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RECENT DEVELOPMENTS IN STATE AND FEDERAL EMPLOYMENT LAW

No single article can summarize all of the changes in state and federal employment law over the course of an entire year. Instead, we have tried to highlight the developments that we believe will most impact employers going forward, including a closing section on items to watch for in 2022. We welcome follow-up and questions from attendees either during the panel presentation, or afterwards, using the contact information provided above.

I. Biden Administration's Employment Law Initiatives – Year 1

A. ***Gender Identity and Sexual Orientation*** – Executive Order 13988 makes it a priority of the Biden Administration "to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation."

B. ***Affirmative Action Plans –*** Biden Administration to beef up monitoring and enforcement efforts through the OFCCP. On December 2, 2021 the Office of Federal Contract Compliance

Programs (OFCCP) issued an announcement introducing its new contractor portal, describing it as a "platform where covered contractors must certify whether they are meeting their requirement to develop and maintain annual AAPs [affirmative action programs]." Beginning on March 31, 2022, contractors will be able to utilize the certification feature in the portal to certify their AAP compliance. Existing contractors must certify whether they have developed and maintained an affirmative action program by June 30, 2022.

C. ***Employee Tip Rules Changed, Penalties Increased –*** On September 24, 2021, the Department of Labor issued a final rule invalidating much of the 2020 tip rule proposed under the Trump Administration (which had not taken effect). Among the highlights: (1) employee coverage by the tip rule is expanded, (2) managers and supervisors may not receive tips from mandatory tip rules, and (3) civil money penalties are expanded beyond the narrowed scope proposed by the prior administration.

D. ***Student-athletes –*** National Labor Relations Board's General Counsel has made clear that she will be open to viewing certain student-athletes at colleges and universities as employees, and support collective bargaining by such students. This follows a Supreme Court ruling against the NCAA, invalidating its rules against compensating student-athletes for their services (which generate billions of dollars each year for colleges and universities). The Board also withdrew a proposed rule from the Trump

Administration that would have rendered most student-athletes at private colleges and universities as non-employees.

II. Lingering Covid Concerns and Returning to Work

A. OSHA Is Still Watching – Keep It Safe

The Supreme Court's highly publicized decisions last month (1) to strike down the OSHA vaccine-or-test mandate for all private employers with more than 100 employees and (2) to uphold the vaccine mandate for healthcare providers who receive Medicare or Medicaid payments may have left non-healthcare employers thinking they are free and clear to handle the pandemic any way they want, as we enter the third year of coping with it.

Not so fast says OSHA (the federal Occupational Safety and Health Administration), which last week announced it had penalized an Ohio auto-parts supplier, Sanoh America, for failing to protect its 270-employee workforce from the coronavirus. Not only did the employer not follow OSHA's federal guidelines on social distancing and mask wearing, it also failed to enforce its own COVID-19 policies.

As a result, according to OSHA, infections surged to 88 employees in August of 2021, with five hospitalizations and two deaths.

"Sanoh America's failure to follow health and safety guidelines and its own company policies resulted in worker illnesses and death. OSHA continues to enforce all standards applying to the coronavirus and holds employers accountable for failing to meet their obligations to minimize worker exposure to the coronavirus," OSHA stated.

All employers should take this as a clear warning and reminder that they can be liable – for civil penalties and even individual claims – if they fail to continue taking reasonable and necessary steps to follow federal and state guidelines to protect workers and reduce infections. OSHA's updated guidance on the coronavirus and protecting the workforce can be found here.

B. The Ten Covid Commandments of Working Under Covid

A majority of employers have returned their employees to work in their offices, plants, stores and factories.

Still, the legal and health issues can be overwhelming. Therefore, following in the footsteps of one of the original lawgivers[1], we thought it might be helpful to break down the main considerations into ten important guidelines:

1. **Recognize that employers have the right to mandate vaccinations** for employees, as the U.S. Equal Employment Opportunity Commission recently noted. Whether that is a good decision for your workplace is a more nuanced question and requires further consideration. Many healthcare providers, including the University of Pennsylvania Health System and a number of our healthcare clients, already have decided it is the right thing to do to protect their patients and employees.

[1] Of course, if Mel Brooks is to be believed, there were originally 15 Commandments. See link here.

2. **If an employee refuses to get vaccinated, don't ask why**. Many of the potential answers (such as health issues and religious beliefs) can be fraught with risk.

