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THE LAST 60 DAYS OF ACTION IN EMPLOYMENT LAW

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Federal

On March 29, 2021, the Equal Employment Opportunity Commission, after delaying the opening of the 2019 EEO-1 Component 1 Data Collection on May 8, 2020 in light of the COVID-19 public health emergency, announced that the 2019 and 2020 EEO-1 Component 1 data collection will open on April 26, 2021. The deadline for submitting 2019 and 2020 EEO-1 Component 1 data will be July 19, 2021. The EEO-1 Component 1 collects workforce data from employers with 100 or more employees and from federal contractors with 50 or more employees.

On February 19, 2021, the United States Department of Labor withdrew opinion letter FLSA2019-6, which dealt with whether a service provider for a virtual marketplace company is an employee of the company under the Fair Labor Standards Act or an independent contractor. See FLSA Opinion Letters.

On February 3, 2021, the Seventh Circuit Court of Appeals held that the Uniformed Services Employee and Reemployment Rights Act (USERRA) required an employer to provide paid military leave to the same extent that it provided paid leave for other comparable absences. See White v. United Airlines, Inc., No. 19-2546, 2021 U.S. App. LEXIS 2973 (7th Cir. Feb. 3, 2021).

On January 29, 2021, the United States Department of Labor announced that it was ending the Payroll Audit Independent Determination (PAID) program, under which employers could self-report wage and hour violations and settle without liquidated damages or additional penalties. See DOL Release No. 21-142-NAT.

Arizona

On February 4, 2021, Arizona amended its civil rights act to prohibit discrimination based on pregnancy, childbirth, and related medical conditions. The amendment becomes effective on July 23, 2021. See 2021 Ariz. HB 2045.

California

On March 19, 2021, California Governor Newsom signed Senate Bill 95 to expand California's COVID-19 Supplemental Paid Sick Leave (CSPSL) until September 30, 2021. The law requires any California employer with more than 25 employees to provide, in addition to regular paid sick leave, CSPSL (80 hours for full-time employees and an amount based on a formula for part-time employees) for COVID-19-related reasons, including to care for themselves, to care for a family

member, or to become vaccinated. The maximum benefit is $511 per day or $5,110 in the aggregate. The law is retroactive with respect to sick leave taken beginning in January 2021. See 2021 Cal. SB 95.

On February 25, 2021, the California Supreme Court held that, in the meal period context, employers cannot engage in the practice of rounding time punches (adjusting the hours that an employee has actually worked to the nearest preset time increment). The meal period provisions of the California Labor Code are designed to prevent even minor infringements on meal period requirements, and rounding is incompatible with that objective. See Donohue v. AMN Servs., LLC, No. S253677, 2021 Cal. LEXIS 1294 (Feb. 25, 2021).

Colorado

On February 23, 2021, the Colorado Department of Labor and Employment (CDLE) issued revisions to the Wage Protection Rules relating to Colorado employers' paid sick leave obligations under the Healthy Families and Workplaces Act (HFWA). The HFWA requires Colorado employers to provide at least 48 hours of paid sick and safe leave each year either on an accrual basis based on hours worked or frontloaded annually. This requirement remains unchanged. However, the law now also requires all Colorado employers to provide employees access to up to 80 hours of public health emergency leave upon the declaration of a public health emergency by federal, state, or local authorities. The revisions clarify how public health emergency leave accrues for part-time employees and clarifies that employees who are hired *during* a public health emergency are entitled to such leave. The revisions take effect on April 14, 2021. See Wage Protection Rules, 7 CCR 1103-7.

Connecticut

On March 4, 2021, Connecticut Governor Lamont signed an "Act Creating a Respectful and Open World for Natural Hair," also known as the CROWN Act. The CROWN Act bans discrimination in the workplace based on natural hair by amending Connecticut's anti-discrimination statute to define "race" as being "inclusive of ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles." "Protective hairstyles" is defined to include, but is not limited to, "wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, Bantu knots, afros and afro puffs." See 2021 Conn. H.B. 6515.

