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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

W&L

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HUMAN RIGHTS ORGANIZATION SUED FOR RACIAL BIAS; SUPREME COURT TO HEAR AFFIRMATIVE ACTION PREFERENCES AT HARVARD

The former president of the Human Rights Campaign, the country's largest LGBT advocacy group, has sued the organization in federal court alleging that he was underpaid and then terminated "because he is Black" and saying that the group has a "deserved reputation for unequal treatment of its non-White employees." This may come as a surprise to some to know that "equal employment" and "civil rights" groups are often sued themselves over the same issues. There is no better example than the Equal Employment Opportunity Commission (EEOC), that has more employment discrimination charges filed against it per capita than any other organization in the entire country.

At the same time, the U.S. Supreme Court has agreed to hear an incredibly controversial case involving affirmative action policies at Harvard University and the University of North Carolina. Harvard has rejected the claims of discrimination and says that it only considered race in a flexible way, as one factor among many in building diverse classes of students. The high court's 1978 decision in *Regents of the University of California v. Bakke* barred the use of racial quotas but said schools could still use race in some circumstances for assembling a diverse student body.

The current case will address what the "race plus factor" means and how it should be applied. Some say the old goal of "equality" is now applied by some as meaning "equity," which mean unequal treatment in an effort to achieve equal results.

CONGRESS PASSES BILLS GUARANTEEING HARASSMENT CASES MAY BE BROUGHT IN COURT

The U.S. House of Representatives on February 7, 2022, and the U.S. Senate on February 9, passed bills that would prohibit enforcement of contract provisions that mandate third party arbitration of workplace sexual harassment or assault claims. The measures are bipartisan, introduced by Democrats and Republicans. The law as passed narrowly pertains to sexual harassment and assault allegations, although separate legislation that has not passed would nullify all pre-dispute arbitration agreements. Proponents of this type legislation have argued that private arbitration allows offenders to escape public scrutiny and requires claimants to go to a private procedure buried in the fine print of employment policies. Employers argue that arbitration is quicker and cheaper than other forms of litigation, and that arbitrators do just as good a job as judges and juries in deciding harassment cases. The measures do not prohibit employers and plaintiffs from agreeing to arbitration after the dispute arises. The new law applies to any dispute or claim that arises or accrues on or after the date of enactment, and nullifies pre-dispute arbitration agreements covering sexual assault or harassment. This legislation will be addressed further in the next newsletter.

EEO-1 REPORTS DUE IN MAY

For many years, the EEOC rules have required employers to file an annual report, known as the EEO-1 or Standard Form 100, in which employers with 100 or more employees submit data on their employees' race, sex and ethnicity by job groups. The EEOC has announced a tentative deadline of May 17, 2022 for filing the report, a deadline that has previously been delayed due to the COVID-19 pandemic. The 2022 filing deadlines will not include worker pay data, but the EEOC is evaluating requiring such race and gender pay data for the purpose of filings in the future.

ARE MORE GUARANTEED INCOME PAYMENTS IN OUR FUTURE, AND DO THEY DISCOURAGE WORK?

A number of cities and counties across the country are experimenting with guaranteed income payments, supplementing programs on the federal level. There are at least 20 such pilot programs currently in existence, designed to study the concept of giving low-income persons money with none of the traditional strings of welfare. The idea is to gain research from which to determine appropriate policy for the future, but the projects are small in scale and so far have given out less than $35 million. Examples include San Francisco, which has given out $1,000 a month to 130 persons lasting six months, and Hudson, New York, which is paying a random selection of 25 low-income residents $500 a month for five years.

If these programs sound radical, consider that Congress itself passed a temporary mass cash distribution program in the form of stimulus checks to a majority of Americans. Many believe the closest thing we have to a long-term assistance program is the child tax credit, which sent eligible parents between $250 and $300 a month for each child they have. This current level of child tax credit expired at the end of 2021 without being renewed.

There is considerable debate from both sides of the aisle about these and similar programs. Many years ago, the Nixon Administration almost passed a national basic income policy for all but the wealthiest Americans. The concept is quite simple, that if you give people money, they are going to be better off, but the question is are they better off compared to what?

Some believe that the limited duration and scope of the current programs are not sufficient to determine the policy moves that could be considered. The biggest fear is that a guaranteed income would deter people from working at all. Even supporters can see that the monthly support sometimes reduces work hours. Supporters are also divided as to whether a basic income concept should take precedence over other social programs like universal healthcare or affordable housing.

