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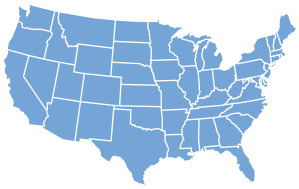
EMPLOYERS STATE LAW ALERT



HRhero.com Summarizing Significant New Employment Laws & Regs in All 50 States

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Digital Workplace

Lawmakers beginning to take note of AI's role in the workplace

by Tammy Binford

"The robots are coming." That has become a common refrain among workers worried about technology, particularly artificial intelligence (AI), putting them out of a job. But beyond replacing them, workers are beginning to worry that AI might unfairly prevent them from landing a job in the first place. So, as technological advances continue, a new catchphrase is in order: "If the robots are coming, laws—and lawsuits—can't be far behind."

Already, many employers are using AI in recruiting and applicant screening. Some programs use AI to analyze an applicant's voice and facial expressions. Systems also analyze gestures and speech patterns. AI programs can even judge the applicant's abilities and qualifications for a job. Plus, the platforms can "learn" with each "conversation," thereby improving with each interview.

If software is that smart, what's to keep it from picking up biases that can taint the hiring process? For example, what if a qualified candidate has a disability affecting facial expressions or speech patterns, causing her to be disqualified? What other legally protected characteristics might the software be biased against, characteristics such as race, ethnicity, gender, and age?

Or is it possible AI can guard against biases an all-human process might miss? And what kind of human monitoring at all phases of the process—from software development through analysis of job interviews—is necessary to obtain the best outcomes? What rights do job candidates have when they're being analyzed, not by a robot exactly, but not really by a human being either?

It's not just HR professionals who are pondering those questions. Lawmakers are exploring the issues, too.

Illinois passes first law

Concern about AI's effect on the hiring process led lawmakers in Illinois to unanimously pass the state's Artificial Intelligence Video Interview Act in May 2019. It was signed by the governor in August and will become effective January 1, 2020.

The law requires employers using AI to inform applicants that it will be used to analyze their interview videos, and employers must explain to candidates how the AI program works and the characteristics the program will use to evaluate interviewees.

The law also requires employers to get an applicant's consent to be evaluated by AI before the video interview. In addition, employers must maintain confidentiality, and they must destroy both the video and any copies within 30 days after an applicant requests they be destroyed.

The law is designed to provide protections to jobseekers, but it also can be seen as protection for

(continued on page 2)

In This Issue

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Alan King, Editor • Brad Forrister, VP Content • With contributions from members of the Employers Counsel Network

employers that want to incorporate AI into their hiring processes since it provides guidance on acceptable use.

The new Illinois law is the first of its kind in the nation, but it lacks certain specifics. For example, it doesn't define AI or provide guidance on how job applicants should be notified. It also doesn't outline penalties and enforcement actions. Another important question left unanswered: Does it allow an employer to reject consideration of applicants who don't consent to an AI evaluation?

Time will tell if the legislature will pass amendments clearing up questions and whether other states will follow Illinois' lead.

Action in other states

The Illinois law is the first of its kind, but other states are looking at the issue. For example, the California Consumer Privacy Act, which becomes effective January 1, 2020, is a data privacy law aimed at controlling the use and sale of personal data. The law may apply in some employment situations.

New York has passed legislation that creates the New York State Artificial Intelligence, Robotics and Automation Commission, which is a temporary group charged with looking at current state laws related to technologies and studying measures taken in other states.

So far, Congress hasn't weighed in on the issue, but U.S. Senators Kamala Harris of California, Elizabeth Warren of Massachusetts, and Patty Murray of Washington wrote a letter to the Equal Employment Opportunity Commission (EEOC) in September 2018 asking the agency to address potential problems associated with AI, according to a July 2019 article from Bloomberg Law, but the article says there has been no action from the agency.

Other considerations

Even though few states have taken action and nothing seems imminent on the federal level, the growing use of AI is leading some big law firms to form groups focusing on helping employers understand possible liability.

Concerns over bias in hiring as well as other facets of the workplace continue as technology keeps advancing. Some fear the lack of gender diversity in AI-related jobs will lead to platforms that may affect how women are hired or promoted.

But technology affects more than hiring. Since it automates tasks, it can affect the number of people needed in certain jobs. A November 1, 2019, article in *Harvard Business Review* points to the unbalanced gender distribution in common jobs, with jobs such as administrative assistants and elementary and middle school teachers more often going to women and other jobs such as construction workers and truck drivers more often performed by men.

The article cites a PwC estimate that more women than men will be affected by changes in the workforce by the late 2020s since many of the tasks being automated are traditionally performed by women. Eventually, however, with technology like self-driving vehicles making headway, job losses in male-heavy industries also will be affected. The changes on the way make striving for gender parity in all areas more important, the article says.