3. **If employees do raise religious or disability-related objections to getting vaccinated, employers have a duty to try to accommodate them.** Proceed with caution. Accommodations may include allowing employees to work from home, to wear a mask at work, or otherwise to adjust working conditions to ensure the workplace is safe.

4. **If the employer plans to mandate or check vaccination status, consider how that will be done**. There are three basic options: (1) the honor system (trust the employee's verbal answer); (2) having a Human Resources-type employee check but not copy the CDC proof of vaccination for each employee; or (3) check and copy the proof of vaccination for each employee. In all circumstances the information provided (whether oral or written) must be kept confidential, as with other employee health information.

5. **Consider masking and social distancing requirements for the unvaccinated**, as recommended by OSHA and the CDC, to protect the health and safety of visitors, co-workers and others.

6. **Consider how mandating vaccinations may affect your workforce**, including employee morale and potential

employee resignations for those who refuse to return to work if vaccination is required – and conversely, the objections of those who may refuse to return to work if all are not vaccinated. Try to be flexible and empathetic.

7. **Review state laws** – a handful of states now prohibit employers from asking employees if they have been vaccinated or mandating vaccinations for employees.

8. **Consider what structural, personal and policy safety measures might be needed** to protect the health and safety of employees and visitors, if this is the first time you are returning to the workplace at full force or close to it. OSHA has industry-specific recommendations and 11 specific interventions to protect the health of workers. OSHA will require documentation of Covid-prevention plans for employers who have non-vaccinated employees.

9. **Consider offering employees an incentive or bonus to get vaccinated**. Taxes may apply, depending on the type of incentive offered.

10. **If an "at-risk" employee self-identifies, take appropriate precautions and steps to protect that employee from infection and discrimination**. OSHA and the CDC have helpful guidance.

III. Minimum Wages and Base Salary Requirements

A. State Minimum Wages Up in Many States, Federal Rate Flat.

Lobbying campaigns by workers, unions and progressives to increase state, federal and private minimum wages to $15 per hour have had mixed results in this region. While national retailers such as Walmart, Target, and Amazon have voluntarily increased their minimum wages to $15 per hour, most states remain below that level and the federal rate has not budged except for federal contractors.

New Jersey's Up. Effective January 1, 2022, New Jersey increased its minimum wage to $13 per hour. The rate will climb to $15 by January 1, 2024.

Most employees have minimum wage protection under the law, but there are exceptions, including automobile salespersons, outside salespersons, and minors under the age of 18, except for minors working in certain industries. For more details on the exceptions, see this link. Tipped employees are covered by the law, too, but in a more complicated fashion. Their total earnings (hourly wage plus tips) must equal at least the minimum wage per hour.

Pennsylvania's flat. Pennsylvania's minimum wage remains at $7.25 per hour.

New York's Up. New York's minimum wage is now $15 for most workers, with exceptions.

The federal rate remains at $7.25, but on November 24, 2021, the Department of Labor finalized regulations that raise the minimum hourly rate for federal contractors to $15. The higher wage took effect January 30, 2022.

B. Exempt Base Salary Rate Changes at Federal and State Levels

The federal base salary rate for exempt "white collar workers" (executive, administrative and professional) under the Fair Labor Standards increased to $684 per week ($35,568 per year) in 2020.

In **Pennsylvania**, the state's Department of Labor and Industry had published a final rule to substantially increase the exempt salary requirement to $780 per week effective October 3, 2021, and to $875 per week ($45,500) effective October 3, 2022. **But in a huge development for Pennsylvania employers in 2021**, the General Assembly and Governor agreed as part of a budget resolution to eliminate the rate increases and strip away most modern protections and regulations relating to exempt "white collar" workers and base salary requirements. As a result, exempt Pennsylvania workers have far greater rights under the FLSA than under the Pennsylvania Minimum Wage Act.

In **New Jersey**, the base salary rate for exempt employees in the same as under the FLSA.

In **New York,** the state base salary rate for EAP exempt employees is $937.50 per week, with employees in New York City and some surround counties having a minimum base rate of $1,125 per week ($58,500 per year).

Exceptions apply to all of these general rules.

IV. Latest ABCs of LGBTQ

Legal issues continue to arise an in the wake of the Supreme Court's 2020 decision, *Bostock v. Clayton County*, 590 U. S. ____ (2020), which held that discrimination against employees based on sexual orientation or gender identity

is sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended.

