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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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WITH INFLATION HIGH, UNION WAGES NOT KEEPING UP

For the past year, compensation for workers with non-union jobs is rising faster than those represented by a union. Wages for non-union workers rose 6%, compared to 3.4% for those in unions.

One reason for the disparity is that unions negotiate long-term collective bargaining agreements, typically three years, locking in pay rates in spite of inflationary times. An example of how non-union workers adapt more quickly is at Delta Airlines, where Delta started paying flight attendants for the time the passengers spend boarding, while the attendants at 17 other union-represented airlines do not. A recent example at Starbucks shows that it granted pay increases to about 9,000 non-union stores while the 200 stores that have recently been unionized were excluded, due to the requirement to first negotiate with the union.

CONSIDERATIONS FOR EMPLOYERS DEALING WITH ABORTION ISSUES

The Supreme Court decision in *Dobbs v. Jackson Women's Health* on June 24, 2022 returned abortion issues to the states, allowing each state to "address abortion as it pleases." It is expected that approximately half of the states will pass some type of state laws prohibiting abortion totally or partially, although some of these state laws may at least be temporarily blocked in litigation. Many of the remaining states are likely to provide even stronger protection to abortion access. Issues will be created when a resident of Missouri, for example, which bans abortion, goes to Illinois, where abortion is still permitted, and what happens where a resident of Missouri receives abortion medication from a New York doctor?

Justice Brett Kavanaugh, in his concurring opinion, expressed the view that a state may not bar a resident of a state from traveling to another state to obtain an abortion, based on the Constitutional right to interstate travel. The general rule is that one state ordinarily cannot prosecute a person for something that occurred in another state, but the situation can get complicated. Can someone be charged for aiding pregnant women in Missouri to travel out of state, such as an employer providing abortion assistance, or the person who supplied the car and drove her to Illinois, for aiding and abetting the abortion?

Abortion pills can now be prescribed by telehealth appointments and mailed directly to homes. In some areas, mobile abortion clinics are being set up. But are buying abortion pills a form of "drug trafficking?" There is an incredible amount of uncertainty about what these issues mean for employers and employees, whether benefits are managed by a health-insurance provider or human resource departments, and how employees' privacy will be protected.

Employers with employees in states that prohibit abortions are reviewing whether to cover abortions in their health plans, and making decisions on whether they want to pay for employees to travel out of state for abortion drugs and procedures.

The number of issues employers face include discrimination, health confidentiality, workplace conduct, employee benefits, and regulatory compliance. Employers must also evaluate how such issues affect their relationships with employees, customers, and stockholders.

A majority of HR executives tend to feel that they do not plan to change their current healthcare offerings or are still evaluating options. Those companies wishing to support abortion rights have mostly decided to offer up reimbursement for travel and healthcare costs to employees who have to get such care out of state.

Self-insured employer plans are generally covered by the Employee Retirement Income Security Act of 1974 (ERISA), and so arguably ERISA-covered plans may pre-empt state law. While sensitive patient care information is federally protected via the Health Insurance Portability and Accountability Act of 1996, or HIPAA, benefits administered separately, such as travel reimbursement for an out of state abortion, are not. There are also tax implications. If abortion-related travel coverage is viewed as "a significant benefit in the nature of medical care," participants in high-deductible health plans would have to meet their annual deductibles of at least $1,400 for individuals or $2,800 for families before the plan could pay for abortion-related travel. Business groups are seeking guidance and have sent a letter to three government agencies on the *Dobbs* ruling, including the Secretaries of Human Health and Human Services, Labor, and Treasury. These business groups are seeking guidance on updating privacy protections under HIPAA, and Treasury/IRS guidance assuring plan sponsors that travel benefits meeting tax code requirements are not considered significant medical benefits, and thus are not taxable.

In contrast, fully-insured plans that smaller employers often use are generally subject to state regulation. Even HIPAA has exceptions that allow information to be disclosed for law enforcement purposes, such as when there is a court order, warrant, or subpoena regarding the disclosure.

Employers may be asked about how they would handle a personal data request related to abortion. According to a statement issued by Meta, "We comply with government requests for user information only where we have a good-faith belief that the law requires us to do so. In addition, we assess whether a request is consistent with internationally recognized standards on human rights."

Employers can also generally still expect to be held liable under the Pregnancy Discrimination Act and Title VII of the Civil Rights Act if they treat employees differently for having had an abortion, seeking one, or choosing not to have one. The *Dobbs* decision did not address employment discrimination issues.