Cases

Oregon

Analysis

Employer Retaliation

Oregon Supreme Court expands potential retaliation liability

by Calvin L. Keith

The Oregon Supreme Court has expanded potential liability for retaliation under state law to include acts outside the workplace and acts by nonemployees. It reviewed a case in which a former medical assistant sued a surgeon under Oregon's employment discrimination statute claiming he had discriminated against her because she opposed or reported certain unlawful practices. The trial court dismissed her retaliation claim, but the Oregon Court of Appeals reversed that decision. On review, all the facts she alleged were treated as true, and all reasonable inferences were drawn in her favor. Read on to learn how the supreme court reached its decision.

Facts

Nicole McLaughlin was a medical assistant at Hope Orthopedics, where she worked closely with orthopedic surgeon Kenneth Wilson. They worked well together, and she asked him to provide a reference when she applied to the MBA program at Willamette University. The supreme court described the reference he wrote as a "glowing one."

Over the following few months, Wilson began to sexually harass McLaughlin. Because she feared retaliation, she didn't report it. After she was accepted into the MBA program, however, she reported his conduct to her employer. She was placed on paid leave while the complaint was investigated and ultimately left her employer to enter the MBA program without ever returning to work.

Shortly after McLaughlin's complaint against him was resolved, Wilson went to the office of the director of admissions at Willamette University and alleged McLaughlin had left her last two jobs by getting large amounts of money and a gag order. He claimed he was concerned she would manipulate male faculty members. His statements spread to others at the university, including the dean of the MBA program. McLaughlin sued, alleging she suffered unwanted attention and emotional distress.

Wilson asked the court to dismiss McLaughlin's claims without a trial because he wasn't her employer nor even an employee of her prior employer at the time of his alleged conduct. Further, because she wasn't employed at the time of the alleged conduct, there had been no unlawful retaliatory interference with her employment. The appeals court disagreed and ruled for McLaughlin, finding Wilson was covered by the Oregon antiretaliation statutes. He sought the supreme court's review of the decision.

Supreme court's decision

The supreme court considered two questions. First, does Oregon's antiretaliation statute—ORS 659A.030(1)(f)—cover Wilson, who was neither an employer nor a coworker at the time of the alleged conduct? Second, does it cover the conduct Wilson allegedly engaged in, which was postemployment and didn't affect McLaughlin's job at Hope?

Oregon's antiretaliation statute makes it an unlawful employment practice for "any person to discharge, expel, or otherwise discriminate against any other person" because she has opposed or complained about an unlawful employment practice. The two issues for the court were whether Wilson was a person under the statute and whether the conduct led him to "discharge, expel or otherwise discriminate against any other person."

While other parts of the Oregon discrimination laws prohibit discrimination by "employers, labor organizations and employment agencies," the state's retaliation law instead refers to "any person." Wilson asked the supreme court to assume "person" was intended to mean the same as in other parts of the statute where the words "employers, labor organizations and employment agencies" are used.

The court assumed just the opposite. The legislature must have meant something different by using "person" rather than "employers, labor organizations and employment agencies." Similarly, the court rejected Wilson's argument that the use of the word "person" was a result of a recent legislative change that was simply a mistake by the legislature. The court noted it cannot assume the legislature made a mistake nor correct a mistake but rather must interpret the statute as written. Accordingly, it held the use of the word "person" was meant to make the Oregon antiretaliation provisions more expansive than other parts of the discrimination law and allow it to apply to retaliatory acts by individuals who were neither coworkers nor employers.

Wilson next argued the antiretaliation provision should be read so that any retaliatory conduct must occur in the workplace and relate to the employment relationship. McLaughlin argued the use of the terms "otherwise discriminate against" encompasses discriminatory treatment even when it has no connection to employment. Wilson contended the phrase "otherwise discriminate" had to be read in conjunction with the terms that preceded it—"discharge" and "expel"—and therefore must be related to employment.

The supreme court disagreed with Wilson, noting that nothing in the legislative history or the statutory language limited relief to acts occurring inside an employment relationship. It found the language at least extended to retaliation with a link to past or future employment. It didn't answer McLaughlin's broader contention that the statute would include acts with no connection to employment at all.

The Oregon Supreme Court held that the retaliatory acts alleged in the complaint had a clear connection to McLaughlin's prior employment. Wilson had been her supervisor and had gone to Willamette to complain about her actions while at Hope. In doing so, he interfered with her future employment. Accordingly, a reasonable fact finder could determine his activities would deter an employee, such as McLaughlin, from pursuing her rights to be free from discrimination. The supreme court affirmed the appeals court's decision and sent the matter back to the trial court for further proceedings.

Bottom line

As the supreme court has confirmed, retaliation provisions apply not only to employers but also to all persons. Accordingly, individuals who act outside the workplace or who were never employed at the workplace may be subject to a legal action if they discriminate against someone because she complained of unlawful conduct at the workplace. Under appropriate facts, an employer could also be liable.

