First & Foremosts

Legal Update

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rise to every challenge

New State Laws

Virginia Returns to Federal OT Standard

- Governor Youngkin amends the Virginia Overtime Wage Act (VOWA) to:
  - Return to the FLSA's calculation of the regular rate for determining the overtime pay for nonexempt employees.
    - (The sum of the employee's compensation for a given workweek divided by the total hours worked by the employee during that workweek)
  - Return of the fluctuating workweek method.
  - Shorten the statute of limitations period for overtime wage payment disputes under the VOWA to match the FLSA.
  - Return to the FLSA's remedies for any violation of the VOWA overtime pay requirements.
- Effective July 1, 2022.

DC Will Offer Private-Sector Workers Maximum Paid Leave Benefits

- Eligible employees will be able to take the following paid leave:
  - 12 weeks of parental leave;
  - 12 weeks of family care leave; and
  - 12 weeks of medical leave.
- Paid parental, family, and medical leave capped at 12 weeks per year.
- Will also be able to take 2 weeks of paid prenatal leave.
- Reduction in payroll take from .62% to .26% for employers.

Expanded Definition of "Harassment" and "Sexual Harassment"

- Rejects the "severe or pervasive" standard in the federal Title VII of the Civil Rights Act.
- Harassment defined as:
  - Unwelcome and offensive conduct, which need not be severe or pervasive, when:
    - Conduct that is based on race, color, religion, ancestry or national origin, sex, age, marital status, sexual orientation, gender identity, or disability, and
    - One of the following is met:
      - Submission to the conduct is made either explicitly or implicitly a term or condition of employment of an individual;
      - Submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual; or
      - Based on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile
- Effective October 1, 2022.

Tolling of Statute of Limitations for Employment Discrimination and Harassment Claims

- Amendment to Section 20-1013 of the Annotated Code of Maryland.
- Tolls the deadline to complainants to file a lawsuit alleging discrimination or harassment when administrative charge or complaint filed under federal, state, or local law is pending.
- Amendment gives individuals more time to file a lawsuit for an alleged unlawful employment practice under Maryland law.
- Effective October 1, 2022.

Reasonable Accommodations for Applicants with Disabilities

- Amendment to Section 20-606 of the Annotated Code of Maryland.
- Clarifies that employers may not fail or refuse to make a reasonable accommodation for the known disability of an applicant for employment, unless doing so would cause under hardship to the employer.
- Effective October 1, 2022.

Recreational Cannabis/Marijuana

- Bill 1: HB1
  - Voter referendum on a proposed constitutional amendment to legalize recreational cannabis for individuals over the age of 21.
  - Will be voted on in November.
  - If passed, would take effect on January 1, 2023.

- Bill 2: HB837
  - Prohibits an individual from smoking cannabis or hemp in an indoor place of employment.
  - Provides avenue for employees to make a compliant of violation of the law.
  - Becomes effective only if voters ratify HB1.

Revisions to Maryland Personal Information Protection Law

- Revises the definition of “personal information” to include genetic information.
- Must notify individual if there is a breach of the security system and personal information, including genetic information, has or will be misused.
- Business that owns, licenses, or maintains computerized data that includes personal information must provide notice no later than 45 days after the business discovers or is notified of the breach of the security system.
- Business that maintains computerized data that includes personal information but does not own or license it must notify the owner or licensee of the personal data within 10 days after the business discovers or is notified of the breach of the security system.

New State Holiday- Juneteenth

- Maryland recognizes Juneteenth National Independence Day as a State legal holiday and a State employee holiday.
- Observed on June 19, 2022.
- Law effective June 1, 2022.

Maryland Paid Family Leave

- **Covered employers**:
  - Applies to all public and private employers that employ at least one person in Maryland.
- **Employee eligibility requirements**:
  - Must have worked at least 680 hours over the 12 month period preceding the first requested date of leave
- **Who pays for the leave?**
  - Funded through employer and employee payroll tax contributions to fund administrated by the state of Maryland.
- **Reasons for leave**:
  - To care for a newborn child or a child newly placed with the employee for adoption, foster care, or kinship care (within the first 12 months after birth);
  - For the placement of a child with the employee for adoption, foster care, and in order to care for the newly placed child (within the first twelve (12) months after placement);
  - To care for a family member with a serious health condition;
  - For the employee's own serious health condition;
  - To care for a service member who is the employee's next of kin; or
  - Because the employee has a qualifying exigency arising out of the deployment of a service member who is the employee's family member

Maryland Paid Family Leave

- **Amount of leave**:
  - Ordinarily: up to 12 weeks of paid leave in a 12-month period
  - BUT, employees are entitled to up to 24 weeks of paid leave in a 12-month period IF they:
    - Take leave to care for a newborn child or child placed with them; AND
    - Take leave for their own serious health condition.
- **Who pays for the leave?**
  - Funded through employer and employee payroll tax contributions to fund administrated by the state of Maryland.
- **How much are employees paid**?
  - Amount depends on weekly wage
  - Capped at $1000 per week
- **Effective date**:
  - Must contribute funds beginning October 1, 2023
  - Employees entitled to take leave beginning January 1, 2025

