EMPLOYMENT LAW UPDATE
KEY DEVELOPMENTS AND EMERGING TRENDS

By Michael S. Kalt

National Conference of State Legislatures
Agenda

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2. 
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- Identify significant developments
- Identify emerging differences among state/agencies
- Preview items to beyond)
#METOO - RELATED DEVELOPMENTS

§ “Sexual Harassment” issues have dominated headlines and legislative agendas since 2017 (and continue to do so)

§ For example, in 2018 nearly half of California’s new employment laws were #MeToo-related
Expanding and new anti-harassment training very popular:

- Numerous new states have enacted laws requiring harassment training
- Pre-existing training requirements expanded (e.g., smaller employers, non-supervisors)
- Industry-specific harassment training (e.g., construction, janitors, legislative, etc.)
- New types of training (e.g., “bystander intervention,” “anti-bullying,” “interactive,” etc.)
# METOO - RELATED DEVELOPMENTS

Increased access to justice:

§ Longer limitations periods

§ Limiting waivers/barriers to courthouses

§ (CA) effectively precluding summary judgment

§ Expanding who can be sued
  
  • Individual liability
  
  • Joint liability (e.g., contractors)
  
  • Non-employer relationships (fiduciary, business, etc.)
# METOO - RELATED DEVELOPMENTS

§ Increased protections from harassment

- State specific rules (rather than Title VII only)
- Non-employee harassment (third-party)
- Non-employer harassment (e.g., interns, volunteers, independent contractors, etc.)
- Legislative employees (e.g., lobbyists)

§ Industry-specific protections (e.g., panic buttons for hotel workers [Illinois, New Jersey, etc.])
# METOO - RELATED DEVELOPMENTS

Confidentiality limits a major focus, especially in settlement agreements:

§ Cannot preclude discussion of “underlying facts” (but amount paid okay)

§ Cannot preclude “compelled disclosure” in another matter

§ Cannot require employee agreement not to report/pursue claims

§ New defamation protections

§ “No rehire” provisions likely next focus area
# METOO - RELATED DEVELOPMENTS

§ State Legislatures increasingly under scrutiny and are responding positively

§ Potential Legislature-specific changes:

- Increased training
- Removing immunities from suit
- Permitting claims against non-employers
- "Whistleblower" protections
- Preventing indemnification of harassers (T.B.D.)
- No campaign funds to defend/settle suits
EXPANDED "EEO" PROTECTIONS

- U.S. SUPREME COURT ANALYZING WHETHER "SEX" UNDER TITLE VII INCLUDES "SEXUAL ORIENTATION" OR "GENDER IDENTITY"
  - Many states include "sexual orientation"
  - Some states include "gender identity" (CA, NH)

- ADDITIONAL PROTECTIONS/REQUIREMENTS
  - Extending to smaller businesses
  - "Actual or perceived..."
  - New categories (e.g., crime victims [CT], "..."
  - Municipality protections for "gender identity," "sexual or..."
“HAIR”-RELATED PROTECTION

§ Expanding “race” to include hair texture and hairstyles
  - braids, locks and twists (NYC, Cincinnati)
  - Cannot expressly ban natural hair
  - Careful with facial hair

§ Expanded religious protections
  - include facial hair (CA)
PREGNANCY ACCOMMODATION

**Trend:** States are increasingly:
- Expressly precluding pregnancy discrimination
- Requiring reasonable accommodation for pregnant employees (27 states as of June 2019)

**Potential accommodations include:**
- Modifying work practices or policies
- Modifying work duties
- Adjusting work schedules
- Permitting more frequent breaks
- Providing furniture/modifying equipment
Federal law requires employers to provide a private place and a location “other than a bathroom” to express milk.

Many states have additional protections.