The court has also declared it isn't just conduct directly affecting the individual's employment—such as a discharge or discipline—that may result in a claim. Conduct that might cause someone not to file a discrimination charge may be actionable as well. One place this may arise for employers is when they provide posttermination negative references. An employee will likely be able to file a claim under the statute against the employer and the individual who provided the reference even though the conduct occurred after the employment relationship ended.

Excerpted from *Oregon Employment Law Letter*
Calvin L. Keith, Julia Markley, Edward Choi, Editors
Perkins Coie LLP

Statutes

California

Dispute Resolution

Prohibits restrictive settlement agreements

This law bars an agreement to settle an employment dispute from containing a provision that prohibits, prevents, or otherwise restricts a settling party from working for an employer against which he has filed a claim or any parent company, subsidiary, division, affiliate, or contractor of the employer. The law also clarifies that an employer and an aggrieved person are free to agree to end a current employment relationship or prohibit or otherwise restrict the aggrieved person from obtaining future employment with the employer if the employer has made a good-faith determination that the person engaged in sexual harassment or sexual assault. The law further clarifies that an employer is not required to continue to employ or rehire a person if there is a legitimate nondiscriminatory or nonretaliatory reason for terminating or refusing to rehire him.

Cite: 2019 CA AB749, CA Pub. Ch. 808 (2 pages)

Enacted: 10/12/2019

Effective: 1/1/2020

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB749

Employee Privacy

Security breach notification

This law revises the definition of personal information for purposes of security breach notifications to add specified unique biometric data and tax identification numbers, passport numbers, military identification numbers, and unique identification numbers issued on a government document. The law authorizes a person or business that is required to issue a security breach notification to include in a notification for a breach involving biometric data instructions on how to notify other entities that used the same type of biometric data as an authenticator to no longer rely on data for authentication purposes.

Cite: 2019 CA AB1130, CA Pub. Ch. 750 (10 pages)

Enacted: 10/11/2019

Effective: 1/1/2020

https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1130

Employee Training

Sexual violence and harassment training for janitorial employees

This law relates to the registration and training of employees who provide janitorial services. The law requires the Division of Labor Standards to create two types of registrations, one for registrants without employees and one for registrants with employees, and prohibits the division from approving a registration if the employer does not include in their written application, among other things, the name of any subcontractor or franchise servicing contracts affiliated with branch locations and the name of any subcontractor on franchise servicing the contracts. The law requires the division to require employers subject to the training requirements to use the training content created by the Labor Occupational Health Program.

This law also requires employers to use a qualified organization from a list developed and maintained by the director to provide the required training and requires qualified organizations to provide peer trainers for employers to use in the training. The law mandates that employers pay the qualified organization a specified amount per participant unless an alternative payment has been agreed to under a collective bargaining agreement. The law requires employers to submit a specified report of training completion to the director.

Cite: 2019 CA AB547, CA Pub. Ch. 715 (3 pages)

Enacted: 10/10/2019

Effective: 1/1/2010

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB547

Employment Discrimination

Extension of time to file complaint

This law extends the time period for employees to file discrimination complaints from one year after the unlawful practice occurred to three years. The law specifies that the operative date of the verified complaint is the date the intake form was filed with the labor commissioner.

Cite: 2019 CA AB9, CA Pub. Ch. 709 (2 pages)

Enacted: 10/10/2019

Effective: 1/1/2020

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB9

Analysis

Independent Contractors

Are you ready for California's new law on independent contractor status?

by Cathleen S. Yonahara

On September 18, 2019, California Governor Gavin Newson signed a landmark bill, Assembly Bill (AB) 5, into law. The new law may potentially reclassify over a million independent contractors as employees. Companies that have independent contractors in California should conduct an audit to determine whether the contractors satisfy the "ABC test" or fall under a statutory exception and make any necessary adjustments to their business structures if they don't.

AB 5 codifies, expands California Supreme Court's ABC test

In *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County* (April 30, 2018), the California Supreme Court abandoned the long-standing multifactor common-law test set forth in *Borello v. Department of Industrial Relations* in favor of a much narrower three-pronged test (commonly referred to as the "ABC test") for determining independent contractor status for purposes of California Wage Orders.

Under the ABC test, a worker is presumed to be an employee, rather than an independent contractor, unless a hiring company proves each of the following:

- (A) The worker is free from the control and direction of the hiring entity, both under the contract for the performance of the work and in fact;
- (B) The worker performs work that is outside the usual course of the hiring entity's business; and
- (C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

AB 5 codified and expanded the *Dynamex* decision to broadly apply the ABC test for purposes of the (1) California Labor Code, (2) Unemployment Insurance Code, and (3) Wage Orders, unless a specific statutory exemption applies.

Does AB 5 apply prospectively or retroactively?

AB 5 states it is declaratory of existing law with regard to California Wage Orders and violations of the Labor Code relating to wage orders. However, all the exceptions to the

bill that would relieve an employer of liability apply retroactively to the maximum extent permitted by law.

