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Notes: Top Workplace and Employment Law Considerations in 2021

(*January 28, 2021*)

Catch Me If You Can: State Law Compliance

Many states have been updating their FMLA leave laws in recent years, and some long-planned changes will take effect in 2021: California, Colorado, Connecticut, Maine, Massachusetts, and New York all have updated or new leave laws, each with its own details and requirements. There are newer laws, too, spurred by the COVID-19 pandemic, to protect workers' health and the safety of their co-workers.

California's AB 685 will be in effect through Jan. 1, 2023. Under this law, employers who learn of a possible COVID-19 exposure must give potentially exposed employees and subcontractors written notice within one day. Employers who learn of an outbreak of multiple cases have 48 hours to report the situation to public health officials.

Colorado is extending its 2020 FFCRA coverage. All employers must provide two weeks (up to 80 hours) of emergency paid sick leave for all employees who need time off to quarantine, who are sick with COVID-19 or who are caring for a sick child or one who's out of school due to the pandemic. As if that's not enough, there are also a variety of anti-harassment training requirements for different states.

Employment law changes in 2021 can create complex new tracking and reporting requirements, especially for businesses that operate in more than one locale. You may want to consider legal support to stay on top of these laws. We are encouraging all employers who are in multiple locations to check in with us at the end or beginning of each year to ensure their multi-state addendum is up to date.

Post-Election Update

HR leaders can expect more employee-friendly policies under President Biden. As employers work to restore stability—and a greater sense of normalcy—in the year ahead, it is important to understand that 2021 also likely will be an unpredictable year, especially related to medical, social, economic and political factors, including on the legislative and regulatory fronts.

Biden's announced proposals include increasing the federal minimum wage to $15 per hour. He also supports the Paycheck Fairness Act, which would require employers to demonstrate the reason for disparities in pay between men and women. These proposals have been languishing in

Congress for several years, and the prospects for final action during the 117th Congress are not clear, yet a Democratic-led House, Senate, and White House could push them forward.

Paid leave faces a similar scenario. Biden supports paid family and medical leave based on proposals such as the FAMILY Act, which would provide workers two-thirds of their salary (subject to a cap) for up to 12 weeks of qualifying leave. He also supports the Healthy Families Act, under which employees would earn an hour of paid sick leave for every 30 hours worked, up to seven paid sick days per year.

Biden has also said he would ensure that workers receive overtime protections to which they are entitled. In addition, he proposed restoring the broad definition of "joint employment" and stopping employers from misclassifying workers (including "gig" workers) as independent contractors. He could attempt to implement such proposals through executive and administrative action.

Having regained control of the Senate, Congressional Democrats are expected to pass the Forced Arbitration Injustice Repeal Act, and Biden has indicated his support. The Act, which has already passed the House, would invalidate pre-dispute arbitration agreements in the employment, civil rights, consumer, and antitrust contexts, and would require employers to litigate workplace disputes in court.

In its 2018 decision in *Epic Systems v. Lewis*, the Supreme Court expressly upheld class and collective action waivers in the employment context. Employers utilizing such waivers can currently mandate the resolution of employment-related claims on an individual basis in an arbitration proceeding, thereby minimizing their exposure to potential class-wide liability. Notwithstanding *Epic Systems*, Biden has stated that he would sign legislation prohibiting employers from seeking such waivers.

Finally, Biden has proposed placing limits on non-compete and no-poaching agreements. More specifically, Biden has stated that he will work with Congress to prohibit non-compete agreements with the exception of those "that are absolutely necessary to protect a narrowly defined category of trade secrets" and to eliminate no-poaching agreements altogether.

Remote Work: Important Considerations as Employees Continue to Work at Home

Language to Consider in Remote Work Policies:

- General remote work policy language
- Safe workplace
- Injury reporting
- Timekeeping
- Overtime
- Meal and rest breaks
- Discrimination, harassment, accommodation
- Confidentiality, data security

Update the following policies and training managers:

1. Wage and Hour Compliance
    a. Implement reasonable reporting procedures for unscheduled time
    b. Travel time: Remote workers reporting to other sites
    c. Reimbursement: State-specific laws: Some cover all incurred business expenses; others for equipment that cannot be otherwise used by employee
2. Health and safety issues
    a. OSHA not inspecting home offices
    b. Injury at home is work-related if directly related to performance of work and the employee's job
    c. Communicate to employees about home workplace free of safety hazards. Provide written guidance, including to report injuries
    d. Be alert to accommodation requests disguised as requests for home equipment (faster computer, larger monitor, etc.)

