

Annual Employment Law Wrap-Up:

What Happened in 2020 and What It Means for 2021

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Agenda

Federal Update

- Discrimination issues
 - Supreme Court LGBTQ decision (*Bostock v. Clayton County, Georgia*)
 - EEOC Complaints
 - Reminder about harassment training
 - Executive order on diversity training
 - Racial Competency in the workplace
 - Off-duty activism
- Impact of a Biden administration on employers in 2021

State Law Update

- Massachusetts Paid Family and Medical Leave
- Maine paid leave
- Unemployment insurance fraud

Pandemic-related Issues

- Telework outside of your own home state
- Reopening challenges
- State travel restrictions
- Testing and vaccines

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FEDERAL UPDATE

Bostock v. Clayton County, Ga. **(SCOTUS, June 15, 2020)**

- Does Title VII – “because of sex” – prohibit discrimination on the basis of gender identity and sexual orientation?
 - ***Bostock v. Clayton County, Ga (11th Cir. 2019)***: employee fired after participating in a gay recreational softball league; was openly criticized by those who influenced employer’s decision making. Eleventh Circuit declined to extend Title VII protection to sexual orientation discrimination claim.
 - ***Zarda v. Altitude Express (2nd Cir. 2019)***: employee fired allegedly because his employer discovered he told a female client he was gay and because he did not conform to the “straight male macho stereotype.” Second Circuit ruled *en banc* in favor of the EEOC’s expansive interpretation of Title VII.
 - ***EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. (6th Cir. 2019)***: employee fired after informing employer that she intended to transition from male to female and would represent herself and dress as a woman while at work. Sixth Cir. found in favor of the employee.

Bostock v. Clayton County, Ga. **(SCOTUS, June 15, 2020)**

Title VII prohibits discrimination based on sexual orientation or gender identity.

"The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids ... An employer who fires an individual merely for being gay or transgender defies the law."

- Justice Gorsuch (writing for a 6-3 majority)

EEOC FY 2019 Enforcement and Litigation Data

- Sex: 23,532
 - Including 7,514 complaints of sexual harassment
- Race: 23,976
 - Including 8,682 of complaints of racial harassment
- Disability: 24,238
- Religion: 2,725
- National Origin: 7,009

Sexual Harassment Training

CT

- All employers
 - 2 hours of training to all supervisory employees within 6 months of assumption of supervisory position
- Employers with 3 or more employees
 - 2 hours of training to all employees within 6 months of hire
- Periodic training to update all supervisory and non-supervisory employees not less than every 10 years

ME

- Employers with 15 or more employees
- For all new employees within one year of hire
- Additional training for supervisory/managerial employees within one year of hire

MA, NH, RI, and VT

- No requirements

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Racial Competency in the Workplace

Harassment Based on Race: Recent EEOC Settlements

- Harassment based on race is unlawful!
- Derogatory comments
 - N--- word
 - Boy
 - Monkey
 - Colored
 - Your kind/you people
 - You are lucky to be paid. A long time ago Blacks were doing this for free
 - Reference to KKK
 - Racist graffiti

EEOC v. Icon Burger Acquisition, LLC (d.b.a. Smashburger)

- Alleged race-based hostile work environment
 - Constant racist and demeaning comments by a manager (e.g., calling the employee “chimpanzee” “monkey” “you look like a monkey with your big nose” “n---” word)
 - Racist comments about the employee to his fiancée who is white and also an employee (e.g., “how can you be with him when he looks like a monkey?”)
 - Lasted for approximately 10 months
 - Harassment was reported on multiple occasions to management, but Smashburger waited nearly a year before conducting a serious investigation
 - Smashburger took remedial action only after the employee filed a charge with EEOC

EEOC v. Icon Burger Acquisition, LLC (d.b.a. Smashburger)

- EEOC filed a race harassment lawsuit in US. District Court of Eastern District of NY
- Smashburger has agreed to financial settlement (\$70,000) and must implement substantial non-monetary measures
- A 3-year consent decree (entered November 20, 2020)
 - Enjoined from discriminating, creating hostile work environment, or retaliation based on race
 - Revisions to Smashburger’s anti-discrimination policies
 - Creation of procedures for investigation of discrimination and retaliation complaints
 - Training for supervisors, management and HR employees
 - Training for all NY employees
 - Periodic reporting to EEOC

Racism: What Can We Do Today?

Training for all

Zero tolerance for harassment

Evaluate leaders based on racial competency

Increase diversity (employees, vendors, customers, etc.)