Delaware Paid Family Law

- **Reasons for leave**:
  - Parental leave
  - Family Caregiver Leave
  - Medical Leave
- **Amount of leave**:
  - 12 weeks of parental leave, 6 weeks of family caregiver leave, and 6 weeks of paid medical leave in an application year
  - Limit of up to 12 weeks overall of PFML benefits in an application year and 6 weeks of medical and/or family caregiving leave in any 24-month period
- **Who pays for the leave?**
  - Funded through employer and employee payroll tax contributions to fund administered by the state.
- **Covered employers**:
  - Applies to employers with 10 or more employees working in Delaware
  - BUT:
    - Employers with 10-24 employees only have to provide parental leave
    - Employers with 25 or more employees must provide all leave under the law

Delaware Paid Family Law

- **Employee eligibility requirements**:
  - Employed for at least 12 months by the employer with respect to whom leave is requested; and
  - Has worked for at least 1,250 hours during the previous 12 month period
- **How much are employees paid?**
  - 80% of employees' average weekly wages
  - Capped at $900 per week
- **Effective date**:
  - Must contribute funds beginning January 1, 2025
  - Employees entitled to take leave beginning January 1, 2026

Limits On Permissible Workplace Training on Diversity, Bias and Racism

- Under new Florida law, it is unlawful for covered employers to subject any individual working in Florida to training or instruction that "espouses, promotes or advances" individuals to believe, among other things:
  - That an individual, by virtue of his or her race, color, sex, or national origin, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
  - That members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.
  - That an individual, by virtue of their race, color, sex, or national origin, bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, sex, or national origin.
- Limits ability of employers to have discussions on implicit bias in trainings.

NY Employers Who Conduct Electronic Monitoring Must Provide Written Notice to New Hires & Post a Notice for Existing Employees

- Effective May 7 all NY employers must inform new hires and existing employees if the employer monitors or plans to monitor or intercept their telephone or email communications or internet usage.
- The notice must be in writing (hard copy or electronic) and state:

  > "any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means."

- Must obtain an acknowledgment of receipt from the new hire
- Must post a notice for existing employees in a "conspicuous place which is readily available for viewing" by existing employees subject to electronic monitoring

Title VII & Discrimination Laws

A Transfer is an "adverse employment action" for Title VII purposes in D.C.

- *Chambers v. D.C.,* D.C. Cir. en banc, No. 19-07098 (June 3, 2022).
- D.C. Circuit held that employers can't legally transfer workers or deny their request for transfer based on Title VII protected category
- Overturned prior case (*Brown v. Brody*, 199 F.3d 446 (1999).), which required a pay reduction or "objectively tangible harm" for Title VII liability arising out of a transfer.
- Under new standard, employees need not prove anything more than they faced discrimination in the terms and conditions of employment based on a protected characteristic

A Reminder about the Importance of RIF Selection Criteria

- *Alicia Gosby v. Apache Industrial Services, Inc.,* No. 21-40406 (5th Cir. 2022).
- The Plaintiff a temporary employee of a construction company had a diabetic attack at work 6 days before being terminated as part of a layoff.
- Plaintiff claimed that she was selected for layoff due to her diabetes.
- 5th Circuit concluded that the short amount of time between her diabetic episode and her termination was sufficient to make a threshold showing of a *prima facie* case of discrimination.
- Burden shifted to the employer to allege a non-discriminatory reason for the termination and then the Plaintiff had to show this reason was a pretext for discrimination.
- Court held there was sufficient evidence to doubt the Employer's alleged legitimate reason for the layoff because of inconsistent explanations and the absence of clear criteria for inclusion in the RIF.

"Tenure" not necessarily direct evidence of age discrimination

- *Smith v. AT&T Mobility Services,* No. 21-20366 (5th Circuit May 17 2022).
- Plaintiff alleged age discrimination arising from not being promoted
- In support, he claimed comments re: "old heads" and "tenure" showed direct evidence of age discrimination
- Court held comment by supervisor that she was:

  > "not going to hire any tenured employees because" the new facility is "state of the art… with the highest technology and equipment," and she needs CSMs who are innovative and capable of leading the facility "in the right direction"

  Was a close call but not direct evidence of age discrimination because Plaintiff had not presented evidence that the manager intended tenure to mean age in making this comment.
- Court held a comment will constitute direct evidence of discrimination when it is:
  - Related to the protected class of persons of which the plaintiff is a member
  - Proximate in time to the complained of adverse employment decision
  - Made by an individual with authority over the employment decision at issue, and
  - Related to the employment decision at issue.