- *Bear Creek Bible Church & Braidwood Management, Inc. v. EEOC* (N.D. Tex. Nov. 1, 2021). The court explained, "an employer violates Title VII if it treats an employee worse because of biological sex, and that an employer similarly violates Title VII if it targets solely homosexual or transgender conduct with its policies." Of note, the court found that employer policies regarding different dress codes and restrooms did not violate Title VII, but that policies concerning bisexual conduct, sex-reassignment surgery and hormone treatment did.
- *Hobby Lobby Stores, Inc. v. Sommerville* (Ill. App. August 13, 2021). Employer's refusal to allow transgender woman to use women's bathroom violated constituted sex discrimination. Damage award of $220,000 affirmed.
- *Tudor v. Southeastern Oklahoma State University* (Sept. 13, 2021). Reinstatement with tenure affirmed for transgender professor who alleged she was denied tenure due to sex discrimination.

V. Sexual Harassment - Remember Me Too?

While the spotlight has shifted away from the "Me Too" movement, the awakening that occurred years ago continues to reverberate in courtrooms and workplaces around the country, encouraging employers and society to prevent workplace sexual harassment, thoroughly investigate claims that do arise, increase transparency, and hold harassers accountable.

Perhaps the most prominent recent case involved former New York Governor Andrew Cuomo, who was forced to resign in disgrace after state investigations found he had "engaged in conduct constituting sexual harassment under federal and New York State law." Of note for employers – and helpful in anti-harassment training – Cuomo has been **criminally** charged with the misdemeanor offense of forcible touching.

On the legislative front, Congress has passed (and President Biden is expected to sign into law) a bill to prohibit employers from requiring employees to privately arbitrate claims of sexual harassment (rather than pursue them in court).

In addition, numerous states – including New Jersey – have recently passed laws that restrict employer efforts to have confidentiality clauses in settlement agreements for sexual harassment claims. Employers should ensure their counsel checks these laws for each applicable state before presenting the final language for a settlement agreement or severance agreement involving such claims.

VI. Evolving Race Discrimination Standards and Issues

A. A more diverse workforce – and more complex claims

Demographic changes in the United States may lead to more varied claims of race discrimination in employment, especially with regard to employees who come from the growing population of mixed-race families.

The U.S. Census Bureau reports that the "multiracial population" of the nation surged 276 percent in the past decade, up from 9 million people to 33.8

million. In addition, the Hispanic or Latino population, which includes any race, rose 23% to 62.1 million in 2020. In contrast, respondents who self-identified as White (and not any other race) accounted for 204.3 million people and 61.6% of all people living in the United States in 2020, down from 223.6 million and 72.4% in 2010. Further data on the Census is available here. Some of these changes are likely due the Census Bureau's refinement of its questions and methods, and cultural changes relating to racial identity. Nevertheless, the data reflect a dramatic shift in how Americans identify themselves racially.

Why does this matter in the field of labor and employment law? A recent decision by the U.S. Court of Appeals for the Third Circuit (covering Pennsylvania, New Jersey, Delaware and the U.S. Virgin Islands) drives home the answer.

In *Kengerski v. Harper*, 6 F. 4th 531 - Court of Appeals, 3rd Circuit, 2021, decided this past summer, a captain with the Allegheny County Jail filed an internal complaint to the warden about a recently promoted co-worker who had made racist comments about the captain's relative. Specifically, the captain alleged that after he disclosed to the co-worker that his grandniece was biracial, the co-worker made racist comments (referring to the grandniece as a "little monkey") and sent harassing texts and photographs with comments and "offensive stereotypes." Stunningly, the defendant tried to explain away the monkey comment as a harmless "zoomorphism" (defense fail). Seven months after the employee complained, the county fired him. He filed suit under Title VII of the Civil Rights Act of 1964, claiming the county terminated him in retaliation for complaining about the racial harassment regarding his grandniece.

The primary question before the Court of Appeals was whether Title VII protected him against retaliation under these facts, since he was not being targeted based on his race (White). First, the Court held that "harassment against an employee because he associates with a person of another race, such as a family member, may violate Title VII by creating a hostile work environment" – agreeing with four other appellate courts who have so ruled. In other words, even if the employee is not being harassed because of his race, he is still protected from "associational discrimination" relating to his relationships with people of other races or mixed racial backgrounds. Second, the Court noted, "Title VII protects all employees from retaliation when they reasonably believe that behavior at their work violates the statute and they make a good-faith complaint."

