated for part-timers), for the same COVID-19-related reasons as listed in the FFCRA
  - Like the FFCRA, this is a one-time-only benefit: employees who have already used their two weeks of paid leave are not entitled to use that leave again
  - There is no guidance as to whether this leave can be used intermittently

COVID-19 Leave *(cont.)*

- D.C. Unpaid "COVID-19 Leave"
  - The D.C. City Council adopted an unpaid leave entitlement of 16 weeks, separate from the 16 weeks of family leave and 16 weeks of medical leave provided by the existing DCFMLA. Enforced by OHR, this unpaid COVID-19 leave is available when a covered employee is unable to work for the following reasons, which are similar, but not identical, to the reasons covered under the FFCRA:
    - (1) A recommendation from a health care provider that the employee isolate or quarantine, including because the employee or an individual with whom the employee shares a household is at high risk for serious illness from COVID-19;
    - (2) A need to care for a family member or household member who is under a government or health care provider's order to quarantine or isolate; or
    - (3) A need to care for a child whose school or place of care is closed or whose childcare provider is unavailable to the employee.
  - Unlike the Paid Public Health Emergency Leave described above, this unpaid leave requirement applies to *all employers* with employees in D.C. – not just those with 50-499 employees
  - Employees must have been employed for 30 days (not 15 days) to take this unpaid leave

COVID-19 Leave *(cont.)*

- Additional state and local paid COVID leave:
  - California (as well as Los Angeles, Sacramento, Long Beach, Oakland, San Diego, San Francisco, San Jose, San Mateo, Santa Rose and Sonoma County)
  - Colorado
  - Nevada
  - New York
  - Philadelphia and Pittsburgh
  - Washington State (and Seattle)
- Pending bills
  - Massachusetts
  - Minnesota
  - New Jersey
  - Pennsylvania

What to Expect from the Biden Administration

Affordable Care Act

- President-elect Biden will likely fight to strengthen the ACA and its underlying policies
- Whether a Biden Administration or Congress will have to start from scratch will depend on the outcome of the U.S. Supreme Court's highly anticipated decision in *California v. Texas*
- Biden is expected to oppose recent deregulation of short-term, limited duration insurance plans on the grounds they do not comply with consumer protections, frequently omit basic healthcare benefits, and provide too little coverage for too great a price

Arbitration

- President Biden has indicated his support for the Forced Arbitration Injustice Repeal (FAIR) Act, legislation that would prohibit employers from requiring employees to sign pre-dispute arbitration agreements as a condition of employment
- The FAIR Act was introduced in 2019 with little chance of passage, given a Republican majority in the Senate and President Donald Trump's vow to veto the measure

Immigration

- Reaffirmed DACA
- The Biden Administration is expected to make it easier for businesses to use immigration to strengthen their businesses
- Exemption of science, technology, engineering, and math (STEM) graduates from caps on employment-based visas is expected

Independent Contractors

- The Biden Department of Labor (DOL) may initiate new rulemaking to rescind the DOL's independent contractor rule
- Moreover, the Biden DOL may take steps to further expand the definition of who qualifies as an "employee" under federal law, making it harder for businesses to contract with independent contractors without fear of misclassification

Minimum Wage

- President Biden previously called for a $15 federal minimum wage
- The Biden Administration also will seek to eliminate the reduced minimum wage for tipped employees (*i.e.,* the tip credit) and likely will seek an increase in the minimum salary to qualify as an exempt employee under the FLSA.

Paid Leave

- President Biden is expected to support paid leave benefits for employees
- Biden previously voiced support for universal paid sick days and the leave provisions of the Families First Coronavirus Response Act
- Supports 12 weeks of paid leave for all workers to care for their newborns, newly adopted or fostered children, for their own or a family member's serious health condition, or to care for injured service members or deal with "qualifying exigencies arising from the deployment" of a family member in the Armed Services

Worker Safety and Health

- President Biden's campaign pledge to enact an Emergency Temporary Standard to address COVID-19
  - State Emergency Temporary Standards commonly include requirements that employers provide Infectious Disease Preparedness and Response plans and employee training, among other obligations
- President Biden pledged to propose a COVID-19 stimulus bill that would enable OSHA to enact an Emergency Temporary Standard that is broader than possible currently under the Occupational Safety and Health Act
- Cover federal public health workers and possibly employees in industry sectors covered by other agencies such as the Mine Safety and Health Administration and the U.S. Department of Transportation

Blacklisting

- EO 13673 under President Obama, “Fair Pay and Safe Workplaces”
- Suffered a triple death:
  - Federal Court issues a TRO
  - Congress disapproved of it
  - Executive (Trump) withdrew it
- If it comes back, it is expected to be less onerous, if at all

Other Trends to Look Out For

COVID-19-Related Employment Litigation

- Through the first nine months of 2020, there has been an overall:
  - 12% decrease in federal employment cases from 2019;
  - Significant decreases in harassment (-22%), Americans with Disabilities Act (-20%), and discrimination (-17%) from 2019, perhaps due to the lack of workplace contact and mass layoffs or shifts to remote work;
  - Approximately 2,000 fewer cases were closed in 2020 than 2019, reflecting the dramatic slowdown in court activity during the pandemic; and
  - The federal district courts with the most employment filings are in New York, Florida, Pennsylvania, Illinois, and Georgia, essentially unchanged from 2019.
  - Such states as California and New Jersey routinely see fewer federal filings and more state filings, data not captured by this survey.

COVID-19-Related Employment Litigation *(cont.)*

- The Report found:
  - 309 employment cases attributable directly to the COVID-19 pandemic filed in federal court;
  - The 309 cases include 228 claims of retaliation, 142 claims of Family and Medical Leave Act violations, and 129 claims of Fair Labor Standards Act violations;
  - 36 of the 309 COVID-19 cases already have settled, most of which were filed against hospitality businesses, warehouse companies, and retirement homes;
  - The federal district courts with the most COVID-19 cases are in New York, Florida, New Jersey, Pennsylvania, Michigan, and Illinois.

2021: Five Issues to Monitor

2021 Issues to Monitor (Predictions!)

1. Returning to the office will bring an increase in accommodation requests to work from home and associated litigation
2. The price of settling cases in Virginia will increase measurably
3. Noticeable increase in claims from current employees (continuing a trend)
4. Paid leave in Virginia

JacksonLewis

Thank you.