New Executive Order for All Federal Contractors

- Order issued September 22, 2020
- Section 4 (i.e., posting, notice, and limitations on training) applies to federal contracts signed after November 22, 2020
- Prohibits certain training
- Requires contractors to:
 - Include specific language in subcontracts and purchase orders
 - Send notice of their obligations under the Order to their labor unions
 - Post such notice in conspicuous places available to applicants and employees

New Executive Order for All Federal Contractors

- OFCCP has 30 days to publish a request for information seeking information from federal contractors regarding D/E/I programming provided to employees
- Directs the Attorney General to assess the extent to which private employer workplace training that uses “divisive concepts” could give rise to a hostile work environment claim and potential liability under Title VII

Words Matter

Diversity is being asked to the dance.

Inclusion is being asked to dance.

Belonging is being able to dance how you want.

Equity is having a turn picking the DJ

Off-Duty Activism/Political Expression

- Lawful off-duty political activities generally protected under applicable state constitution (e.g., free speech; and right to assemble) and/or common law protection (e.g., wrongful termination)
- Certain off-duty activities concerning terms and conditions of employment considered protected concerted activity under Section 7 of the NLRA
- Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont:
 - No law that specifically address off-duty political activities

Whether/How to Respond

- Do you have all the facts?
- Is the conduct lawful or unlawful?
- Is the conduct work-related?
- How is the conduct work-related?
(e.g., violate employer policies,
threatening, etc.)

What to Expect From a Biden Administration

- Executive Order on diversity training
- Employment-related legislation
 - COVID-19/economic relief
 - Pregnancy accommodation
 - Paid leave
 - FFCRA leave
- EEOC
 - Increased employment investigations
- U.S. DOL
 - Joint employer
 - Independent Contractor
 - FLSA salary/duty test
 - Minimum wage
- NLRB
 - Empowerment of unions
- OSHA
 - COVID-19
 - Aggressive enforcement

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STATE LAW UPDATE

Massachusetts Paid Family and Medical Leave

- Benefits available starting January 1, 2021
 - 20 weeks of paid sick leave
 - 12 weeks of paid parental leave
 - 12 weeks of leave to care for family member not available until 7/1/21
- Updated FAQs from the DFML
 - Updated PFML workplace poster
 - Employees cannot “top-off” PFML benefits (through state plan) by using accrued paid time off from their employer
 - But, employers with a private plan can allow their employees to supplement their private plan benefit with accrued paid leave
- The contribution rate remains at 0.75% of eligible wages, and the maximum weekly benefit remains at \$850/week for the year 2021.

Maine Earned Paid Leave

- Effective **January 1, 2021**
- Applies to employers that employ more than 10 employees for more than 120 days in any calendar year
- Generally covers **all employees** (FT, PT, seasonal)
- One hour of paid leave for every 40 hours worked, up to a total of 40 hours per year
- Can be used **for any reason**
- Must begin accruing on first day of employment, but can prevent use for 120 calendar days of employment
 - E.g., Employee hired December 1, 2020 will begin to accrue January 1, 2021; and may use time starting March 31, 2021

Maine Earned Paid Leave

- Rate at which paid leave must be paid
 - “Regular rate” including all compensation received for hours worked: shift differentials, commissions, work performed at a higher rate, non-discretionary bonuses
- Employers may institute black out periods, during which planned leave may not be taken
- Employers may also require up to 4 weeks’ advance notice of planned leave
- Employers must allow employees to use paid leave in increments as small as an hour
- If accrual (v. frontload), employers must permit carryover, but may limit hours accrued in the following year accordingly
- Whether leave must be paid out upon termination is determined by employer policy
 - If no policy on that, MDOL will look to terms of vacation policy

Unemployment Insurance Fraud

Employer obligations:

- Confirm that the employee or former employee has not filed for unemployment benefits
- Notify the state unemployment office fraud department and provide the names of the affected employee(s) -- Massachusetts: UIFraud@MassMail.State.MA.US
- Notify the affected employee(s) that their Social Security number has been compromised and advise them to:
 - Take steps to protect their credit, including locking their credit and other steps – a good reference is www.identitytheft.gov;
 - Hold on to any paperwork they receive from unemployment;
 - Do not use any benefits received (such as a Visa debit card) but hold onto the benefits for the investigation;
 - Be vigilant about any other potential impact on their finances.
- Consider notifying all employees that their information may have been compromised in an unemployment fraud scheme and ask them to be vigilant and to notify a company point of contact if they believe benefits may have been filed fraudulently on their behalf.



PANDEMIC-RELATED ISSUES

Telework: Do You Know Where Your People Are?

