

Hot Topics in Employment Law COVID-19 and Other Topics

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Hot Topics in Employment Law: Overview

- COVID-19 Related Legislation
- Re-Opening Pitfalls and Best Practices
- Employment Litigation Trends
- 2019-2020 United States Supreme Court Term
- Question and Answer Session

COVID-19 Related Legislation

COVID-19 Related Legislation

Families First Coronavirus Response Act (FFCRA)

- First federal paid-leave program ever
- Passed by Congress on March 18, 2020
- DOL's Final Rule implemented on April 1, 2020
- Benefits are provided through December 31, 2020
 - But very likely to be extended into 2021 with no abatement of COVID-19
- Offset to Costs to Employers: a dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA

Families First Coronavirus Response Act (FFCRA)

- Paid short-term sick leave and paid longer-term family medical leave:
 - Paid sick leave:
 - Up to **80 hours** at the **employee's regular rate of pay**
 - Six qualifying reasons
 - Paid FMLA leave:
 - Up to **10 weeks** of at **two-third the employee's regular rate of pay**
 - Limited to three of the six qualifying reasons

FFCRA Qualifying Reasons

- Paid Sick Leave: The employee:
 1. is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
 2. has been advised by a health care provider to self-quarantine related to COVID-19;
 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
 4. is caring for an individual subject to a quarantine order;
 5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
 6. is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

FFCRA Qualifying Reasons

- Paid FMLA Leave:
 - More limited—both in reasons (only 2) and pay (only 2/3 regular rate)
 - Employee needs leave because employee:
 1. is caring for an individual subject to a quarantine order;
 2. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19.

Paycheck Protection Program (PPP)

- Federal loan program established by the federal CARES Act.
- Designed to incentivize employers not to furlough or layoff workforces.
- Paycheck Protection Program Flexibility Act:
 - Signed into law by Congress on June 5, 2020.
 - Made changes to the original PPP and extended application period.
- Covers up to 24 weeks of wages and other expenses for business disruptions during the global pandemic.
- Loan fully forgiven if funds used for payroll costs, interest on mortgages, rent, and utilities.
- Remains to be seen if Congress will renew the program.

What the Future Holds for FFCRA

- *State of New York v. United States Department of Labor*
 - US District Court for the Southern District of New York
 - Court held the US Department of Labor exceeded its authority and violated the Administrative Procedure Act with respect to:
 1. The work-availability requirement for the FFCRA's paid sick leave and paid FMLA leave;
 2. The definition of "health care provider";
 3. The prohibition on intermittent leave under certain circumstances; and
 4. The documentation requirements for leave under the FFCRA.

What the Future Holds for FFCRA and PPP

- Continued court battles regarding the regulations implementing both the FFCRA and PPP.
- As cases of COVID-19 surge across the country, will employers be able to rely on having no work available for employees to perform to circumvent paid-leave obligations?
- Will either program be extended or renewed?

Re-Opening Pitfalls and Best Practices

Re-Opening Pitfalls and Best Practices

- Dealing with continued surges and spikes of COVID-19
- As such, many state, county, and city governments have pulled back re-opening plans
- Employers should be especially cautious regarding:
 - Exercising bias in determining who to return to work;
 - Failing to follow CDC guidelines;
 - Screening all employees for COVID-19 in the same way; and
 - Ignoring employee concerns regarding COVID-19.

Re-Opening Pitfalls and Best Practices

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Re-Opening Hypothetical

- State-wide mask ordinance
- Employer runs a manufacturing facility. Employer and managers are anti-mask and believe the government is infringing on an individual's rights to force individuals to wear masks.
- Employees also believe the same premise.
- Do employees in manufacturing facility have to wear masks?
 - Employer liability
 - OSHA general duty for safe workplace

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Re-Opening Pitfalls and Best Practices

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Re-Opening Hypothetical

- Employee took FFCRA paid leave in April and May due to child care issues when schools were closed.
- Many employees have mentioned being concerned about child care issues and/or homeschooling once school will start for their children in the fall.
- Managers are concerned that employees will have productivity issues and the workplace will be understaffed as a result.
- As a result, managers would like to ask employees what their plans are for child care when schools start and/or if they intend to take leave as a result.
- ISSUES:
 1. Possible discrimination and/or retaliation issues.
 2. What if employees run out of the 12-weeks of leave provided by FFCRA?

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Employment Litigation Trends

Employment Litigation Trends

- EEOC suspended the issuance of charge closure documents unless a charging party requested them as of March 21, 2020. On August 3, 2020, the EEOC began issuing Notices that had been suspended along with newly processed Notices.
- Claims reported to EEOC are on the rise due to COVID-19.
- No coincidence that greatest volume of cases are in states hardest hit by COVID-19 (CA, FL, TX).

Employment Litigation Trends

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COVID-19 Related Lawsuits

- Public Nuisance Claims in COVID-19 Workplace Litigation
- Increase in Wage and Hour Claims Across the Country
- Whistleblower Lawsuits
- Wrongful Termination Claims Alleging Violation of Public Policy

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Employment Litigation Trends

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OSHA General Duty Rule Obligations

- Employers have a general duty to protect their employees from hazards in the workplace
- No private cause of action
- OSHA enforcement
 - Agency has pledged to pursue enforcement actions against employers violating general duty.

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Other Employment Trends

- Possible Family Medical and Leave Act (FMLA) Overhaul
 - US Department of Labor requested comments and data “to provide a foundation for examining the effectiveness of the current regulations in meeting the statutory objectives of the FMLA.”
 - Specifically:
 - Definition of a “serious health condition”
 - Difficulties associated with intermittent leave
- EEOC Notice of Proposed Rulemaking on Conciliation
 - EEOC Meeting on August 18, 2020

2019-2020 United States Supreme Court Term

- *Bostock v. Clayton County, Georgia*
 - Protects sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964
 - Opinion written by Justice Gorsuch
 - So long as plaintiff's sex was one but-for cause of that decision, that is enough to trigger liability under Title VII of the Civil Rights Act of 1964
 - Put another way: if changing the employee's sex would have yielded a different choice by employer, then it is based on "sex"
 - Individuals can use either a "but for" causation or the lesser mixed motive standard when attempting to prove disparate impact cases under Title VII

- *Our Lady of Guadalupe School v. Morrissey-Berru*
 - 7-2 Ruling
 - Opinion written by Justice Alito
 - Holding: The First Amendment's freedom of religion clauses bar courts from adjudicating employees' discrimination claims against their religious employers.
 - Takeaway: Ministerial exception allowed for religious organizations on employment claims.

- *Babb v. Wilkie*
 - 8-1 Ruling
 - Opinion written by Justice Alito
 - Only applicable to public employees, not private sector employees
 - Holding: “If age is a factor in an employment decision, then [the Age Discrimination in Employment Act (ADEA)] has been violated.”
 - Takeaway:
 - It is now easier for federal employees to prove age discrimination.
 - Courts should not use the heightened “but for” causation test for ADEA claims, but instead should use the “motivating factor” standard.

- *Yovino v. Rizo*
 - Closely watched Equal Pay Act (EPA) case determining whether prior salary history is a “factor other than sex” under the EPA
 - Ninth Circuit en banc ruled that prior salary history should not be a “factor other than sex” for which employers can raise as a defense under the Equal Pay Act (EPA).
 - But, the judge who wrote the opinion died 11 days before it was filed.
 - Key because with the judge’s vote, the panel was split.
 - Supreme Court vacated and remanded for further proceedings.
 - Takeway: Because a judge can change his or her decision up to the filing of an opinion, the death of a judge renders the judge unable to participate.

Question and Answer Session