WHEN MUST EMPLOYERS PAY FOR EMPLOYEE COVID-19 TESTS?

Since the early days of the pandemic, the Families First and Coronavirus Aid, Relief, and Economic Security (CARES) Act, laws and regulations have required that group health plans provide first dollar coverage for COVID-19 tests administered ***under medical supervision***. Recently, the U.S. Departments of Health and Human Services, Labor, and Treasury issued guidance expanding the scope of those regulations to include coverage for ***over-the-counter*** COVID-19 tests.

By requiring covering of “at home” tests, the guidance greatly improves access to testing, but like the previous regulations, it does not require coverage of all COVID-19 tests. Specifically, the regulations require coverage only of COVID-19 tests taken for ***diagnostic, not surveillance, purposes***.

Testing for Continued Employment

Demonstrating readiness for employment is one such ***surveillance*** purpose. Although the U.S. Supreme Court recently stopped the Occupational Safety and Health Administration from imposing a “vaccine or test” rule on

companies with 100 or more employees, some employers are considering whether to require unvaccinated workers to test as a condition of continued employment. Some states and local authorities are also considering "vaccinate or test" mandates for employers.

Although the foregoing guidance and previous regulations under the Families First/CARES Act do not require coverage for testing for these purposes, health plans should be aware that they could still be on the hook. In particular, employers that "self-fund" their employees' health benefits may indirectly pay the cost of testing through their health plans.

First, as a practical matter, it is not necessarily clear whether a test is for ***diagnostic*** or ***surveillance*** purposes. Test results do not say why a test was taken.

Given the ease with which employees can identify various symptoms associated with COVID-19, and their possible exposure to others suspected of having COVID-19 (all generally regarded as an adequate basis for coverage), determining whether a test was solely for employment is a challenge.

Exacerbating this challenge, the regulations and guidance under the Families First/CARES Act generally prohibit health plans from using prior authorization, screening and other medical management techniques to find out.

Indeed, the guidance suggests that health plans can rely only on participants' attestations that their tests were not for employment purposes.

Further adding potential confusion in differentiating between "at home" tests required to be covered and those that are not, health plans typically do not process pharmacy claims for "over the counter" products.

Even apart from the regulations, the actual terms of an employer's health plan could require coverage for tests taken for employment purposes. Although previous guidance from the DOL stated that a group health plan cannot cover certain types of testing done solely to determine eligibility for work, case law and more recent DOL guidance suggest otherwise.

Finally, some states may require that employers pay for tests that they require their employees to take. At least six states – California, Illinois, Montana, New Hampshire, North Dakota, and South Dakota – have passed laws that, though differing in important details, require employers to reimburse employees for work-related expenses.

Traps for Employers Who Cover Tests

Some employers may not want to pay for tests their employees take as a condition for continued employment, but others may wish to do so. Reasons include retaining unvaccinated workers, complying with state workplace rules, or meeting collective bargaining obligations.

Providing such coverage, however, can create traps for the unwary. Creating the apparatus to pay testing costs (outside of a group health plan) may create its own ERISA plan, including an "Employee Assistance Plan." Such plans may then require compliance with complex rules and regulations, some of which may override state laws. Further, if not properly administered, on-site testing programs may raise HIPAA and other privacy concerns.

Regardless of whether self-funded employers mandate testing, they should be on guard for excessive testing fees. Fortunately for employers, the guidance caps liability for ***over-the-counter*** tests at $12/test for eight tests per month for each plan member, provided members can obtain tests from designated pharmacies without any up-front cost.

But similar safeguards do not so clearly apply to tests taken ***under medical supervision***. Although the costs of such tests vary, industry surveys have shown that they average $130 to $150, with out-of-network providers charging on average 33% more. A provision in the CARES Act requiring that health plans pay an "amount that equals the cash price for such [testing] service as listed by the provider on a public internet website" has, in the view of some industry observers, made health plans vulnerable to price gouging and abuse.

In fact, relying on this CARES Act language, some out-of-network testing providers have brought lawsuits seeking to recover amounts approaching $500 per tests. If they win, self-funded employers may ultimately be responsible for excessive testing fees. Even at market prices, unanticipated costs for frequent testing may dent an employer's health care budget.

For these reasons, self-funded employers should pay attention to the testing costs that their health plan pay – especially if they require their unvaccinated employees to test.

In particular, employers should review the provisions of their health plans and state law, carefully follow ERISA's requirements, and coordinate with their service providers to ensure the proper administration of COVID-19 testing claims.

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