- Breaks “each time”
- Physical guidelines
- Written policies
- Retaliation protections
“SECOND CHANCE” HIRING

- General consensus post-incarceration employment reduces recidivism
- Federal “First Step Act” limits contractor inquiries about conviction history
- Over 30 states and 150 cities have “ban the box” laws governing timing and content of conviction-related inquiries
“SECOND CHANCE” HIRING (Cont’d)

• “Ban the Box” laws expected to spread further, but with industry-specific carve-outs
• Additional proposals to encourage “second chance hiring”
  • Negligent hiring protections
  • Employment eligibility certificates
  • Evidentiary limitations
“WAGE THEFT” PROTECTIONS

States (CA, CO, NJ) and cities increasingly enacting rules to prevent “wage theft,” especially for hourly/low earning employees

Tools provided:

§ Written notices at time of hire/update
§ Private rights of action
§ Increased penalties, including jail
§ “Joint and several” liability
§ “Naming and shaming”
PAY EQUITY

State-level changes:
- "Substantially similar work" or "equal work" (e.g., same job, job with similar responsibilities, etc.)
- "Fair pay" or "pay equity" or "equal pay"
- Not limited to gender
  - Race/national origin (e.g., Asian American)
  - "All" protected classes

Employer burden to prove...
PAY EQUITY

New tools to prevent

§ Bans on prior salary history in many states and cities
§ Preventing “confidentiality” (IL, NV, WA)
§ Pay Data Reporting
  • Federal: EEO-1
  • States also considering
§ Board of Director/Director
§ “Naming and shaming”
§ “Safe Harbors” for imposing reasonable policies
On September 24, 2016, the Department of Labor released a new rule re Overtime:

- Raising “standard” salary threshold purposes from $400 per week to $913 per week (35,568 annually)
- Increasing “highly compensated executive” threshold to $107,432 annually
- Allowing non-discretionary bonuses and commissions not to exceed 10% of salary

NOTE: Many states have higher minimums:
- $45,760 annually
OTHER DEPARTMENT OF LABOR DEVELOPMENTS

- Additional regulations contemplated regarding
  - Calculating “regular rate of pay”
  - Tip-pooling
  - Fluctuating workweeks
- Opinion Letters regarding
  - Volunteer hours as “hours worked”
  - “Gig economy” workers as independent contractors
“INDEPENDENT CONTRACT OR “EMPLOYEE”

- Federal law recently more employer-friendly
  - NLRB ruling independent contractors cannot unionize
  - Department of Labor opinion gig economy workers are independent contractors

- Some states (e.g., Texas) have similar approach regarding gig workers as contractors

- But other states (and most Democratic Presidential candidates) are narrowing test for independent contractor purposes
“INDEPENDENT CONTRACT OR "EMPLOYEE"

§ California’s “ABC Test” precludes “IC” status unless a person:
   a) Free from control;
   b) Performs work outside usual course of hiring entity’s business; and
   c) Is customarily engaged in independent trade or business

§ New California law (AB 5) codifies “ABC Test” but with various exceptions (and stay tuned for more)

§ Other states (e.g., NY) and presidential contenders supporting/following AB 5
PAID LEAVE

§ “Paid Family Leave” laws are increasingly popular amongst states (e.g., CA, NY, OR, etc.)

§ “Paid Sick Leave” is also adopted within states and cities (e.g., Austin)

§ “Family Leave” similar to laws adopted within states (e.g., [CFRA/Parental leave for employees])

§ Newest trend: Paid leave for any reason” (e.g., ME, CO)
HELPFUL DISABILITY-RELATED DEVELOPMENTS

• “Reliability, stability and trustworthiness are basic job requirements” (Hess v. United Healthcare)
• Overtime can be an essential job function (McNeil [8th Cir.])
• Telecommuting not reasonable accommodation where position requires on-site collaboration (Yochim [7th Cir.])
“ECONOMIC AND SAFETY

States are increasingly requiring employers to provide protective measures for employee/victims of violence, including sexual assault, and sexual harassment (e.g., NY, WA, etc.).

Additional protection includes:
- Expanded basis for protection against violence: [IL], “severe or repeated acts of violence”
- Reasonable accommodation
- "Presumption of reasonable accommodation"

Several states (e.g., CA, CO, FL, NE, VA) have laws that provide state law equivalents for federal military leave benefits.

- **Trend:** States increasingly recognize the value of military leave benefits for Guard and Reserve members (e.g., NE, VA)

- **Trend:** Large majority of states authorize veterans’ benefits (e.g., AK, MO, TN, WA)
HUMAN TRAFFICKING PREVENTION

§ States have begun providing specific training and resources to prevent/spot human trafficking.