Effective January 1, 2020, the ABC test will apply for purposes of the Unemployment Insurance Code and all other provisions of the Labor Code. Beginning July 1, 2020, the test will apply for purposes of workers' compensation.

Statutory exceptions to ABC test

The majority of AB 5 is devoted to explaining the specific statutory exceptions to the ABC test, which are summarized below. Generally, if the ABC test doesn't apply, the *Borello* common-law test will apply.

Specific occupations. Certain occupations are exempted from the ABC test, such as insurance brokers, physicians, surgeons, dentists, podiatrists, psychologists, veterinarians, lawyers, architects, engineers, private investigators, accountants, securities broker-dealers, investment advisers, direct salespeople, commercial fishermen, real estate licensees, repossession agencies, and motor club services. On October 2, 2019, Governor Newson signed AB 170 into law, which added an exception for newspaper distributors until January 1, 2021.

"Professional services" contracts. The ABC test doesn't apply to a contract for "professional services" if the following factors are satisfied:

- The individual maintains a business location (which may include the individual's residence) that is separate from the hiring entity. The individual may choose to perform services at the hiring entity's location.
- If work is performed more than six months after AB 5's effective date, the individual has a business license, in addition to any required professional licenses/permits.
- The individual has the ability to set or negotiate her own rates for the services.
- Outside of project completion dates and reasonable business hours, the individual can set her own hours.
- The individual is customarily engaged in the same type of work performed under contract with another hiring entity or holds herself out to other potential customers as available to perform the same type of work.
- The individual customarily and regularly exercises discretion and independent judgment in the performance of the services.

The term "individual" includes an individual providing services through a sole proprietorship or other business entity.

This exception narrowly defines "professional services" as marketing; HR administration; travel agent services; graphic designers; grant writers; fine artists; enrolled agents who are licensed by the U.S. Department of the Treasury; payment processing agents through an independent sales organization; services by still photographers or photojournalists who don't license content submissions to the putative employer more than 35 times per year; freelance writers, editors, or newspaper cartoonists who don't provide content for the putative employer more than 35 times per year; and licensed estheticians, electrologists, manicurists, barbers, or cosmetologists. AB 5 includes additional subcriteria for some of the above professional services.

Business-to-business contracting relationships. The ABC test doesn't apply to business-to-business contracting relationships that satisfy the following criteria:

- A sole proprietorship, partnership, LLC, LLP, or corporation ("business service provider," or BSP) is free from the control and direction of the contracting business entity.
- The BSP is providing services directly to the contracting business rather than to customers of the contracting business.
- The contract is in writing.
- The BSP has any required business license or business tax registration.
- The BSP maintains a business location that is separate from the business or work location of the contracting business.
- The BSP is customarily engaged in an independently established business of the same nature as that involved in the work performed.
- The BSP actually contracts with other businesses to provide the same or similar services and maintains a clientele without restrictions from the hiring entity.
- The BSP advertises and holds itself out to the public as available to provide the same or similar services.
- The BSP provides its own tools, vehicles, and equipment to perform the services.
- The BSP can negotiate its own rates.
- The BSP can set its own hours and location of work.
- The BSP isn't performing work for which a license from the Contractor's State License Board is required.

This exception specifies that it doesn't apply to an individual worker, as opposed to a business entity, who performs labor or services for a contracting business. However, it also defines a BSP as a sole proprietorship. Thus, it's unclear whether an individual operating as a sole proprietor would be considered a BSP or an individual worker excluded from the exception.

Relationships between referral agency and service provider. Under this exception, a "referral agency" is defined as a business that connects clients with service providers that provide graphic design, photography, tutoring, event planning, minor home repair, moving, home cleaning, errands, furniture assembly, animal services, dog walking, dog grooming, Web design, picture hanging, pool cleaning, or yard cleanup. Relationships between a "referral agency" and a BSP that satisfy the following criteria are excepted from the ABC test:

- The BSP is free from the control and direction of the referral agency in connection with the performance of the work for the client, both as a matter of contract and in fact.
- The BSP has any required business license, business tax registration, or state contractor's license, if applicable.
- The BSP delivers services to the client under its own name, rather than under the name of the referral agency.
- The BSP provides its own tools and supplies to perform the services.
- The BSP is customarily engaged in an independently established business of the same nature as that involved in the work performed for the client.
- The BSP maintains a clientele without any restrictions from the referral agency and is free to seek work elsewhere, including through a competing agency.
- The BSP sets its own hours and terms of work and is free to accept or reject clients and contracts.
- The BSP sets its own rates for services performed, without deduction by the referral agency.
- The BSP isn't penalized in any form for rejecting clients or contracts.

Like the business-to-business contracting relationship exception, this exception doesn't apply to an individual worker, as opposed to a business entity, who performs labor or services. Thus, it's unclear whether an individual operating as a sole proprietor would be considered a BSP or an individual worker excluded from this exception.

Contractor-subcontractor relationship in construction industry. The ABC test doesn't apply to the relationship between a contractor and an individual performing work under a subcontract in the construction industry, provided specified criteria are satisfied.

