RubinFortunato

A Law Firm of Action

THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW

August 4, 2020

Patricia Tsipras, Esquire

Federal

On June 15, 2020, the United States Supreme Court held that Title VII of the Civil Rights Act protects workers from discrimination based on sexual orientation and gender identity. See Bostock v. Clayton Cty., 590 U.S. ___ (2020); see also our Client Alert on this case here.

On July 8, 2020, the United States Supreme Court interpreted the ministerial exception to the First Amendment to find that it bars the adjudication of employment discrimination claims by teachers employed by religious schools. The case, along with a consolidated matter, arose from rulings in the United States Court of Appeals for the Ninth Circuit that found that federal discrimination laws do apply to employees within a religious organization who serve an important religious function but lack the title or training to be considered a religious leader. In a 7-2 decision, the Supreme Court reversed the Ninth Circuit's ruling. See Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. ___ (2020).

California

Effective July 1, 2020, California extended benefits under its Paid Family Leave program from six weeks to eight weeks. See 2019 Cal. SB 83, §§ 39 and 40.

Colorado

On July 14, 2020, Colorado enacted the Healthy Families and Workplaces Act. For the remainder of 2020, the Act will require all employers to comply with the emergency paid sick leave requirements of the Families First Coronavirus Response Act – which currently applies only to employers with fewer than 500 employees. Beginning January 1, 2021, employers with 16 or more employees must begin providing paid sick leave to their employees. Beginning January 1, 2022, all employers must begin providing paid sick leave. Paid sick leave will accrue at the rate of one hour for every 30 hours worked. See 2002 Colo. SB 205.

Florida

On June 30, 2020, and effective July 1, 2020, Florida amended its Civil Rights Act to give a plaintiff one year to file a lawsuit if the State Commission on Human Rights

fails to issue a determination on a charge of discrimination within 180 days. See Fla. Stat. § 760.11(8)(c).

On June 30, 2020, Florida enacted a law making the use of E-Verify mandatory for all public employers, as well as their private contractors. E-Verify is a federal electronic database intended to aid employers in confirming the validity of the documentation provided by new hires to establish lawful employment eligibility. The law will become effective on January 1, 2021. See 2020 Fla. SB 664.

Illinois

Effective July 1, 2020, the City of Chicago created a schedule to increase the minimum wage to $15 per hour by January 1, 2021. See Chi. Ill. Code § 1-24-020.

Effective July 1, 2020, Illinois expanded the coverage of its Human Rights Act to include all employers employing one or more employees in the State. See 2019 Ill. HB 252.

Also effective July 1, 2020, the City of Chicago's Fair Workweek Ordinance requires certain employers within the building services, healthcare, hotel, manufacturing, restaurant, retail, and warehouse services industries to provide covered employees with predictable work schedules and compensation for changes. Covered employees are to be given advance notice of their work schedule (10 days beginning July 1, 2020; 14 days beginning July 1, 2022); the right to decline previously unscheduled hours; one hour of Predictability Pay for any shift change within 10 days; and the right to rest by declining work hours less than 10 hours after the end of the previous day's shift. See the Ordinance FAQs here.

Indiana

Indiana enacted legislation to require that enforceable physician non-competition agreements effective on or after July 1, 2020, contain certain provisions. "Physicians" are defined as "any person who holds the degree of doctor of medicine or doctor of osteopathy or its equivalent and who holds a valid unlimited license to practice medicine or osteopathic medicine in Indiana." The required provisions include:

1. a provision requiring the employer to provide the physician with a redacted copy of any notice that the employer sent to patients of the physician seen or treated during the two years prior to the termination of the physician's employment or the end of the physician's contract concerning the physician's departure from the employer
2. a provision requiring the employer to provide the physician's last known contact and location information to patients that the physician has seen or treated during the two years prior to the termination of the physician's employment or the end of the physician's contract if requested by such a patient
3. a provision providing the physician access to or copies of any medical records associated with a patient that the physician has seen or treated during the two years prior to the termination of the physician's

employment or the end of the physician's contract upon receipt of patient consent

4. a provision providing the physician with an option to purchase a release from the terms of the enforceable physician non-compete agreement at a reasonable price
5. a provision prohibiting the employer from providing patient medical records to the physician in a format materially different from the ordinary course of business, unless the records are produced in paper, portable document format, or as otherwise mutually agreed upon by the parties.

See Pub. L. No. 93-2020.

Iowa

Effective July 1, 2020, the City of Waterloo enacted a ban-the-box ordinance that prohibits covered private employers from inquiring into an applicant's criminal history before making a conditional offer of employment. See City of Waterloo Code of Ordinances § 5-3-15.

Minnesota

On June 3, 2020, the Minnesota Supreme Court affirmed that claims of sexual harassment under the State's Human Rights Act are to be evaluated under the "severe or pervasive" standard, but noted that courts must determine what is severe or pervasive in light of today's definition of acceptable workplace conduct, rather than relying on older analogous cases. See Kenneh v. Homeward Bound, Inc., No. A18-0174, 2020 Minn. LEXIS 323 (June 3, 2020).

