Ch-ch-ch-changes: Employers Race to Keep up with a Host of New State and Local Regulations

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- **The information contained herein is for training purposes only.**
- **It is not intended to be full legal advice on any issue, but rather to identify issues requiring legal analysis.**
- **In the event of a real situation involving a legal issue, we would need to evaluate all of the facts in light of the existing law in order to provide full legal advice.**

TODAY'S AGENDA

- **The Bottom Line on 17 Current Issue Topics**

Today's Topics

1. Individual Health Plan Reimbursement in 2020
2. FMLA Designation…Required
3. FMLA Leave for School IEP Mtgs
4. Paid Leave Expansion
5. The PDA Has Teeth
6. Fed Agency Guidance is not law…
7. Is LGBTQ+ Protected by Title VII?
8. Min. Wages & Overtime
9. Gigs to the Gig Economy

Today's Topics

10. Bye-bye Restrictive Covenants?
11. Going to California?
12. Marijuana, anyone?
13. Social Media Policies
14. Should we be worried about ICE?
15. Guns in the Workplace
16. Internal Investigations
17. Arbitrations

Health Plan Reimbursement

- Recent changes to rules under various provisions of Public Health Service Act, ERISA, and Internal Revenue Code regarding health reimbursement arrangements.
- Beginning in 2020, employers may reimburse employees for individual health insurance premiums **instead of sponsoring a group health plan**.
- Employers may offer individual coverage health reimbursement accounts (ICHRAs) if certain conditions are met.

Health Plan Reimbursement

Conditions for employers to offer individual coverage health reimbursement accounts (ICHRAs):

1. Employee and dependents must be enrolled in qualifying individual plan for each month of coverage.
2. Employer may not offer group health plan to participants
3. If ICHRA is offered to a class of employees, all class members must receive the same terms, subject to specific exceptions.
4. Annual opt-out.
5. Reasonable procedures to confirm coverage.
6. Written notice to each participant containing certain information.

FMLA Leave Designation….Required?

- DOL Opinion Letter: Employers may not delay designating paid leave as FMLA leave, even if the delay complies with a collective bargaining agreement and the employee prefers the delay.
- FMLA
  - Employees are entitled to 12 weeks of unpaid, job-protected leave per year for qualifying reasons.
  - Regulations require employers to designate leave as FMLA leave within 5 business after they have "enough information."
- **DOL: neither employer nor employee may voluntarily decline FMLA protection against delay in designation.**

FMLA Leave: School IEP Meetings

- Federal education laws require public schools to develop IEPs for children receiving special education with input from child, parents, and teachers.
- DOL Opinion Letter: employees may use FMLA leave to attend children's Individualized Education Program (IEP) meetings where the children have health provider-certified serious health conditions.
- Attending IEP meetings = qualifying reason under the FMLA because caring for a family member with a serious health condition includes "mak[ing] arrangements for changes in care."
  - Employee's attendance is essential to providing care.

Job Protected Leave and Paid Leave

Job Protected Leave = return to same position (similar in some cases) after leave

- ADA (Leave as Reasonable Accommodation of a Disability
- Family and Medical Leave (Federal, State FMLA)
- Sick Leave (Company Granted and/or Statutory)
- Other statutory leave (school involvement, voting, etc.)
- Other Company approved time off (PTO, Bereavement, Unpaid Leave, etc.)