Bottom line

You should expect more legislative activity related to AB 5 as businesses continue to push for additional exceptions to and clarification of the new law. Although the gig companies weren't successful in having an exception included in AB 5, Uber, Lyft, and DoorDash have threatened to spend $90 million on a 2020 ballot measure for an exception to the law.

In the meantime, you should work with your legal counsel and promptly conduct an internal audit to determine if any independent contractors in California need to be reclassified in light of AB 5.

Excerpted from *California Employment Law Letter*
Mark I. Schickman, Cathleen S. Yonahara, Editors
Freeland Cooper & Foreman LLP

Sexual Harassment Training

Preventing sexual harassment in the construction industry

This law extends to January 1, 2021, the date on which certain employers are required to begin providing sexual harassment training to seasonal, temporary, or other employees hired to work for less than six months. The law also authorizes an employer that employs workers under a multiemployer collective bargaining agreement in the construction industry to satisfy the sexual harassment training and education requirement by demonstrating that an employee has received the training in one of specified circumstances within the past two years. Finally, the law requires the Division of Labor Standards Enforcement to develop recommendations for an industry-specific harassment and discrimination prevention policy and training standard for use by employers in the construction industry.

Cite: 2019 CA SB530, CA Pub. Ch. 722 (4 pages)

Enacted: 10/10/2019

Effective: 1/1/2020

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB530

Worker Safety

Blood lead levels

This law requires the California Department of Public Health to consider a lab report of an employee's blood lead level at or above 20 micrograms per deciliter to be injurious to the health of the employee and report the case to the Division of Occupational Safety and Health within five business days of receiving the report. The law provides that the report constitutes a serious violation and subjects the employer to an investigation and requires the division to make any citations or fines imposed as a result of the investigation publicly available on an annual basis.

Cite: 2019 CA AB35, CA Pub. Ch. 710 (2 pages)

Enacted: 10/10/2019

Effective: 1/1/2020

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB35

Workplace Accommodations

Requirements for breastfeeding

This law requires an employer to provide a lactation room or location that includes prescribed features. It also requires an employer to, among other things, provide access to a sink and refrigerator close to the employee's workspace. The law deems denial of a reasonable break time or adequate space to express milk a failure to provide a rest period in accordance with state law. The law prohibits an employer from discharging or in any other manner discriminating or retaliating against an employee for exercising or attempting to exercise rights under these provisions and would establish remedies, including filing a complaint with the labor commissioner. The law authorizes employers with fewer than 50 employees to seek an exemption from these requirements if they demonstrate the requirements pose an undue hardship. The law also requires an employer that obtains an exemption to make a reasonable effort to provide a place for an employee to express milk in private.

Cite: 2019 CA SB142, CA Pub. Ch. 720 (2 pages)

Enacted: 10/10/2019

Effective: 1/1/2020

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB142

New York

Analysis

Family Leave

Prepare to ring in the New Year with PFL increases

by Angelo D. Catalano
Coughlin & Gerhart, LLP

In April 2016, New York Governor Andrew Cuomo signed a bill creating the New York Paid Family Leave Benefit Law (PFLBL). Drafted to be phased in over a number of years, the PFLBL provides New York employees the most comprehensive paid leave benefits in the United States. January 1, 2020, represents another significant step increase for those paid family leave (PFL) benefits.

Step increases to AWW

As of January 1, 2019, employees became entitled to up to 10 weeks of PFL at 55% of their average weekly wage (AWW). Like the workers' compensation AWW, the PFL AWW is capped at $1,357.11 per week, even if the employee earns more. The maximum weekly PFL benefit for 2019 is $746.41.

On January 1, 2020, eligible employees will be entitled to the same 10 weeks of leave at 60% of their AWW, which is capped at $1,401.17 for 2020. The maximum PFL benefit for 2020 will be $840.70 per week.

On January 1, 2021, eligible employees will receive 12 weeks of benefits at 67% of their AWW. The AWW for 2021 hasn't been established yet, but it isn't expected to be lower than the AWW for 2020.

Self-funded?

As you may recall, Governor Cuomo promised that the PFL benefit would have no negative impact on employers and would be entirely funded by payroll deductions. The New York superintendent of financial services retains control over the amount contributed by employees; the initial estimates were that they would contribute $1 per week toward the PFL benefit, which would cover its costs.

In 2018, the maximum contribution was 0.126% of an employee's gross wages, capped at $85.80 annually. In 2019, the employee contribution was increased to 0.153% of gross wages, capped at $107.97 annually. In 2020, the contribution will increase to 0.270% of an employee's gross wages, capped at $196.72 annually. As a result, the true cost of the PFL premium is well above $1 per week for some employees.

Bottom line

You should update your policies to reflect the new PFL requirements. Also, be prepared for the use of PFL benefits to increase as the payment value rises and more employees become aware of the benefit. Many employers initially feared PFL because there were many more questions than answers when the law was first passed. After nearly two years of the law under our belts, employers have settled in and come to accept it.