New Mexico

Effective July 1, 2020, Bernalillo County enacted an ordinance that requires employers to allow employees to accrue paid time off to use for any reason. The Ordinance is based, in part, on the belief that paid time off will reduce recovery time from illness and provide other benefits. See Bernalillo County Government, Paid Time Off Ordinance No. 2019-17.

New York

Effective July 24, 2020, the New York City Commission on Human Rights issued its final rule clarifying the positions that are exempt from the City's ban on pre-employment marijuana testing. Specifically, based on their significant impact to health or safety, the following scenarios still require pre-employment marijuana testing: (1) the position requires that an employee regularly, or within one week of beginning employment, work on an active construction site; (2) the position requires that an employee regularly operate heavy machinery; (3) the position requires that an employee regularly work on or near power or gas utility lines; (4) the position requires that an employee operate a motor vehicle on most work shifts; (5) the position requires work relating to fueling an aircraft, providing information regarding aircraft weight and balance, or maintaining or operating aircraft support equipment; or (6) impairment would interfere with the employee's ability to take adequate care in carrying out his or her job duties and would pose an immediate risk of death or serious physical harm to the employee or to other people. See New York City Commission on Human Rights - Exceptions to the General

Prohibition on Pre-employment Testing for Marijuana.

Ohio

Effective June 26, 2020, the City of Toledo passed an ordinance that prohibits employers from inquiring into or using an applicant's salary history in making employment decisions. See City of Toledo, Ohio Ordinance 173-19.

Pennsylvania

On July 23, 2020, Pennsylvania enacted a law that establishes a mental wellness and stress management program for emergency responders who experience post-traumatic stress injuries or traumatic brain injuries on the job. Support for first responders under the new law includes peer-to-peer programs, training for peer support efforts, a toll-free helpline, statewide and regional stress management support, trauma and suicide awareness training, and support for nonprofit organizations offering the services. See 2020 Pa. HB 1459.

Rhode Island

On May 29, 2020, the Rhode Island Supreme Court affirmed the dismissal of a delivery driver's claims against W.B. Mason, who terminated the driver's employment for refusing to submit to a reasonable suspicion drug test. The driver allegedly injured his arm and back while making a delivery. When he returned to the worksite to report the injuries, his supervisor and branch manager questioned him. They observed him stuttering, swearing excessively, "jumping all over the place," having difficulty describing his injuries, not speaking in complete sentences, and staggering, among other things. On the way to the testing facility, the driver disclosed for the first time to W.B. Mason that he was a medical marijuana user and likely would test positive for marijuana. At the testing facility, the driver refused to submit to a drug test and, as a result, W.B. Mason terminated his employment. After a trial, the court ruled that the driver's "incoherent recitation," "volatile behavior," and "the use of profanity" was sufficient to support "reasonable grounds" for drug testing under Rhode Island law. On appeal, the driver argued that his behavior was due to the pain from his injuries. The Rhode Island Supreme Court ruled that, even if the driver's odd behavior was due to pain, rather than drugs, W.B. Mason had reasonable grounds to believe that he may have been under the influence of drugs. Colpitts v. W.B. Mason Co., Inc., No. 2018-337-Appeal (R.I. May 29, 2020).

South Carolina

On June 25, 2020, South Carolina enacted the Lactation Support Act, which requires employers to provide employees reasonable unpaid break time, or paid break time or mealtime, each day to express breast milk. Employers also must make reasonable efforts to provide a room or other location (other than a bathroom stall) in close proximity to the employee's work area for the employee to express milk in privacy. The Act becomes effective on August 24, 2020. See 2020 S.C. SB 406.

Tennessee

On June 22, 2020, Tennessee enacted the Tennessee Pregnant Workers Fairness Act, which requires that every employer with at

least 15 employees make a reasonable accommodation for an employee's or prospective employee's medical needs arising from pregnancy, childbirth, or related medical conditions, unless such accommodation would impose an undue hardship on business operations. The Act goes into effect on October 1, 2020. See 2020 Tenn. SB 2520.

Texas

On June 5, 2020, the Texas Supreme Court declined to hear the city of Austin's appeal in the case challenging its paid sick leave ordinance. The court's decision leaves in place the lower court's holding that the ordinance is unconstitutional. See City of Austin v. Tex. Ass'n of Bus., No. 19-0025, 2020 Tex. LEXIS 517 (June 5, 2020).