Consider the following for relocation or working in a state other than corporate office location:

- Where are employees working? Require approval for change
- Short-term work (e.g., two-week vacation) less of a concern
- Tax implications for employer and employee:
    - Employer: May be considered to be doing business in another state, requiring registration. May have additional withholding obligations
    - Employee: May be subject to withholding in multiple locations and need to pay income taxes
- Professional licenses
- Benefits and insurance: Both for employee and professional
- Insurance held by company
- Varying employment laws: State/local sick leave
    - Paid family medical leave
    - Additional leave types
    - Harassment training
    - Overtime, meal and rest breaks, paystubs, final pay, leave cash-out
    - Restrictive covenant agreements

Manager Training for Remote Performance Management:

- Documentation still important
- Assess management tools (e.g., work assignment status reports) to help with lack of in-person observation
- Monitoring software: Give advance notice. Certain states have requirements (e.g., Connecticut and Delaware)
- Avoid disparate treatment
- Consider individual circumstances, including childcare responsibilities and potential disparate impact on women

NLRB Predictions: Pro Union and Corporate Work Rules

Labor unions in the United States haven't had much good news in recent years, but this week may have provided some reasons for optimism. The rate of unionization in the U.S. increased in 2020 for the first time in over a decade, according to new data released by the Bureau of Labor Statistics on Jan. 22. On this same day, President Biden announced two new executive orders aimed at increasing worker protections.

Biden, who promised before he was elected to be "the most pro-union president you've ever seen," has already taken action toward the goal of reversing the Trump Administration's policies. In a series of moves applauded by union groups, Biden nominated Boston Mayor Marty Walsh, a former union leader, to be his Secretary of Labor and, in his first two days in the White House, Biden fired Peter Robb, the Trump-appointed General Counsel of the NLRB, as well as Robb's Deputy Alice Stock, after each refused to resign.

The move to fire Robb before his term officially ended broke with precedent, but White House Press Secretary Jen Psaki said on Jan. 21 that Robb had not been upholding the NLRB's objectives:

- Protecting Right to Organize (PRO) Act
- Reverse Epic Systems in favor of class actions
- Require binding arbitration for first contracts
- Civil penalties for employer unfair labor practices
- Adopt CA's "ABC Test" for independent contractor status

We can expect some big changes on many issues, including:

- New limits on workplace rules (reversal of *Boeing*)
- Use of employer email systems for organizing (return to *Purple Communications*)
- Expanding joint employer rule (return to *Browning- Ferris Industries*)
- Approval of micro- and other tailored bargaining units (return to *Specialty Healthcare*)
- Restrictions on unilateral changes – "contract coverage" vs. "clear and unmistakable" waiver (reversal of *MV Transportation*)

Federal labor law is likely to see a huge shift as the Biden team goes to work. Employers and others who may be affected should monitor developments and start to consider how they will stay out of harm's way. The challenge will be providing viable and profitable employment opportunities in a much more difficult, risky, and expensive environment.

Non-Competition: Increased Scrutiny and Policy Debates

There has been a lot of discussion recently about the Biden administration's proposal to ban one or more forms of non-competition agreements on a national level. Look, Biden has released a plan which includes the following statement: "Biden will work with Congress to eliminate all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all non-poaching agreements."

We don't anticipate Congress will enact such legislation in 2021. COVID-19 will consume most of the Administration's agenda in 2021. The impeachment of President Trump may also linger well into 2021. However, Biden may seek to limit or eliminate non-compete agreements by way of regulatory changes (such as through the Federal Trade Commission) or by issuance of an executive order. Federal legislation banning or curtailing non-compete agreements may be enacted at some point in the future, given the support of Biden and many in Congress for such a law, though its success may ultimately depend on narrowing its scope (for example, limiting a ban on non-compete agreements to low-wage earners).

However, the COVID-19 pandemic has not stopped state lawmakers from passing legislation intended to curtail the widespread use of non-competition agreements, particularly for low-wage workers. Watch for more of this in state legislatures in 2021.

Watch for potential legal challenges and disputes in 2021 involving geographic-based non-compete agreements. The lines between the "office at home" and the "office at work" have never been blurrier, in light of the ongoing COVID-19 pandemic and the reality that employees will continue to work remotely or in locations outside of his or her employer's headquarters or corporate offices for the near future..

Now is a great time for employers to review their existing non-competition agreements to see whether they address remote work situations, and if not, whether to include specific language covering these types of situations. Also, employers must resolve the uncertainty about the governing law by including in employment agreements clear and explicit choice-of-law.

COVID-19: Laws, Leaves and Return to Work

This year, many states have enacted changes in employee leave policies; ended or extended some temporary exemptions put in place due to the coronavirus pandemic; and taken steps to improve diversity, equity and inclusion in the workplace. Just a simple reminder: update your multi-state addendum asap!