Paid Leave = wage replacement during leave

- PTO, Sick Leave (Company Granted and/or Statutory)
- Paid Family and Medical Paid Leave
- Workers compensation (insurance) – required by state law
- Short Term Disability, Long Term Disability (insurance) – voluntary
- Statutory Paid Leave vs Voluntary Company Paid Leave Policies vs Insurance Benefits

Jurisdictions with Statutory Paid Family/Medical Leave

Nine states and Washington, D.C. have enacted paid family and/or medical leave programs

- California
- Connecticut
- Massachusetts
- New Jersey
- New York
- Oregon
- Rhode Island
- Washington
- District of Columbia
- Hawaii

Employees Pay via Payroll Withholding or Insurance

California • California Paid Family Leave • State Disability Insurance	**New Jersey** • Family Leave Insurance
Connecticut • Paid Family and Medical Leave Program	**New York** • Paid Family Leave Benefit Law • Disability Benefits Law
Hawaii • Temporary Disability Insurance	**Rhode Island** • Paid Family Leave • Temporary Caregiver Insurance

Deep Dive: NY Paid Family/Medical Leave

NY State Temporary Disability Insurance	NY Paid Family Leave
• Provides partial wage replacement to workers that qualify. • Can be received by employees on FMLA leave. • Available for 26 weeks. • 50% of average weekly earnings. • Paid entirely by employer or jointly. with employee through contributions.	• Provides 12 weeks of leave at 60% average weekly pay. • Workers who take time off to care for a seriously ill family member, to bond with a new child, or military exigency. • Cost of leave benefits is paid through weekly payroll deductions.

Deep Dive: CA Paid Family/Medical Leave

CA State Disability Insurance	CA Paid Family Leave
• Provides short-term disability insurance (wage replacement) benefits for nonoccupational illness/injuries. • Up to 52 weeks of full benefits. • Administered by EDD.	• Provides 6 weeks of benefits (will increase to 8 in 2020) at 60% of average weekly earnings. • Workers who take time off to care for a seriously ill family member or to bond with a new child • Administered by EDD

Cost Shared by Employer / Employee

Massachusetts
- Paid Family and Medical Leave Program
  - 25 employee threshold for employer contributions
- State Disability Insurance

Washington
- Paid Family Leave Insurance
  - 50 employee threshold for employer contributions
- State Disability Insurance

Oregon
- Paid Family and Medical Leave Program
  - Starting in 2022
  - 25 employee threshold for employer contributions
- State Disability Insurance

Employer Pays for Family/Medical Leave

D.C. – Employers pay a premium to the district of a certain % of employees' pay

- Beginning on January 1, 2020, employees can take paid leave for:
  - Bonding with a new child (up to 8 weeks)
  - Care for an ill family member with a serious health condition (up to 6 weeks)
  - their own serious health condition (up to 2 weeks)

San Francisco – Paid Parental Leave Ordinance

- Requires employers to pay "supplemental compensation" for the full period a covered employee receives Paid Family Leave to bond with a child
- Currently, this means six weeks (will increase to eight weeks in July 2020)
- Applies to all employers with at least 20 employees worldwide
- Applies to employees who work at least eight hours/week in SF and who work at least 40% of total weekly hours in SF

Pending Paid Family/ Medical Leave Legislation

- At least 16 other states introduced paid family/medical leave legislation in 2019.
  - IN, ME, MD, MN, MO, MT, NH, NE, NM, ND, OK, TN, TX, VT, VA, WV
- Growing bi-partisan support in many states.

Paid Sick Leave Statutes and Ordinances

- 12 States require employers to provide paid time off to employees to use for employees' own illness/medical needs and/or to care for family members
  - Arizona, California, Connecticut, District of Columbia, Massachusetts, Maryland, Michigan, New Jersey, Oregon, Rhode Island, Vermont, Washington
- Some states (e.g., California) also permit employees to use for nonmedical/health purposes (e.g., services for domestic violence victims)
- Generally, accrued based on amount of time worked
  - But may be provided in lump-sum in some instances (e.g., California allows employers to frontload 24 hours or three days of paid sick leave at the beginning of each 12-month period, whichever provides more leave)

Paid Sick Leave Statutes and Ordinances

Local ordinances requiring paid sick leave include:

- Cook County and Chicago, IL
- Montgomery County, MD
- Duluth, Minneapolis, and St. Paul, MN
- New York City and Westchester County, NY
- Philadelphia and Pittsburgh, PA
- Austin, Dallas, and San Antonio, TX
- Seattle and Tacoma, WA
- California: Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco

Compliance Issues: Paid Sick Leave Legislation

- Employees who work in multiple jurisdictions – must meet the requirements of the most generous requirements
- Jurisdictions where lump-sum is treated as an advance on accrual (e.g., San Francisco)
- Jurisdictions covering non-family members (e.g., Los Angeles, New York City, San Francisco)
- Ordinances that provide a private cause of action

The PDA Has Teeth

- Pregnancy Discrimination Act (PDA) requires employers to treat "pregnancy, childbirth, or related medical conditions" the same as other "ability or inability to work"
  - Precise meaning and scope remains unclear
  - *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015): employer may have an obligation to make reasonable accommodations for pregnant women, if it does so for other employees.
- EEOC has become much more aggressive in enforcement.
- Light duty programs present a dangerous trap for employers
  - Often required by workers comp. carriers.
  - Light duty provided for employees who suffer work-related health conditions, but not non-work-related health conditions such as pregnancy.
- PDA extends to "pregnancy-related medical conditions" (fertility treatment, miscarriage, abortions, contraception, post-partum conditions, lactation, etc.)

State Law Pregnancy Accommodation Trends

- Nearly all states (45) have adopted pregnancy discrimination laws.
- Some states and localities also have adopted pregnancy accommodation laws requiring employers to provide reasonable accommodations to pregnant employees unless it would cause undue hardship for the employer.
  - CA, CO, CT, DE, DC, HI, IL, KY, LA, ME, MD, MA, MN, NE, NV, NJ, NY, OR, RI, SC, UT, VT, WA, New York City, and Philadelphia.
  - Reasonable accommodations may include more frequent breaks, modified schedules, assistance with physical tasks, equipment, temporary transfer, leave, private space, etc.

Federal Agency Guidance Is Not Law

- Two new Executive Orders and a related Supreme Court decision limit how federal agencies can utilize agency guidance against private parties.
- *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)
  - Courts should defer to agency interpretation of regulations only if the regulation is "genuinely" ambiguous, and if so, "reasonable."
  - Federal courts cannot blindly defer to agency action.
- <u>Executive Order on Promoting the Rule of Law Through Improved Agency Guidance Documents:</u>
  - Agency guidance must expressly state that it does not bind the public, except as authorized by law or as incorporated into a contract.

Federal Agency Guidance Is Not Law

- Executive Order on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication:
  - **Guidance may not be used to impose new standards** of conduct on persons outside the executive branch except as expressly authorized by law.
  - Agency must establish a violation of law by **applying statutes or regulations**.
  - Agency may not **rely solely on a standard of conduct announced in a guidance document** as a violation of applicable statutes or regulations.
  - When agency uses **a guidance document** to state the legal applicability of a statute or regulation, that document **can do no more, with respect to prohibition of conduct, than articulate the agency's understanding of how a statute or regulation applies to particular circumstances**.

Is LGBTQ+ Protected Under Title VII?

- Whether LGBTQ+ is a protected classification under Title VII.
  - Federal appellate courts are divided.
  - Is discrimination against LGBTQ+ individuals “sex” discrimination?
- Three separate cases before the U.S. Supreme Court:
  - *Bostock v. Clayton County Georgia* and *Altitude Express v. Zarda* involve two individuals claiming termination because of sexual orientation.
  - *R.G. & G.R. Harris Funeral Homes v. EEOC* involves the first transgender employment case to reach the U.S. Supreme Court.
- U.S. Supreme Court heard oral arguments on October 8, 2019.
  - Court appeared deeply divided (Alito & Roberts vs. Ginsberg & Breyer).
  - Gorsuch said it was “close.”
  - Rulings not expected until 2020.

State/Local Protections for LGBTQ+

- Many states and localities have enacted statutes to protect LGBTQ+ individuals from employment discrimination.