Illinois

On March 23, 2021 and effective immediately, Illinois amended its Human Rights Act to prohibit the use of criminal convictions as a basis to refuse to hire, to segregate, or to act with respect to recruitment; hiring; promotion; renewal of employment; selection for training or apprenticeship; discharge; discipline; tenure; or terms, privileges, or conditions of employment unless a substantial relationship exists between one or more of the previous criminal offenses and the employment sought or held, or the granting or continuation of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. Employers must conduct individual assessments to determine whether

a substantial relationship between the job and conviction exists and, if an employer makes a decision that a conviction record disqualifies the individual from employment, the employer must notify the individual in writing, provide an opportunity to respond, and notify the employee of their rights to challenge the decision internally or with the Illinois Department of Human Rights. See 2019 Ill. SB 1480.

Also on March 23, 2021, Illinois amended its Equal Pay Act to require private employers with more than 100 employees to obtain an "equal pay registration certificate" by March 23, 2024, and every two years thereafter. To apply for a certificate, employers must provide data on employee demographics and wages and certify compliance with anti-discrimination and equal pay laws. See 2019 Ill. SB 1480.

Maryland

Effective February 19, 2021, Montgomery County, Maryland amended its ban-the-box legislation. The original ordinance, which became effective in 2015, prohibits employers with at least 15 full-time employees in Montgomery County from conducting a criminal background check on a job applicant, or otherwise inquiring about the criminal or arrest history of an applicant, prior to the completion of a first interview. The amendment expands this restriction and covers smaller employers. Specifically, employers (including the county government) with at least one employee (no longer limited to full-time employees) in Montgomery County may not require a job applicant to disclose, or ask others to disclose, whether the applicant has an arrest record or conviction record or has been accused of a crime, or conduct a criminal record check on the applicant before a conditional offer of employment, unless the employer is covered by an applicable exemption under the law. In addition, the amendment provides that an employer can never require an applicant to disclose whether the applicant has been arrested, or has an arrest record, for a matter that did not result in a conviction. Nor can an employer require an applicant to disclose whether the applicant has an arrest record or a conviction record for, or otherwise has been accused of (1) a first conviction for trespass; disturbance of the peace; or assault in the second degree; or (2) a conviction of a misdemeanor if at least three years have passed since the date of the conviction; and the date that any period of incarceration for the misdemeanor ended; or (3) a matter for which records are confidential; or have been expunged. See Montgomery County Bill 35.20.

New Jersey

On March 25, 2021, a federal judge enjoined enforcement of N.J. Stat. § 10:5-12.7 – which prohibits employers from requiring prospective waivers of New Jersey Law Against Discrimination claims – with respect to arbitration, finding that the law is preempted by the Federal Arbitration Act. See N.J. Civil Justice Inst. v. Grewal, No. 19-17518, 2021 U.S. Dist. LEXIS 57437 (D.N.J. Mar. 25, 2021).

On March 9, 2021, in connection with an action by a police officer, the New Jersey Supreme Court identified three distinct causes of action within the Pregnant Workers Fairness Act (PFWA): (1) unequal or unfavorable treatment; (2) reasonable accommodation; and (3) penalization, which arises when conditions of a designated

accommodation were made particularly harsh. See Delanoy v. Twp. Of Ocean, A-68 September Term 2019, 084022, 2021 N.J. LEXIS 173 (Mar. 9, 2021).

On February 22, 2021, Governor Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, which (1) creates license types and operations requirements for businesses in all phases of the cannabis supply chain, from cultivation to retail sale; (2) directs the state Cannabis Regulatory Commission (CRC) to promulgate regulations governing licensing and operations of businesses selling cannabis, including setting statewide caps on the number of licenses; (3) allows CRC to levy an excise tax on cannabis and municipalities to issue a transfer tax on cannabis sales to the public and for transfers between licensed businesses; (4) establishes preferences, reporting, and funding to promote the participation of socially and economically disadvantaged communities in the cannabis industry; and (5) creates employment protections for people who engage in lawful behavior with respect to cannabis. Most of the statute will not become operative until CRC issues rules and regulations. See 2020 N.J. AB 21.

New Mexico

On January 21, 2021, at the first Albuquerque City Council meeting of the calendar year, the governing body unanimously passed a CROWN Act, amending the Albuquerque Human Rights Ordinance, which will explicitly prohibit race-based hair discrimination. Effective as of January 26, 2021, the amendment protects against the denial of employment and educational opportunities because of hair texture or culturally specific hairstyles, including braids, locs, twists or bantu knots. See Council Bill No. O-20-47.

