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Employment and Labor Law: A Year in Review

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▶ COVID-19

CMS Vaccine Mandate -- Exemptions

- ▶ Medical Exemption
 - Available for recognized clinical contraindications to COVID-19 vaccines.
 - Temporary delay in vaccination may also be available for individuals due to “clinical precautions and considerations,” which may include acute illness secondary to COVID-19, and individuals who received monoclonal antibodies or convalescent plasma for COVID-19 treatment.
- ▶ Religious Exemption
 - Available to employees whose sincerely held religious belief, observance, or practice prevents them from being vaccinated against COVID-19.
 - EEOC guidance states: “an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information.”

Exemption Considerations/Analysis

Medical Exemption

- Exemption form is complete, signed, and dated by licensed practitioner.
- LP is practicing within the scope of practice.
- LP is not the employee requesting exemptions.
- Clearly indicates employee's contraindications.
- Contraindications are recognized and clinically appropriate.

Exemption Considerations/Analysis Con't..

- ▶ Religious Exemption
 - Employee clearly identifies religious belief and it does not appear to be merely philosophical, moral, or political.
 - Employee demonstrates the sincerity of the belief by explaining WHY the religious belief prevents vaccination.
 - There is no objective information that casts doubt on sincerity of belief or its religious nature. (e.g. first requested a medical exemption but submitted a religious exemption upon denial).

CMS Vaccine Mandate

- ▶ What are surveyors looking for?
 - The regulations (42 CFR § 483.80 and § 483.430) require the following at a minimum:
 - Documentation that staff were provided education regarding the benefits and risks and potential side effects associated with the COVID-19 vaccine.
 - Documentation that staff were offered the COVID-19 vaccine or information on obtaining the COVID-19 vaccine.

CMS Vaccine Mandate

- Documentation that vaccines were offered, and whether accepted or declined.
- A process for ensuring all staff (unless exempted) have received the first vaccine prior to providing care.
- A process for ensuring all staff (unless exempted) are fully vaccinated.
- A process for ensuring precautions are in place to mitigate transmission by all staff not vaccinated.
- A process for tracking and securely documenting staff vaccination status.
- A process for tracking which staff have received booster(s).
- A process by which staff may request an exemption.
- A process for tracking and documenting information from staff regarding exemption requests.

CMS Vaccine Mandate Con't

- A process for ensuring all appropriate documentation respecting a medical exemption is collected.
- A process for ensuring and tracking the vaccination status of all staff for whom the vaccination must be delayed.
- Contingency plans for staff who are not fully vaccinated.

CMS Vaccine Mandate Misc.

- ▶ CDC Recommendations vs. CMS Mandate
 - “Up-to-date” vs. “Fully-vaccinated”
- ▶ At what point in the hiring process may an employer inquire about vaccination status?

What's New?

Updated EEOC Charge Filings

TYPE	YEAR 2019	YEAR 2020	YEAR 2021
Total	72,675	67,448	61,331
Race	23,976	22,064	20,908
Color	3,415	3,562	3,516
Sex	23,532	21,398	18,762
National Origin	7,009	6,377	6,213
Religion	2,725	2,404	2,111
Retaliation-All	39,110	37,632	34,322
Retaliation Title VII	30,117	27,997	25,121
Age	15,573	14,183	12,965
Disability	24,238	24,324	22,843
Equal Pay Act	1,117	980	885
GINA	209	440	242

Judicial Case Filings

Twelve-Month Period	# of Employment Discrimination Cases Filed
2016	14,109 (including ADA employment cases)
2017	14,406 (including ADA employment cases)
2018	15,203 (including ADA employment cases)
2019	15,119 (including ADA employment cases)
2020	13,712 (including ADA employment cases)

PA UC Update

- ▶ Reminder that employers are now required to provide departing employees with an Employee Information Sheet, Form UC 1609.
- ▶ UC Claims System up and running for about a year.
- ▶ Uptick in fraud without a dedicated employer reporting mechanism.
- ▶ Job Search requirements resumed in July 2021.
- ▶ In-person hearings have resumed.
 - Considerations for self-representation, UC service, or attorney.