Sexual Orientation*	Gender Identity*
Alaska, Arizona, California, Colorado, Connecticut, Delaware, D.C., Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, Washington, and Wisconsin	California, Connecticut, Delaware, D.C., Hawaii, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Virginia, and Washington

*In AK, AZ, KS, KY, MI, MO, MT, OH, PA & VA, these apply only to the public sector.

FLSA – Minimum Wages

- Federal Minimum Wage is $7.25/hour
- Many States and Localities are higher
  - State minimum wage rates range from $5.15 in GA and WY to a high of $12.00 in CA, MA, and WA and $14.00 in D.C.
  - Some localities are even higher (Emeryville, CA: $16.30).
- State and local minimum wage rates increase regularly.

FLSA –Exemptions

The US Department of Labor (DOL) announced September 24, 2019 that it will raise the minimum threshold for mandatory overtime pay under the Fair Labor Standards Act (FLSA) to **$35,568** from its current level of $23,660.

- The new rate will take effect January 1, 2020, and is expected to cover an additional 1.3 million workers
- **No exemption for part time.**

The DOL's final rule will also:

- Allow employers to use nondiscretionary bonuses and incentive payments, including commissions, to count for up to 10% of the standard salary level so long as those bonuses are paid annually;
- Raise the annual compensation requirement for "highly compensated employees" from $100,000 per year to $107,432; and
- Revise the special salary levels for workers in US territories as well as the motion picture industry.

- First change since 2004

- Less than the Obama administration's proposal of $47,476

State Wage and Hour Law Exemption Requirements

- Multiple states, including California and New York, have salary thresholds for overtime eligibility that already exceed the new federal standard.
  - The salary thresholds in many states increase frequently.
  - In many states, the minimum salary thresholds apply to all employers regardless of size.
- Some states have expanded the categories of employees who may be exempt.

Gigs to the Gig Economy

- "Gig Economy:" labor market characterized by the prevalence of short-term contracts or freelance work as opposed to permanent jobs.
    - Uber business model
- Potential Benefits to Employers:
    - Savings on labor costs
    - Avoidance of workers compensation, unemployment insurance, and taxes
    - Avoidance of wage and hour law compliance
    - Avoidance of anti-discrimination law compliance
    - Avoidance of OSHA and discrimination laws
- **Risks: misclassifying gig workers as independent contractors versus employees**:
    - Liability for unpaid wages and benefits
    - Penalties and fines
    - Litigation
- Broad range of classification standards used across different states

Gigs to the Gig Economy Cont'd: State Law Trends

- In 2019, CA enacted a very aggressive standard for classifying workers as independent contractors vs. employees.
- CA statute codifies the "ABC test" – to classify a worker as an independent contractor, employer must show he/she is:
    1. Free from the employer's control
    2. Works outside the employer's usual course of business
    3. Customarily engaged in an established business or trade
- Other states have adopted ABC test: NJ & CT
- Several states now are considering adoption of ABC test: NY, IL, WI, OR & WA
- Two states are repealing the ABS test effective 2020: OK & T

Bye-Bye Restrictive Covenants?

- Restrictive covenants protect the company's investments in confidential and proprietary information and business relationships.
- What law applies to enforcement?
  - Currently, no federal law (enter, **Workforce Mobility Act of 2019**)
  - State law – the state where the activity occurs and/or specified in choice of law provision.
    - Choice of law provisions recognized in most states, if not against public policy.
      - Some states expressly reject choice of law provisions (e.g., CA).
      - Generally, a court in a state with a stricter covenant law is not likely to apply (or as liberally apply) the law of a state with more lenient standards or that authorizes the court to modify an agreement to make it enforceable, and enforce it as modified.

Bye-Bye Restrictive Covenants?