While most of the heavy lifting involving PFL is handled by the same insurance companies that handle disability benefits, you must stay on top of necessary paperwork and provide appropriate notice to employees. It's also imperative to understand the interplay between the PFL and federal laws like the Family and Medical Leave Act (FMLA), which has different rules for when paid time off must be used. Employment counsel can help you navigate your obligations and employees' rights under the myriad leave laws.

Excerpted from *New York Employment Law Letter*
Edited by Charles H. Kaplan of Sills Cummis & Gross P.C. and Paul J. Sweeney of Coughlin & Gerhart LLP

Pennsylvania

Employment Eligibility

Creates the Construction Industry Employee Verification Act

This law prohibits an employer in the construction industry from knowingly employing an unauthorized employee, defined as an individual who does not have the legal right or authorization under federal law to work in the United States. The employer must verify an employee's eligibility through the E–Verify system and keep a record for the duration of the employment or for three years, whichever is longer. Staffing agencies will be subject to the law's requirements of employers for workers supplied to the construction industry. The law authorizes the Department of Labor and Industry to receive and investigate complaints.

Cite: 2019 PA HB1170, PA Pub. Ch. 75 (11 pages)

Enacted: 10/7/2019

Effective: 10/7/2019

https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=B&billNbr=1170&pn=2129

Regulations

Colorado

Analysis

Leave Policies

CO's 'use-it-or-lose-it' vacation laws in flux after new regulations

by Katarina Niparko

Recently, Colorado's Department of Labor and Employment (CDLE) proposed certain amendments to the rules promulgated under Colorado's Wage Protection Act (WPA) and the Colorado Wage Claim Act (CWCA) related to the payout of vacation time when an employee is discharged from employment. The proposed amendments, if permanently adopted, will prohibit employers from establishing agreements requiring employees to forfeit unused vacation pay at the end of the employment relationship.

'Use it or lose it' as interpreted in Nieto

As recently interpreted by the Colorado Court of Appeals, state law currently allows employers to include a "forfeiture" clause, also known as a "use-it-or-lose-it" clause, in their employment contracts. Such clauses allow employers to refuse to pay out unused vacation time upon employees' separation or termination from employment. In *Nieto v. Clark's Market, Inc.*, the court of appeals upheld an employer's enforcement of its use-it-or-lose-it policy upon the termination of its employment relationship with a worker.

In *Nieto,* the district court found in favor of the employer when a former employee sued under the CWCA after the employer refused to pay out her accrued but unused vacation time when she left its employ. The district court found the employer's handbook clearly states that an employee "forfeits all earned vacation pay benefits" if she is discharged, with or without cause, or if she voluntarily leaves the company but fails to give two weeks' notice. The court of appeals affirmed the lower court's determination that the policy didn't violate the CWCA because the payout of vacation time is dependent on the employment agreement signed by the parties.

Under the CWCA, "wages" or "compensation" includes "vacation pay earned in accordance with *the terms of any agreement"* (emphasis added), and any "wages or compensation . . . unpaid at the time of such discharge is due and payable immediately" when an employee is involuntarily separated from employment. The court concluded that because the terms of the employment agreement are controlling in determining which wages or compensation are due at the time of discharge, an employer that refuses to pay out unused vacation at the time of discharge pursuant to its use-it-or-lose-it policy would not be in violation of the CWCA.

Changes proposed after Nieto

After the release of the *Nieto* decision, the CDLE adopted proposed rules interpreting the WPA. The rules became effective on August 20, 2019, albeit temporarily, but they may become permanent in December. A public hearing on the proposed rules will be held by the CDLE on October 15. If they're made permanent, the rules would effectively mandate that use-it-or-lose-it policies that apply to vacation payout at the time of discharge violate the CWCA.

The proposed rules state that "vacation pay," which is included in the definition of "wages" or "compensation," is "earned in accordance with the terms of any agreement." However, they further unambiguously state that "if an employer provides paid vacation for an employee, the employer shall pay upon separation from employment all vacation pay earned and determinable in accordance with the terms of any agreement between the employer and the employee." The proposed rules also interpret the CWCA's language pertaining to vacation time "earned and determinable in accordance with the terms of any agreement" to prohibit employers from requiring the forfeiture of any earned vacation pay upon the separation of employment.

Employers may continue to establish agreements addressing whether they offer any vacation pay for employees, as well as the amount and frequency of accruable vacation pay during specific employment periods. Employers may also continue to have use-it-or-lose-it policies that limit the rollover of unused vacation from one year to the next, but such policies may limit rolled-over vacation time only when an employee has already accrued one year's worth of vacation time (or more). The proposed rules include the following example:

> [For] an agreement for ten vacation days per year . . . [the employer] (a) may provide that employees can accrue more than ten days, by allowing carryover of accrued vacation from year to year; (b) may provide that employees cannot accrue more than ten days, by disallowing carryover of unused vacation from year to year; but (c) may not provide that after an employee accrues ten days, that amount diminishes below ten days for any reason.