New York

On February 11, 2021, the New York Court of Appeals held, in a 6-1 decision, that individual owners, employees, agents, and limited partners of a business entity cannot be held vicariously liable under the New York City Human Rights Law (NYCHRL) for employment discrimination by the entity's employees and that such persons may be held individually liable only if their own personal conduct violates the law. By way of background, the plaintiff, a former employee of Bloomberg, L.P., using the pseudonym, Margaret Doe, alleged that her supervisor sexually harassed and abused her. Doe alleged employment discrimination claims under the NYCHRL against her supervisor, Bloomberg, L.P., and Michael Bloomberg in his individual capacity. Doe did not allege that Mr. Bloomberg knew of or participated in her supervisor's alleged wrongdoing. Instead, she alleged that, as the owner and CEO of Bloomberg, L.P., Mr. Bloomberg was an "employer" under the NYCHRL and, therefore, was vicariously liable for the supervisor's discriminatory conduct. The Court held that Doe's allegations that Mr. Bloomberg "fostered a culture of discrimination and sexual harassment at Bloomberg, L.P., based primarily on news articles and reports of a deposition in an unrelated case," were insufficient to state a claim against him under the NYCHRL. See Doe v. Bloomberg, L.P., No. 8, 2021 N.Y. LEXIS 50 (Feb. 11, 2021).

On January 22, 2021, the Second Circuit Court of Appeals affirmed the Southern

District of New York's grant of a preliminary injunction enforcing a non-compete and prohibiting a former IBM sales manager (Lima) from working at Microsoft because he would inevitably disclose IBM's trade secrets. The Second Circuit based its decision, in part, on the following findings: (1) Lima's job at IBM provided him with access to IBM's trade secrets, namely IBM's confidential plans regarding its strategy to acquire new cloud computing clients in Latin America—the exact geographic market he would be overseeing at Microsoft; (2) Lima would perform substantially similar work at Microsoft in an arena where IBM was a direct competitor; (3) the district court did not clearly err in concluding, as a predictive matter, that Lima would inevitably disclose IBM's confidential information as he undertook his job duties at Microsoft; and (4) the non-compete agreement does not impose undue hardship on Lima, as he is currently on Microsoft's payroll. IBM v. de Freitas Lima, No. 20-3039-cv, 2021 U.S. App. LEXIS 1766 (2d Cir. Jan 22, 2021).

Pennsylvania

Effective April 1, 2021, the City of Philadelphia expanded its Fair Criminal Record Screening Standards (FCRSS). The FCRSS has applied, and will continue to apply, to job applicants, prohibiting employers from considering an applicant's criminal history prior to making a conditional offer of employment. Now, it also will apply to current employees, independent contractors, and gig workers who work within the City's geographic boundaries. Employers also are prohibited from using criminal histories for re-employment decisions and continued employment, including promotions, raises, and/or terminations. To the extent that employers are permitted to consider an individual's criminal background, they must conduct an individualized assessment before making any employment decision based on the criminal background. If an employer makes an employment decision based, in whole or in part, on the individual's criminal record, they must give individuals written notice of, and reasons for, the negative employment decision, and permit the individual 10 business days to provide evidence of any inaccuracy or to provide an explanation. Employers may inquire about an employee's pending criminal charge if it is job-related. Lastly, the amended FCRSS replaces punitive damages with liquidated damages. A complainant can potentially recover liquidated damages equal to the maximum allowable salary for the job subject to the complaint for a period of one month, not to exceed $5,000. See Bill Nos. 200479, 200413, 200614.

Texas

On March 10, 2021, a Texas appellate court affirmed a lower court's injunction prohibiting enforcement of the City of San Antonio's paid sick leave ordinance, ruling that is it unconstitutionally preempted by the Texas Minimum Wage Act. Specifically, the paid sick and safe leave provision in the City's ordinance established a minimum wage that was inconsistent with the State's Minimum Wage Act and, thus, violated the Texas Constitution. See Washington v. Associated Builders & Contractors of S. Tex., No. 04-20-00004-CV, 2021 Tex. App. LEXIS 1751 (Tex. App. Mar. 10, 2021).