§ Federal law prohibits the destruction/confiscation of foreign passport/travel documents for purposes (i.e., trafficking).

§ California considers SB 589 (2009) with posting a "Worker Bill of Rights."
LEGISLATIVE PROTECTION

- Harassment protection
- Whistle-blower protection
- Unlawful legislature
- No indemnification for unlawful conduct
- Right to unionize
ARBITRATION AGREEMENTS

§ Federal Law (FAA): Employment arbitration agreements – including class action waivers – generally enforceable

§ State Law: Most states follow the FAA

§ Some prohibit mandatory employment arbitration agreements (e.g., IL, NJ, WA, CA)

§ Minority (but growing) opinion
POLICY/SETTLEMENT AGREEMENT LIMITS

Targeted provisions include:

§ Waiver of claims to obtain benefits (CA)

§ Non-disparagement/non-reporting provisions (CA, OR)

§ Confidentiality provisions, including wages and sexual harassment facts

§ “No rehire” provisions (VT, CA)
NON-COMPETITION COVENANTS (NCC’S)

§  Governed by state law, and reasonable restrictions generally permissible

§  California disagrees: NCC’s generally unenforceable, except in very narrow circumstances

§  Recently, states increasingly limiting NCC’s, including by:

  §  Income limits/type of employee (e.g., “non-exempt”)
  §  Permissible length (e.g., 18 months)
  §  Enforcement limits (e.g., “layoff” exception)
  §  “Moonlighting limits”
  §  Non-solicitation limits
NON-COMPETITION COVENANTS (NCC’S)

§ NCC’s drafted upon separation viewed more favorable

§ “Non-poaching” provisions generally enforceable, if reasonable (e.g., one year)

§ Trade secret/confidentiality agreements viewed differently
MUNICIPAL-LEVEL ORDINANCES

§ Trend: Many cities are enacting ordinances that preempt employment laws (e.g., minimum wage), especially in states that have enacted a state-wide version.

§ Counter-trend: States are enacting preemption ordinances that preempt local ordinances (a) conflicting with state laws, (b) preventing predictive scheduling, (c) weakening a state version (e.g., NJ [sick leave laws]).

§ California’s view: Permits local laws even where statewide versions exist for sick leave, discrimination or safety.
PREDICTIVE SCHEDULING REQUIREMENTS

§ **Concern:** Last minute scheduling or changes materially impacts lower-wage employees

§ **Solution:** Require minimum amount of notice and limit employer changes (unless compensate with premium for changes)

§ Presently limited to several cities (Philadelphia, Chicago, Emeryville) or particular industries (OR [retail/food service])
MARIJUANA

§ Trend: States are increasingly allowing use for medicinal and/or recreational purposes.

§ Issue: Marijuana remains illegal under Federal law, and even in states where it is legal.

§ General Rule: Employers are generally not required to accommodate or otherwise address marijuana usage/effects, or violation of contractor laws.

§ Upcoming: Drug-testing for marijuana usage (both in and out of the workplace) is on the horizon, requiring accommodation of marijuana users.
SMOKING

§ Currently 28 states have enacted comprehensive smoke free workplace laws

§ Trend: Many states and cities extending these prohibitions to e-cigarettes or vaping in workplace (e.g., AK, CA, FL, RI, etc.)
CONSUMER DATA PRIVACY

- California’s Consumer Privacy Act (CCPA) allows “consumers” to request businesses identify and delete personal information

- Concern: As worded, employees may request employers delete personnel-related information (i.e., harassment charges)

- A brief extension likely, but employers must still identify categories of personal information gathered and business purpose
STATE-MANDATED RETIREMENT PLANS

Concern: Workers not saving enough for retirement, and many employers do not offer retirement plans.

Trend: Ten states (e.g., OR, NY, NJ, etc.) and several cities require states to offer savings vehicle and employers to offer savings plan.

Employers coordinate payroll deductions to state saving vehicle unless employee opts out.
THINGS TO WATCH IN 2020

§ SCOTUS decisions regarding Title VII protections re: “sexual orientation” and “gender identity”

§ Employment issues in Presidential Campaign (e.g., minimum wage, pay equity, independent contractor)

§ Department of Labor Secretary Eugene Scalia and other federal agencies

§ State-level developments