Under the case's facts, therefore, the employee could meet the elements of a retaliation claim under Title VII and the Third Circuit reversed the district court's grant of summary judgment and remanded the case for a decision on the merits.

So what lessons can we take from this case and the multi-racial trend?

- Employees are protected from harassment and discrimination not just based on their own race, but also that of their family members and those with whom they associate;
- Employers can expect more employees to claim protected status from these relationships, tracking the dramatic increase in multi-racial Americans;

- Any offensive racial comment or harassment should be prohibited at work, regardless of whom it targets; and
- There is no "safe harbor" (and there never was) for White-on-White offensive racial conduct or comments, even if directed at another race.

B. Beware of Reverse Discrimination

Employers and society are moving rapidly to correct historic injustices, inequality and ignorance with regard to racism, sexism and gender identity. This is long-overdue progress, but employers need to be wary of going overboard and engaging in "reverse" discrimination.

The law of the land – state and federal – requires "equal treatment" regardless of race, sex or gender with few exceptions.

The well-documented history of unequal treatment of American Blacks, Hispanics, Asians, women, gay people and the transgender community is prompting many managers, lawyers and human resources professionals to push strongly to eradicate discrimination and harassment against these minorities, focusing on those who have been disenfranchised for centuries. And that is a good thing.

But when employers and decision-makers apply different standards *favoring disadvantaged groups* in pursuit of their goal, the danger of "reverse discrimination" is high.

Why do we highlight this now? Because recent rhetoric and decision-making suggests that many are nearing or crossing the line under the law:

- Politicians have advocated a presumption that all allegations of sexual harassment should be credited as true, until proven otherwise. That is not due process, and innocent victims of false accusations have, on occasion, prevailed in showing "reverse sex discrimination" when a male harasser is terminated based on an unsubstantiated, single accusation by a female, because the employer prejudicially presumes "the guy must have done it."
- Supporters of diversity and affirmative action sometimes get ahead of the facts and direct that a position be awarded to a minority to correct past disparities in race. It is completely legal and proper to have an affirmative action plan that follows the requirements of the law, to recruit heavily from underrepresented populations, and to promote diversity and inclusion. An employer breaks the law, however, when it decides who to hire or promote based on the candidate's race or sex. Yet, surprisingly often, such reverse race discrimination occurs sometimes. See link here. While understandable, and perhaps even laudable in the goal, such race-based or sex-based decision-making is nevertheless completely illegal.
- Major corporate employers – including Google, Microsoft, YouTube, Starbucks and Wells Fargo – have faced legal challenges and lawsuits claiming reverse discrimination in the past year after adopting diversity policies and other initiatives to hire and promote more people of color into their higher ranks.

Another reason to be careful: juries. Not all jurors are "woke" and an undeniable fact is that in most U.S. jurisdictions, the jury you get will be predominantly white. In our experience trying such lawsuits, these juries will be receptive to a claim of "reverse" discrimination, and eager to enforce the "equal treatment" standard, punishing those who transgress in any direction. Some of the largest verdicts in discrimination cases in Pennsylvania, for example, have been "reverse" cases.

The point here is not to be reactionary or preserve an unjust system. Rather, it is merely a warning that in the present-day rush to promote

diversity and inclusion, we all must keep in mind that equal treatment remains the law of the land.

VII. Age Discrimination - New Standard on the Horizon?

We usually do not report on proposed legislation or bills, but this one is important enough for an update – and seems to have the bipartisan and White House backing that could make it law soon.

Last year the House of Representatives passed a bill by a vote of 247-178 that would lighten the standard for age discrimination claims to bring it back in line with other anti-discrimination laws and make it easier for employees to prove a violation of the Age Discrimination in Employment Act ("ADEA").

The law would effectively nullify *Gross v. FBL Financial Services Inc*. (557 US 167, 129 S. Ct. 2343, 174 L. Ed. 2d 119 - Supreme Court, 2009), a 5-4 split decision of the Supreme Court that concluded that ADEA plaintiffs must prove they were discriminated against "because of" age, meaning that plaintiffs must show that "but for" their age, they would not have been fired or otherwise harmed. In contrast, Title VII of the Civil Rights Act has been interpreted to require only that the protected status (sex, race, religion, national origin, etc.) was a "motivating factor" or "played a role" in the mistreatment. The plaintiff suing under Title VII may prevail even if the employer had "mixed motives" – both discrimination and legitimate business reasons.