The CDLE supported its proposed rules against use-it-or-lose-it provisions by stating:

> Recent interpretations that unused vacation pay is forfeited upon employment separation [are] contrary to the text and legislative intent of the vacation pay statute, which states that the "wages" or "compensation" that cannot be forfeited include "vacation pay earned in accordance with the terms of any agreement."
>
> . . .
>
> The legislature expressly rejected a prior version of that provision that would have allowed an "agreement between the employer and the employee that requires or results in loss or forfeiture of accrued vacation pay."

Judicial action and executive reaction

Assuming they stand, the proposed rules will provide further clarity on the prohibition against forfeiture of vacation pay upon separation from employment under Colorado law. In any event, the CDLE's rulemaking response to the Colorado Court of Appeals' holding in *Nieto* presents an interesting example of the interplay between the state's executive and judicial branches. We will continue to monitor the status of the CDLE's rules, including whether they are permanently adopted, and track this area of the law as it develops.

Excerpted from *Colorado Employment Law Letter*
John M. Husband, Emily Hobbs-Wright, Bradford J. Williams, Robert M. Thomas, Editors
Holland & Hart LLP

Licensure

Supervision of physician assistants

The Colorado Medical Board adopted rules and regulations regarding the licensure of and practice by physician assistants, including requirements for a supervisory plan or a practice agreement as applied to all supervising physicians and physician assistants.

Cite: 3 C.C.R. 713-7 Rule 400 (42 CR 18, 09/25/2019) (8 pages)

Adopted: 09/25/19

Effective: 10/15/19

https://www.sos.state.co.us/CCR/Upload/AGORequest/AdoptedRules02019-00317.doc

Licensure—Healthcare Professionals

Military service credit

The Medical Board adopted rules and regulations relating to education, training, or service gained during military service.

Cite: 3 C.C.R. 713-43 Rule 910 (42 CR 18, 09/25/2019) (2 pages)

Adopted: 9/25/2019

Effective: 10/15/2019

https://www.sos.state.co.us/CCR/Upload/AGORequest/AdoptedRules02019-00318.doc

Wages

Wage Protection Act amendments

The Department of Labor and Employment approved emergency amendments to Wage Protection Act rules to update references to statutes, clarify that "tips" and "gratuities" are treated the same under the Act, to correct misinterpretation of the vacation pay statute to prevent forfeiture, and to clarify that workers have the same wage law rights regardless of immigration status.

Cite: 7 C.C.R. 1103-7 (42 CR 18, 09/25/2019) (7 pages)

Adopted: 8/20/2019

Effective: 8/20/2019

https://www.sos.state.co.us/CCR/Upload/AGORequestEmergency/AdoptedRules42019-00438.doc

Florida

Licensure

Dietitians and nutritionists

The Board of Medicine amended licensure by endorsement rules for dietitians and nutritionists, with reference to an updated application for licensure.

Cite: Fla. Admin. Code R. 64B8-42.001 (45 FAW 172, 09/04/2019) (1 page)

Adopted: 9/4/2019

Effective: 9/18/2019

https://www.flrules.org/gateway/readFile.asp?sid=0&tid=22339699&type=1&file=64B8-42.001.doc

Iowa

Licensure

CPA examination

The Accountancy Examining Board adopted amended rules stating that should the board determine that examination window limitations have been eliminated, candidates may retake failed examination subject exams once their previous grade has been released.

Cite: Iowa Admin. Code r. 193A-3.6(1) (IAB, 09/11/2019, page 671) (2 pages)

Adopted: 8/8/2019

Effective: 10/16/2019

https://www.legis.iowa.gov/docs/aco/bulletin/09-11-2019.pdf

Louisiana

Licensure—Healthcare Professionals

Advanced practice registered nurses

The Board of Nursing amended rules for initial, renewal, and reinstatement of Advanced Practice Registered Nursing licenses as well as prescriptive authority and related continuing education requirements.

Cite: LAC 46:XLVII.4507, 4513, 4516 (45 LR 1201, 09/20/2019) (3 pages)

Adopted: 9/20/2019

Effective: 9/20/2019

https://www.doa.la.gov/osr/REG/1909/1909.pdf

Maryland

Licensure—Continuing Education

Insurance producer continuing education requirements

The Insurance Administration adopted amendments to regulations to require insurance producers that are licensed in title insurance to take continuing education courses only designated as "title."

Cite: COMAR 31.03.02 (46:19 Md. Reg. 816, 09/13/2019) (1 page)

Adopted: 8/27/2019

Effective: 1/1/2020

www.dsd.state.md.us/COMAR/SubtitleSearch.aspx?search=31.03.02.*

Workers' Compensation

Legal representation and fees

The Workers' Compensation Commission adopted amendments to clarify the awarding of attorneys' fees when a last award of compensation for permanent partial disability is increased under COMAR 14.09.04.03.