Other Statutory Issues Including NLRA

A Resurgence of Labor Union Activity Across the Country

- In April employees of an Amazon warehouse facility in Staten Island, NY voted to form the first US union in Amazon's history
  - The union used organic peer-to-peer organizing tactics
- The NLRB reported an increase of 57% in union election petitions in 2021.
- Unfair Labor Practice Charges are also showing significant increases
- The White House is seeking ways to make unionization easier
- The NLRB's General Counsel is asking the NLRB to find "captive audience" meetings violate the NLRA and seeking to reinstate a doctrine that would require an employer to recognize and bargain with a union absent an election
- Remember TIPS & FOE
  - No Threats, Interrogations, Promises, or Surveillance
  - But Facts, Opinions and Examples are permissible

NLRB's "Salt Mine" Tweet Decision Overturned by Third Circuit

- FDRLST Media, LLC v. NLRB, No. 20-3492 (3rd Cir. May 20, 2022).
- Tweet by publisher that he'd send his employees "back to the salt mine" if they tried to unionize
- The NLRB concluded that this statement was an unlawful threat
- The 3rd Circuit concluded that the NLRB lacked the evidence to support its ruling – Namely that a reasonable employee would interpret the tweet as a veiled threat.

Non-Statutory Issues

Mandatory Arbitration Policy in Handbook Unenforceable

- *Coady v. Nationwide Motor Sales Corp.,* No. 1:20-cv-01142-SAG (4th Cir. April 25, 2022).
- Plaintiffs alleged failure to pay wages; Employer moved to compel to arbitration
- Fourth Circuit held employer cannot force employees into private arbitration when the employment contract reserves for the employer an unlimited, unilateral right to modify an arbitration agreement
- Handbook acknowledgment contained language reserving for the employer the right to "enforce, change, abolish or modify" the terms.
- Therefore the employer's promise to arbitrate was unenforceable and void.

FMLA/ADA

ADA requires reasonable accommodation to *qualified* disabled employees

- *Ehlers v. University of Minnesota*, No. 21-1606 (8th Cir. May 19 2022).
  - Reassignment "is an accommodation of last resort when the employee cannot be accommodated in his existing position."
  - Court held that To be eligible for transfer, the employee must show that there is an available position for which they are **qualified**
  - Qualified means able to perform the essential functions of the position with or without accommodation

Jury Awards employee $450,000 after Employer throws him a unemployment

- *Berling v. Gravity Diagnostics,* No. 19-CI-01631 (Kenton County, Kentucky March 31, 2022)
  - Employee filed suit against employer following two panic attacks the employee suffered at work after his colleagues threw him a birthday celebration
  - Employee had an anxiety disorder
  - Prior to birthday, employee told office manager he did not want the office to hold a birthday party for him
  - Employer did so anyway
  - This triggered a panic attack that forced employee to leave the office.
  - The next day, employee's supervisor confronted employee about his reaction to the party causing employee to suffer another panic attack.
  - Three days later, employee terminated the employee because other employees were frightened for their safety when the employee suffered the panic attacks.

DOL Issues New Resources Aim to Improve Understanding of Mental Health Leave

- Wage and Hour Division has new resources to help workers understand their rights to take leave for serious mental health conditions
- Fact Sheet #28O: Mental Health and the FMLA (PDF)

7th Circuit Clarifies that Discouraging FMLA Violates the FMLA

- *Ziccarelli v. Dart, et al.*, 7th Cir., No 19-3435 (June 1, 2022)
- 7th Circuit held that an employer can violate the FMLA by discouraging an employee from exercising rights under the FMLA without actually denying an FMLA leave request.
- Rejects the idea that for a violation of the FMLA to take place, an employer must actually deny an FMLA request.
- Employee entitled to remedy if they can show prejudice from the discouragement.

EEOC and DOJ Warn Against Disability Discrimination

- EEOC issues new technical assistance document, Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.
- EEOC warns that use of software, algorithms, and AI can violate the ADA when:
  - Employers do not provide a reasonable accommodation that is necessary for a job applicant or employee to be rated fairly by the algorithm;
  - Employers rely on an algorithmic decision-making tool that intentionally or unintentionally screens out an individual with a disability; and
  - Employer adopts an algorithmic decision-making tool for use with its job applicants or employees that violates the ADA's restrictions on disability-related inquiries and medical examinations.
- Employers must adopt promising practices.

OSHA

OSHA'S Response to Amazon Tornado Incident Cautions Employers Over Need to Enhance Emergency Planning

- Under the General Duty Clause, employers have an obligation to protect employees from foreseeable risks of death or serious injury.
- OSHA issued a letter to Amazon in response to the Category 3 tornado hitting a distribution facility resulting in the death of 6 employees
- The letter notes three areas of deficiency in Amazon's emergency planning:
  - 1) a megaphone used to broadcast information to employees was locked and inaccessible at the time of the incident;
  - 2) employees were not well-trained with regard to shelter in place locations within the facility; and
  - 3) the EAP's weather planning was not specific to threats potentially faced by this specific location.

  This signals OSHA's plan to issue citations in the event OSHA finds inadequate emergency planning.

Thank You!

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Nicole Behrman has represented clients before the DC Superior Court, District Court for the District of Columbia, the EEOC, DC Office of Human Rights, and DC Office of Administrative Hearings. She has litigated cases involving claims of discrimination, harassment, retaliation, FMLA interference and retaliation, wage and hour violations, breach of contract, and wrongful termination in violation of public policy.