- **Workforce Mobility Act of 2019** – a bipartisan bill introduced October 17, 2019 (Senator Chris Murphy (D.-Conn.) and Todd Young (R.-Ind.))
  - To limit the use of non-compete agreements.
- "[N]o person shall **enter into, enforce, or threaten to enforce** a non-compete agreement with any individual who performs work for the person and who in any workweek **is engaged in commerce or in the production of goods for commerce . . . .**"
  - Would invalidate agreements already in place
    - Companies will lose benefit of bargain.
    - How will this affect agreements these are part of?
  - Exceptions: covenants in connection with dissolution of a partnership or sale of a business.
- Could be significant support for it.
  - In recent years, Senators Elizabeth Warren (D.-Mass.) and Marco Rubio (R.-Fla.) introduced other bills to limit or prohibit non-competes.

Bye-Bye Restrictive Covenants?

- State Law Trends:
  - Public opinion disfavors non-competes:
    - Employee lacks bargaining power at the time of employment.
    - Unfairly restrict ability to make a living because the company in better position to bear the burden of competition than the employee is to bear the burden of unemployment.
    - Too broadly applied – employees with no real ability to compete.
  - In 2019, at least 7 state legislatures enacted laws setting new limits on non-competes, particularly with respect to low-wage and entry-level workers.
    - Example: Maryland law now voids non-competes for employees who earn equal to or less $15 per hour or $31,200 per year.

Going to California?

- 2019 saw significant changes in California's employment laws.
  - Often a trend-setter state.

- CA takes the position that its laws apply to any work that is done in CA, regardless of where an employee principally works.
  - Consider when employees travel to CA for work – various CA laws apply.
    - E.g., meal and rest breaks, wage and hour laws, discrimination laws, etc.

- "ABC test" for classification of employees vs. independent contractors.
  - CA already was applying ABC Test in context of wage and hour law.
  - In 2019, CA expanded to certain leave requirements, workers comp., and unemployment comp.

Going to California?

- #MeToo movement prompted changes to CA sexual harassment laws:
  - **STAND Act** voids confidentiality/NDA provisions in settlement agreements for sexual assault, sexual harassment, sex discrimination, or retaliation, unless harmed party requests privacy.
    - NJ, VA & WA have enacted similar legislation.
  - Training requirements: Employers with 5 or more employees must provide 2 hours of training to all supervisory employees and one hour of training to all nonsupervisory employees.
    - Training must be interactive.
    - CT, DE, HI, ME, MA & NY also have enacted training requirements for private employers.
  - CA also considering a bill banning mandatory arbitration provisions in sexual harassment cases.

Going to California?

- Hair discrimination banned by CROWN Act:
  - Expands definition of race under state anti-discrimination laws to include traits historically associated with race, such hair texture and hairstyles.
  - “Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals . . . ”
- Trends in other states:
  - New York has adopted nearly identical legislation.
  - New Jersey is on the verge of enacting it.

Marijuana in North Carolina?

- Employers generally do not have to hire employees who test positive for marijuana.
- **However, Hemp and CBD Oil are legal products as of now**, so long as they contain less than 0.3% percent tetrahydrocannabinol (THC).
  - North Carolina law also provides an exception for the use of hemp extracts to treat intractable epilepsy in certain circumstances.
  - G.S. 90-94.1 allows products for this class of patients to contain up to 0.9% THC.
  - These more specific laws automatically terminate on July 1, 2021 and apply only to a very narrow set of people.
- North Carolina law prohibits employers from discriminating against employees for their lawful use of lawful products during non-working hours (G.S. §95-28.2).
  - Employer generally may set its own rules for its employees during working hours.
  - Employers should not deny employment based on detection of these substances in a drug test.

Marijuana: State Law Trends

- State marijuana laws are a complex web.
- As of September 2019, 33 states and D.C. have legalized medical marijuana use, and 10 states and D.C. have legalized both medical and recreational marijuana use.
- Many of these states have enacted laws that protect employees and job applicants from discrimination based on their status as medical marijuana users (AZ, AR, CT, DE, IL, ME, MA, MN, NY, PA, RI & WV).
  - Employers generally may ban use at work or during working hours.
  - A few states require employers to accommodate medical marijuana use (NV & NY).
  - Nearly all states allow employers to discipline for being impaired at work.
- So far, none of the recreational marijuana statutes contain employment protections.