- Issues related to location of work
 - Taxes
 - Business registration
 - Unemployment benefits
 - Employment laws
- What is the tipping point?
 - No clear guidance
 - But . . . we are heading into month 10
- Recommendation
 - For now . . . know where your employees are working!

Trade Secret Protection Tips For Teleworkers

- Require employees to sign non-disclosure (and non-solicitation if appropriate) agreements
- Review and update electronic communication and technology policy to be protective of the employer, including:
 - Ability to monitor remote use
 - Ability to remotely wipe the device if necessary
 - Consider requiring use of separate devices for work and personal use for employees with high level of access to confidential information and trade secrets
- Review and update confidentiality policies
 - Prohibit storage of employer information in employee cloud storage
 - Prohibit use of personal email accounts for any work purposes
 - Prohibit sharing passwords with anyone including co-workers
- Take prompt actions if learn about potential breach

Enhancing Cybersecurity

- Employer-provided v. personal devices
- Password protection and multifactor authentication
- Train employees
- Protocols for departing employees
- Cyberattack response plan

Screening and Contact Tracing Technologies

- With screening questionnaires – stick to the CDC or state guidance
- Audit occasionally to be sure employees are complying
- If using apps that track location or use facial recognition, consider privacy issues
- Implement protocols for what happens to the information that is gathered
 - Limit access, storage, use

Reopening Challenges

- Accommodations
 - Telework likely reasonable accommodation if employee has an underlying medical condition
 - Telework not required accommodation if member of employee's household has underlying medical condition, but . . .
 - Decisions based on age are risky!

Reopening Challenges

- Leave
 - FFCRA and state leave may expire at end of December
 - Parents of young children have a lot to deal with!
 - Consider retention goals
- Follow protocols
 - Stress staying home when sick
 - Ensure quarantines are followed
 - Note new CDC guidance on quarantine
 - Notify close contacts of positive test result

Travel Restrictions

- Cross-boarder travel restriction (last updated November 25, 2021)

CT	ME	MA	NH	RI	VT
14-day quarantine or negative test	14-day quarantine or testing	14-day quarantine or negative test	14 day quarantine or negative test	14-day quarantine or negative test	14-day quarantine, or 7-day and negative test

- Know your state orders
 - They change frequently!
 - Pierce Atwood Quick State by State Reference Tool:
 - <https://www.pierceatwood.com/alerts/covid-19-quick-state-state-reference-tool-regarding-reopening-new-england-states>
 - Please check back regularly for updates

Travel Restrictions

- Limit business travel to the extent possible
- Understand quarantine requirements
 - Example: NH imposes obligation on employers to prohibit work in office after travel outside of NE
- Wanting to get out to facilities is not the standard!

EEOC: Updated Q&A

- COVID-19 testing before entering the workplace
 - Testing consistent with CDC guidance will meet the ADA's "business necessity" standard; tests must be accurate and reliable
- Invite employees not currently in the workplace to request disability accommodation in advance of their expected return to the workplace
- Don't ask whether employees have family members with COVID-19 or symptoms associated with COVID-19
 - Ask "have you had close contact with..." rather than "does one of your family members have COVID" ...
- The period of providing telework because of the COVID-19 pandemic could serve as a "trial" period, which could make it more difficult for employers to take the position that the essential functions cannot be done remotely.

EEOC: COVID-19 Testing

- Allows *employers to administer* a test to detect the presence of the COVID-19 virus to employees before initially permitting them to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others
- Prohibits employers from requiring COVID-19 **antibody** testing before permitting employees to re-enter the workplace

EEOC: COVID-19 Vaccines

- EEOC's general guidance is to *encourage* employees to be vaccinated
- Vaccine requirements are likely permissible if there is a policy clearly providing an exemption for employees with a disability or a sincerely held religious belief, and also an interactive process
- Practical considerations if requiring vaccine:
 - Will you enforce it?
 - How many people do you think will request an accommodation?
 - Who bears the cost of the COVID-19 vaccine?

OSHA: Reporting of COVID-19 Infection

- New guidance issued on Sept. 30, 2020
- Requires prompt reporting of hospitalizations and fatalities caused by workplace exposure
- Report of hospitalization within 24 hours
- Report of fatalities within 8 hours, provided the death occurs within 30 days of workplace exposure
- The reporting clock starts once the employer knows both that:
 - The employee has been in-patient hospitalized or has died; and
 - The reason for the hospitalization or the cause of death was a work-related case of COVID-19
- Use “more likely than not” standard in determining whether it was a work-related cause of COVID-19
- Report by using any one of the following:
 - Call the nearest OSHA office;
 - Call the OSHA 24-hour hotline at 1-800-321-OSHA (6742); or
 - By electronic submission, report online.

Presenter

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