The lighter burden in the new law also would apply to make the "motivating factor" standard available for workers claiming disability discrimination under the Americans with Disabilities Act and retaliation under Title VII.

Given the age of our President (78) and the average age of our Senators (63), one would think this bill would get a sympathetic (if droopy) ear from Mitch McConnell (79) and friends, as it did from Nancy Pelosi (81).

However, it has stalled in the Senate and its fate is unknown.

VIII. Union organizing

With unemployment low, workers feeling empowered, and the Biden Administration and National Labor Relations Board supporting union rights, expect more workers and unions to be active in pursuing unionization and collective bargaining.

Recent examples at Amazon & Starbucks illustrate how unions are pushing to enter companies, geographic regions, and areas in which they have been unsuccessful in the past.

IX. New Laws in the Region

Philadelphia Bans Some Marijuana Testing. Philadelphia's ban on pre-employment marijuana testing took effect January 1, 2022. The ordinance prohibits pre-employment marijuana testing as a condition of employment. Big exhale for a lot of job seekers out there.

Employers and employees should know, however, that the law does not make for-cause testing during employment illegal, such as when an employee is involved in an accident at work. Moreover, employers may discipline employees for being under the influence of marijuana at work or possessing it at work.

Substantial exceptions to the law apply, including for law enforcement, positions requiring a commercial driver's license, or positions requiring the

supervision or care of children, medical patients, the disabled or otherwise vulnerable individuals. In addition, the Philadelphia ordinance does not apply if federal or state law, or an enforcement agency, requires such pre-employment testing.

New York Requires Notice of Electronic Monitoring. It has long been a best practice for employers to include in their employee handbooks a provision putting employees on notice that their use of company computers, phones and email systems is subject to employer monitoring, and workers should have no expectation of privacy when using them.

New York now has made such notice mandatory, amending the state's Civil Rights Law to require written notice to employees if the employer "monitors or otherwise intercepts" telephone calls, emails or internet usage using "any electronic device or system."

The law takes effect May 7, 2022. Notices need to be provided to employees and posted conspicuously in either a physical location or on the company intranet.

Independent Contractor Misclassification in New Jersey. Intentional employee misclassification in order to evade insurance premium payments violates the New Jersey Insurance Fraud Prevention Act. Effective January 1, 2022, civil penalties are up to $5,000 for first violation, in addition to potential liability to the individual workers for employee benefits and overtime pay.

X. Employment Law Trends Expected for 2022

A. ***"The Great Resignation" has led to a big surge in restrictive covenant litigation to enforce non-compete and non-solicit covenants.*** Top-performing employees are being recruited aggressively and responding to the offers of greater pay, opportunity, etc. For those that have non-compete, confidentiality and non-solicit clauses in their employment agreements, this leads to court fights – and the battle of enforceability. Check your agreements (or implement them, if you do not have them already but need them), make sure they are reasonably tailored, supported by consideration, enforceable, signed and secure in employee files (paper and electronic). State laws vary on the terms that are permitted, so consult with your attorney, as needed.

B. ***Ramping up efforts to retain employees.*** With sales and profits increasing for most employers, we can expect an arms race in employer efforts to keep their employees happy and from jumping ship. Cash is king, of course, so salary increases, bigger bonuses and a higher starting rate will be import. Also consider increasing perks, getting rid of jerks, team building, employee stock ownership plans, and enhancing the quality of the work experience.

C. ***Covid claims regarding leave, vaccinations and terminations.*** Even if the pandemic eases, expect more and more employees to challenge vaccine mandates, mask mandates, and discipline or terminations relating to covid and leaves for covid – including to care for sick family members. "Covid brain" also may become a

more common explanation for work errors. Follow the rules and go step by step.

D. ***Wage and hour class actions.*** Employers continue to misclassify some employees as "salaried" and exempt from overtime, even when they do not meet the requirements of state and federal law. Women continue to be paid, on average, less than men. And some employers try to dodge state and federal taxes by misclassifying some employees as "independent contractors." These are all dangerous situations that can lead to huge liabilities and disruptions of the workforce – often triggered by plaintiffs' class-action lawyers, eager to identify common violations. Employer self-audits are commended to avoid these expanding and costly claims.

E. ***Working from home after covid –*** adjusting to the new normal. Employers will need to determine to what extent they will allow employees to work from home after covid subsides. There are costs and benefits, of course, but no denying that many employees are never going back to working at the office five days a week. How an employer deals with that reality may determine how well they succeed in 2022 and beyond.