Marijuana: State Law Trends

- In 2019 New York City became the first municipality to prohibit employers from requiring prospective employees to submit to marijuana testing by amending the New York City Human Rights Law.
  - Such testing now is considered an “unlawful discriminatory practice.”
  - The law provides exceptions for certain types of jobs: (1) safety-related positions; (2) transportation-related positions; (3) caregivers; (4) positions for which drug testing is required by any federal or state statute, regulation, or order for purposes of safety or security; (5) positions for which drug testing is required by a contract with the federal government, or for which the federal government provides funding; and (6) positions for which drug testing is required pursuant to a collective bargaining agreement.
  - The law *does not* provide any exceptions specific to financial services employers.

Social Media Policies

- Since 2012, the NLRB has issued multiple decisions regarding employer restrictions on use of social media.
- NLRA gives employees the right to engage in “concerted action” regarding the terms and conditions of their employment.
  - Employers may not adopt social media policies that prohibit or “chill” concerted action.
- NLRB Advice Memo: Employer may not require employees to identify themselves by their real names when discussing Company on social media.

Should We Be Worried about ICE?

- In 2019, ICE enforcement raid in Mississippi – arrested 680 undocumented workers and seized employer records
  - Largest statewide enforcement action in the nation's history.
  - Increased concern about aggressive enforcement.
- Immigration compliance is good election year politics for both parties.
  - I-9 audits and site visits likely to increase.
  - Industries most at risk: agriculture, construction, hospitality, manufacturing.
- Be prepared to show due diligence efforts and good faith.
  - Conduct routine audits for I-9 compliance.
- Implement training for managers involved in the onboarding process.

Guns in the Workplace

- Currently, no federal law regulates guns in private workplaces.
- About half of the states regulate guns in the workplace in various respects.
  - Balance employee rights versus safety concerns (e.g., “guns in trunks” laws).
- California enacted legislation that will take effect in September 2020.
  - An employer, co-worker or school employee now may file a court petition requesting a gun violence restraining order against an employee who poses a significant danger in the near future of causing personal injury to others by having in their custody or control or owning, purchasing, possessing, or receiving a firearm.

Internal Investigations

- Investigations sometimes require assistance of outside attorneys and/or consultants such as forensic accountants or technology specialists (before or during litigation).
- Attorney-client privilege can extend to communications between counsel and outside consultants.
  - But, consultant must be integral to counsel's ability to perform the investigation and discuss with client.
- *SEC v. Navellier & Assocs.,* Civil Action No. 17-11633-DJC (D. Mass. Jan. 22, 2019)
  - The attorney-client privilege did not extend to an outside consultant hired as part of an internal company review to assist counsel in advising clients regarding possible future litigation with the SEC.
  - The consultant "must be 'necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.'"
  - The consultant must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.
- Companies and counsel need to analyze whether the consultant is truly necessary or merely helpful or convenient, and tailor communications with the consultant accordingly.

Arbitration

- States continue to enact prohibitions mandatory arbitration with employees.
  - CA, IL, MD, NJ, NY, WA & VT.
  - Scope varies by state (CA & VT apply only to sexual harassment claims, while NY applies to all claims of discrimination or harassment).
- Preemption challenges may limit the scope and effect of these state prohibitions due to conflicts with the Federal Arbitration Act (FAA) in cases involving interstate commerce.
  - In June 2019, S.D.N.Y. held the FAA preempted NY prohibition on mandatory arbitration.
- Large companies (e.g., Google and Microsoft) are eliminating or reducing use of mandatory arbitration clauses as a result of public outcry.
- Recommendation: review arbitration provisions in agreements, offer letters, policies, etc.
  - Consider the need for mandatory arbitration.
  - Dial-back over-reaching provisions.

QUESTIONS?

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