Social Media: Pro-Employer Policies May Be Short-Lived

Earlier this month, the National Labor Relations Board (NLRB) reversed the decision of an ALJ and held lawful an employer's social media policy prohibiting disparagement of the company and others, "inappropriate communications," disclosing confidential information, posting photos of coworkers, or using the company logo to denigrate people or causes. *Medic Ambulance Service*, 370 NLRB No. 65 (Jan. 4, 2021).

The employer's social media guidelines expressly ban "inappropriate communications, even if made on your own time using your own resources." The ALJ found that the policy unlawfully restricted employee rights under the National Labor Relations Act (NLRA) to criticize their terms and conditions of employment.

The NLRB disagreed with the ALJ. It held that the employer's prohibitions, when read in the context of the guidelines, were lawful.

The NLRB ruled the following provisions are lawful:

1. *"Do not disclose confidential or proprietary information regarding the company or your coworkers."* The NLRB found this provision did not unlawfully restrict employees' right to share information about coworkers, because this language was followed by "express prohibitions limited to the use of copyrighted or trademarked company information, trade secrets, or other company information." Moreover, these concerns were did not outweigh the company's interest in protecting patient and customer privacy, the NLRB said.
2. *A prohibition on use of the company name to endorse, denigrate, or otherwise comment on a person, product, cause, or opinion*. The NLRB held that the context of the policy makes clear the concern is with employees appearing to speak on the company's behalf. Social media policies should be written to make the distinction between employees speaking for the company rather than for themselves quite clear, as overly restricting an employee's right to be critical on their own social media would be unlawful interference with employee Section 7 rights under the NLRA.
3. *A ban on using photos of coworkers without their express consent*. Because this policy was couched as respect for the privacy and dignity of coworkers, the NLRB read the policy in that context and found it lawful.
4. *A policy prohibiting sharing employee compensation information*. Although banning employee discussion of their compensation has long been unlawful, this policy, read in context, was not a violation of the NLRA, the NLRB said. The provision emphasizes the importance of protecting the company's confidential information, and that all telephone calls from outside regarding current or former employees be forwarded to supervisors. The NLRB read this as a limited restriction, protecting confidential company information, and reflecting the limitation on who can speak for the company. It saw this as *not* restricting employees from discussing it among themselves or with a union. Guidelines should be drafted to highlight the intent of the rules to protect legitimate company interests and give specific context where possible, but strict prohibitions on discussing wages generally continues to be problematic.
5. *Prohibition on using social media to disparage the company or others*. The NLRB noted that, although this rule potentially may interfere with employee rights, it is lawful because, on balance, companies have a compelling interest in "being able to depend on the loyalty of their employees." This is consistent with the NLRB's decision in *Motor City Pawn Brokers*, 369 NLRB No. 132 (July 24, 2020).

Social media policies must be crafted to be readily understood by a reasonable employee to address legitimate company interests and not to interfere with employee rights. Employers should partner with counsel to develop social media policies. Under Biden, NLRB decisions restricting an employer's ability to promulgate policies that potentially restrict Section 7 rights are likely to return eventually. However, for now, an employer's rights to create policies continues to be clarified in the favor of protecting the employer's business interests.

Increased Litigation: From COVID-19 Vaccines to Safety and Wage and Hour claims

There have been seven Minnesota cases, all involving our Whistleblower Act. Generally, we can expect cases in the following areas:

- Constitutional Rights
- Failure-to-Pay Claims
- Family and Medical Leave Act
- Misclassification
- Non-compete
- WARN Act
- Whistleblower
- Worker's Compensation
- Workplace Safety
- Wrongful Termination, Retaliation and Bias

Diversity, Inclusion and Employee Engagement

For years, HR and organizational leaders have often discussed the importance of diversity, equity and inclusion (DEI) in the workplace. Nonetheless, studies showed that many organizations underperformed in this area and that many HR professionals have felt their organizations were not prioritizing DEI issues. In comes 2020, with widespread protests against racial injustice in the United States and elsewhere in the world. Amid these developments, more organizations now seem to recognize the need to prioritize DEI-related issues.

Generally – areas to explore are:

- the types of DEI initiatives used in today's organizations
- the tools that organizations use to measure pay gaps and pay equity
- diversity and equity at leadership levels
- the tactics and strategies that are most closely associated with successful DEI initiatives

New Employee Requests (and Needs) in the Workplace

Watch for requests for greater safety precautions, demands that they only work with people who have been vaccinated, requests for work from home equipment (know which states require payment for home equipment), relaxed performance requirements and variable hours. We are going to have to be a bit more flexible in the coming years.