Virginia

Effective July 1, 2020, Virginia

- enacted a law prohibiting employers from requiring applicants to disclose information related to any past arrest, charge, or conviction for simple marijuana possession. See 2020 Va. HB 972.
- enacted the Values Act, which adds sexual orientation and gender identity to the list of protected characteristics under the Virginia Human Rights Act. The law also creates new protections and private rights of action in places of public accommodation, housing, and credit on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, and veteran status. Furthermore, the Values Act rewrites the Human Rights Act's private rights of action and remedies. Previously, the Human Rights Act contained only a limited private right of action for unlawful discharge and limited a prevailing party's remedies to 12 months of back pay plus interest and attorney's fees capped at 25% of the back pay award. The Values Act expands the rights of action to include all forms of discrimination and retaliation, like Title VII, its Federal counterpart. The law also now states that courts may award prevailing employees "compensatory and punitive damages" and uncapped "reasonable attorney fees and costs," among other non-monetary relief. See Va. S.B. 868.
- amended its Wage Payment Act to provide meaningful enforcement mechanisms. The amendments provide employees with a right to sue in court to recover unpaid wages (a three-year limitations period exists and collective actions are permitted). Previously, only the Virginia Department of Labor and Industry could file such actions. A prevailing employee will be able to recover wages owed, as well as liquidated damages equal to double damages for all violations and treble damages for knowing violations, prejudgment interest, and reasonable attorney's fees and costs. See 2020 Va. S.B. 838.
- enacted a law prohibiting employers from entering into, enforcing, or

threatening to enforce a restrictive covenant against a low-wage earner. The law defines a "restrictive covenant" as a non-competition agreement and appears to continue to support an employer's ability to protect confidential and proprietary information and trade secrets with non-disclosure and non-solicitation agreements. The law defines low-wage earners as employees or independent contractors whose average weekly earnings are less than the average weekly wage of the Commonwealth (~$1,000), but excludes employees whose earnings are derived from sales commissions, incentives, or bonuses. A private right of action now exists for employees to challenge or enjoin their restriction. Successful employees are entitled to liquidated damages, lost compensation, and attorney's fees. Employers must post a notice in the workplace that summarizes the law. See 2020 Va. S.B. 480.

- enacted a law to create a private right of action for employees whose employers knowingly misclassify them under the Fair Labor Standards Act and to protect employees or independent contractors from retaliation if they report misclassification. See 2020 Va. S.B. 894; 2020 Va. S.B. 662.
- amended its Human Rights Act to prohibit discrimination based on traits historically associated with race, including hair texture, hair type, and protective hairstyles. See 2020 Va. HB 1514.

Washington

Effective July 1, 2020, the Washington State Department of Labor and Industries revised Washington's overtime rules. The revisions increase the salary threshold and update the job duties tests that are used to determine whether an employee is entitled to overtime. In general, to be exempt from overtime, an employee must perform certain job duties and must be paid a fixed salary that meets a salary threshold. Washington increased its minimum salary threshold to $675 per week, or $35,100 per year, currently 1.25 times Washington's minimum wage. It will increase incrementally until January 2028. With respect to job duties, Washington's revised rules more closely align with the federal job duties tests to determine whether a worker is performing executive, administrative, professional, computer professional, or outside salesperson duties that would allow an employer to classify them as exempt from overtime. See Washington State Department of Labor & Industries - Changes to Overtime Rules.

Effective June 11, 2020, Washington State amended its paid family leave law. The key changes include – *Waiting Period*: The law previously provided that the "waiting period" was unpaid. It was unclear whether an employee could elect to receive employer-provided supplemental benefits during the waiting period. The amendments make it clear that an employee may satisfy the waiting period while simultaneously receiving an employer's "supplemental benefits," which the amendments now

define as vacation, personal, medical, sick, compensatory, or any other paid leave offered by an employer under the employer's established policy. The state will not reduce an employee's leave benefits by the amount of the supplemental benefits. The amendments also eliminated the waiting period for qualifying military exigencies. *Coverage*: The amendments expand the definition of "family member" to include a child's spouse. "Casual labor" – defined as work performed infrequently and irregularly, and if performed for an employer, does not promote or advance the employer's customary trade or business – is exempted from coverage. *Violations:* A private right of action (including class actions), with a three-year limitations period, now exists in court for an employee who claims interference, retaliation, or discrimination. Damages include lost wages, benefits, and other compensation lost due to the violation, as well as reasonable attorney's fees and litigation costs. *Concurrent Worker's Compensation*: Previously, all employees receiving worker's compensation were disqualified from receiving leave benefits. Employees receiving worker's compensation benefits are now disqualified from receiving leave benefits only if the employees have a permanent or temporary total disability. *Conditional Waiver from Eligibility:* Previously, to receive a conditional waiver from leave premiums, an employee would have to be "physically based" outside of Washington. The test now is whether the employee "primarily performs work" outside of the state. *Successive Related Periods of Leave:* The law formerly provided that successive periods of leave caused by the same or related injury or sickness were deemed a single period of family and medical leave only if separated by less than four months. The amendments removed this requirement. See 2020 WA H.B. 2614.

Effective June 10, 2020, Washington amended its Law Against Discrimination to prohibit discrimination based on traits historically associated or perceived to be associated with race, including hair texture and protective hairstyles. See 2020 WA H.B. 2602.

To discuss any of these changes, contact Patricia Tsipras at 610.408.2029 or ptsipras@rubinfortunato.com