In the meantime, President Biden has signed two executive orders intended to improve access to abortion services which direct the Secretary of Health and Human Services to consider actions to help patients travel outside their states for abortions using funds from Medicaid. This move will likely be challenged in the courts. The Justice Department has also filed its first post-*Roe* lawsuit on abortion rights, suing the State of Idaho over its law banning abortion after six weeks. The Department of Justice (DOJ) contends that federal law requires doctors and hospitals to perform medically required abortions to preserve a pregnant woman's health. The lawsuit relies on the Emergency Medical Treatment and Labor Act, which requires hospitals to provide treatment to save a patient's life, as well as to prevent organ dysfunction or serious impairment of bodily function.

Many states have privacy laws that extend beyond those in the U.S. Constitution, and thus the rationale of the *Dobbs* ruling. A number of lawsuits are being filed in states challenging abortion limitations under state constitutional privacy laws.

So what is an employer to do? At the beginning, employers should review what policies they currently have in their healthcare plans. Many employers will need to consult with their third-party administrators to determine their responsibility for government inquiries concerning abortion services. Employers can also begin exploring conservative practices that limit legal liability and privacy violations, such as limiting retained information on employees who sought these services.

EEOC ISSUES STUDY ABOUT THE EFFECT OF REQUESTING PAY DATA FROM EMPLOYERS

A July study was released about the effect of the race and gender pay data the Equal Employment Opportunity Commission (EEOC) collected from employers in 2019 and 2020. The pay data collection was added as a "Component 2" of the EEOC's annual diversity report known as the EEO-1. The EEO-1 form describes a workforce's race, sex and ethnic makeup.

The report on the collection of the race and gender pay data by the National Academies of Sciences found the information useful to the EEOC. However, the report also said that the 10 job categories used were not specific enough and the 12 pay bands were too broad. There is no current pay data requirement to complete the EEO-1 form, and the EEOC Commission still has a 3-2 Republican majority.

The EEOC has not indicated whether such pay data will be required in the future, but the current EEOC Commissioners have totally different views of the impact of the recent study. The three Republican commissioners each released statements that the main takeaway from the report was that the Agency's attempt at collecting pay data was deeply flawed. They recommended that any future collection of pay data go through a rulemaking process. Current Democrat EEOC Chair Charlotte Burroughs said the study confirmed that collecting and analyzing such pay data can be a useful tool in preventing and combating pay discrimination. The employer community is concerned about the level of burden that pay data reporting requirements may have, as well as the misleading nature of the conclusions from the data.

WHAT YOU SHOULD KNOW ABOUT RECENT EEOC COVID-19 GUIDANCE

On July 12, 2022, the EEOC announced new guidance concerning COVID-19. The most important change is that the prior guidance stated that conducting mandatory work site COVID-19 testing always met the Americans' with Disabilities Act (ADA) standard that any mandatory medical test be "job-related and consistent with business necessity." The new guidance states that COVID-19 workplace testing is no longer automatically compliant with this ADA standard. Instead, employers will now need to assess whether testing is job-related and consistent with business necessity based on current pandemic and individual workplace circumstances. The EEOC identified "possible considerations" employers may use when making this assessment:

- The level of community transmission;
- Vaccination data;

- Information regarding variants;
- The speed and accuracy of testing;
- Types of contacts between employees and others in the workplace (such as whether vulnerable populations are involved); and
- The potential impact on operations if an employee enters the workplace with COVID-19.

Notwithstanding the EEOC's new guidelines surrounding COVID-19 testing, the EEOC reiterates that employers may continue screening employees who are physically entering a work site with regard to COVID-19 symptoms or diagnoses, but should not screen employees who are working remotely or not physically interacting with coworkers or others. In addition, the EEOC clarifies that employers may screen job applicants for COVID-19 symptoms after making a conditional job offer, as long as it does so for all employees entering the same type of job. Further, employers may require employees to provide a doctor's note clearing them to return to work after having COVID-19. Employers may also rely on other alternatives to determine whether it is safe for an employee to return to work (e.g., following current Centers for Disease Control (CDC) guidance).

In general, the EEOC guidance did not change regarding other COVID-19 issues. For example, if an employer wants to ask an individual employee (as opposed to general screening methods applied to all employees) questions regarding symptoms associated with COVID-19 or request the individual to undergo a temperature screening or testing, the employer must have a reasonable belief based on objective evidence that the individual may have COVID-19.

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