Wage and Hour Update

- ▶ As of February 1st, DOL is in the process of hiring at least 100 investigators to monitor employers for Wage and Hour violations.
- ▶ In FY 2021, DOL collected \$230 million for workers who were improperly compensated.
- ▶ DOL announced last summer that it was in the process of reviewing the Final Overtime Rule implemented under the Trump administration, which raised the salary-basis threshold to \$684/week and announced a proposed rule may be coming in October.
- ▶ DOL held “listening sessions” for employers in mid-May to discuss some of DOL’s proposed changes.
- ▶ It is speculated that salary levels may reach \$900/week or more.

Wage and Hour Update

- ▶ As part of the 2021-2022 PA budgetary process, Act 70 became law on July 9, 2021, which abrogated regulations for the PA Minimum Wage Act.
- ▶ No legislative action this year to rectify the situation.
- ▶ Effectively, this means that the executive, administrative, and professional exemptions of PA's Minimum Wage Act are no longer enforceable by DLI. However, the federal DOL still enforces its rules.
- ▶ Employers need to know and review employee classifications, especially in nursing.
- ▶ Considerations for 8/80 Rule.
- ▶ See EEOC v. Medical Staffing of America, LLC

OSHA Update

- ▶ General Duties Clause reminder.
- ▶ Injury Log (Form 300) – recording COVID cases.
- ▶ No need to record reaction to COVID vaccine through May 2023.
- ▶ June 2021 Healthcare ETS.
 - Expired in December of 2021.
 - Recordkeeping duties remain.
 - A comment period on a proposed final standard closed on April 22nd and a hearing was held on April 27th.
- ▶ Uptick in OSHA inspections in long-term care through June 9th.
Could be additional focused inspection windows.

OSHA Update Con't

- ▶ What will OSHA review at inspection?
- ▶ See Hi Tech Motorcars, LLC case.

FMLA Update

- ▶ DOL forms updated in Summer 2020.
 - We strongly recommend using the DOL forms versus an in-house form.
 - Be aware of the various notices and designations an employer must make.
 - When in doubt, give employees a Certification of Health Care Provider to be completed by their physician.
- ▶ Law continues to evolve to become less rigid and punish the mechanical application of standards; it's not black and white.
- ▶ See EEOC v. Groendyke Transport, Inc. case

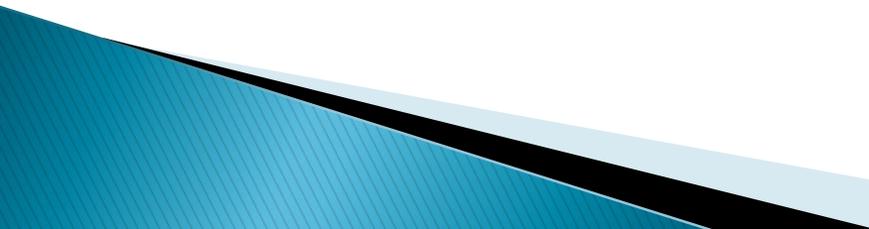
NLRB Update

- ▶ April 7th General Counsel memo requesting NLRB to restrict employers from requiring employees to attend meetings discussing union issues on work time.
- ▶ Social Media policies continue to be a hotly-litigated issue.
- ▶ In *Medic Ambulance Service*, 370 NLRB No. 65 (Jan. 4, 2021), NLRB found the following provisions in an employer's Social Media Policy to be acceptable:
 - “Do not disclose confidential or proprietary information regarding the company or your coworkers.”
 - A prohibition of employees using the company name to endorse a product or pass on opinions regarding people, products, or causes.
 - Prohibiting employees from using social media to disparage the company or others.
 - Employers should periodically review social media policies (and Employee Handbooks generally) to ensure compliance.

NLRB Update Con't.

- ▶ Historic Medicaid funding increase and relationship to union activity.
 - ▶ Renewed focus on union activity.
 - ▶ In July, NLRB announced union petitions up 58% during 1st 9 months of FY 2022.
 - ▶ Proposed Joint Employer Rule of 9/6/22.
 - ▶ DOL issues Employer Toolkit to help employers deal with union issues.
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Medical Marijuana in PA

- ▶ Medical Marijuana Act (“MMA”) passed in 2016.
 - ▶ An employer cannot discriminate against applicants or employees “solely on the basis of such employee’s status as an individual who is certified to use medical marijuana.”
 - ▶ Federal MORE bill, which would end federal prohibition on cannabis use, passed in the House, but not expected to pass Senate.
 - ▶ NJ has legalized recreational use of marijuana.
 - ▶ Recreational use still illegal in PA, as is smoking medical marijuana.
 - ▶ Philadelphia ordinance regarding job applicant testing.
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MISCELLANEOUS

- ▶ I-9 Proposed Rulemaking for Remote Verification of I-9 Documents
 - Would give employers flexibility to examine I-9 documents via video or other remote means instead of an in-person examination.
 - Would require employers to retain evidence of the documents examined.
 - ▶ H-1B VISA cap already met for FY 2023.
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PA Workers' Compensation Update

- ▶ **No reported COVID-19 cases to date.**
 - Oral report from WCJ at conference suggests COVID cases to number in the hundreds so far, most of which have resolved.
 - However, DLI's "Pennsylvania Workers' Compensation Workplace Safety Annual Report" suggests there were far more.
 - We are aware of a few unreported cases which did not settle, but details are sparse.
- ▶ **Two avenues to pursue COVID WC claim:**
 - Infectious Disease.
 - Disease as Injury.
- ▶ **Tough standard to prove COVID-19 contracted at work and to the exclusion of other sources, which requires a medical expert.**
 - What can employers do prior to and after the claim is made?
- ▶ **What is the pragmatic approach for employers: to settle or not to settle?**

Statutes, Case Law, and Guidance

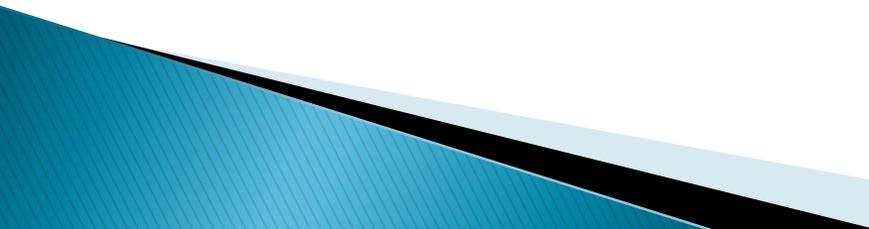
Statutes

- ▶ **Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act**
 - Passed in the U.S. House of Representatives 4/1/22; Currently before the Senate.
 - Removes marijuana from the list of scheduled substances under the Controlled Substances Act, also eliminating criminal penalties for individuals who manufacture, distribute, or possess marijuana.
- ▶ **Creating a Respectful and Open World for Natural Hair (“CROWN”) Act of 2022**
 - Passed in the House on 3/18/22; Currently before the Senate.
 - Prohibits discrimination based on an individual's hair texture or hairstyle if that texture or style is commonly associated with a particular race or national origin.
- ▶ **Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 signed into law on March 3, 2022.**
 - Amends the Federal Arbitration Act makes arbitrations unenforceable as to claims of sexual assault and sexual harassment.
 - Applies to claims filed after March 3, 2020.

Recent Title VII Cases

- ▶ **Kengerski v. Harper**
 - Violation of Title VII by discriminating against employee for associating with an employee of a different protected class.
- ▶ **Whetstine v. Woods Services**
 - Termination of employment for office romance/love triangle NOT discrimination based on sex.
- ▶ **Norfolk v. GEO Group, Inc.**
 - Employer may be liable for discrimination based on spouse's protected activity.
- ▶ **Friel v. Mnuchin**
 - No sex discrimination claim where claim is based on end of consensual relationship.

Recent EEOC Guidance

- ▶ EEOC created a new webpage with guidance regarding discrimination based on sexual orientation and gender identity.
 - ▶ The guidance states, among other things, that consistent, intentional use of names or pronouns inconsistent with a transgender individual's preferred gender (misgendering) could result in liability for a hostile work environment.
 - ▶ However, unintentional use of the same does not arise to such a level.
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Questions?

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Thank you and enjoy the conference!

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