Cite: COMAR 14.09.04 (46:20 Md. Reg. 846, 09/27/2019) (1 page)

Adopted: 9/12/2019

Effective: 10/7/2019

www.dsd.state.md.us/COMAR/SubtitleSearch.aspx?search=14.09.04.*

Minnesota

Workers' Compensation

Fee schedule payment limits

The Department of Labor and Industry adopted adjustments to the relative value fee schedule conversion factors and rules implementing the schedule tables.

Cite: Minn. R. 5221.4020, 4035, 4050, 4060, 4061 (44 SR 412, 09/23/2019) (4 pages)

Adopted: 9/23/2019

Effective: 10/1/2019

https://mn.gov/admin/assets/SR44_13%20-%20Accessible_tcm36-403471.pdf

Missouri

Labor

Labor and industrial relations commission

The Department of Labor and Industrial Relations adopted amendments to rules for administration, review, policies, employment security appeals, and tort victims appeals.

Cite: 8 CSR 20-2.010, 3.010, 3.030, 3.060, 4.010, 8.010 (44 MO Reg. 2308, 09/02/2019) (9 pages)

Adopted: 9/30/2019

Effective: 10/30/2019

https://www.sos.mo.gov/adrules/csr/current/8csr/8csr#8-20

New York

Workers' Compensation

Authorizations

The Workers' Compensation Board updated regulations regarding new types of medical providers to add a duly licensed acupuncturist, chiropractor, nurse practitioner, occupational therapist, physical therapist, physician, physician assistant, podiatrist, psychologist, or social worker to the definition of treating medical provider. The amended rules also clarify that providers requesting prior authorization for pharmaceuticals or durable medical equipment should not use the variance process.

Cite: 12 NYCRR 324.1, 324.3, 325-1.4 (2019-37 N.Y. St. Reg. 7, 09/11/2019) (10 pages)

Adopted: 8/27/2019

Effective: 9/11/2019

https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=I09e1b570ad0d11dda763b337bd8cd8ca&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)

Workers' Compensation

Medical provider authorization

The Workers' Compensation Board adopted a new rule as Part 323 to Title 12 NYCRR that describes the process for providers to become authorized by the board and maintain authorization.

Cite: 12 NYCRR 323 (2019-37 N.Y. St. Reg. 8, 09/11/2019) (3 pages)

Adopted: 8/27/2019

Effective: 9/11/2019

https://govt.westlaw.com/nycrr/Browse/Home/NewYork/NewYorkCodesRulesandRegulations?guid=Idbc54e70e6b911e9876dbf2da0f1fc1d&originationContext=documenttoc&transitionType=Default&contextData=(sc.Default)

Oklahoma

Workers' Compensation

Exempt status

The Workers' Compensation Commission adopted rules to implement the statutory repeal of the Certificate of Noncoverage and creation of the Affidavit of Exempt Status, defining the new term, removing references to the repealed Certificate of Noncoverage, and amending the definition of "Mandatory EDI Implementation Date" to reflect that mandatory implementation began on September 1, 2018.

Cite: OAC 810:1-1-2, 3 (36 OK Reg. 2038, 09/03/2019) (1 page)

Adopted: 5/28/2019

Effective: 9/13/2019

www.oar.state.ok.us/oar/codedoc02.nsf/rmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374o-bdcli00_

Workers' Compensation

Practice and procedure

The Workers' Compensation Commission amended general provisions, rules for post order relief, and fees related to workers' compensation hearings.

Cite: OAC 810:10-1-3, 5, 10; 810:10-5-66; 810:10-5-105 (36 OK Reg. 2039, 09/03/2019) (2 pages)

Adopted: 5/28/2019

Effective: 9/13/2019

www.oar.state.ok.us/oar/codedoc02.nsf/frmMain?OpenFrameSet&Frame=Main&Src=_75tnm2shfcdnm8pb4dthj0chedppmcbq8dtmmak31ctijujrgcln50ob7ckj42tbkdt374obdcli00_

South Carolina

Occupational Safety

Chemical safety

The Division of Occupational Safety and Health adopted revisions to regulations to incorporate federal amendments for process safety management of highly hazardous chemicals, including accident prevention and medical services and first aid.

Cite: S.C. Code Regs. 71-006, 007 (43-9 SC Reg. 72, 09/27/2019) (17 pages)

Adopted: 9/27/2019

Effective: 9/27/2019

https://www.scstatehouse.gov/coderegs/Chapter%2071.pdf

Texas

Healthcare Professionals

Notification of changes in practice

The Medical Board adopted amendments to rules concerning the transfer and disposal of medical records to modernize the notice requirements when a physician leaves from or relocates a practice in order to offer patients the opportunity to obtain a copy of their medical records or have their records transferred.

Cite: 22 TAC § 165.5 (44 TexReg 4867, 09/06/2019) (2 pages)

Adopted: 8/21/2019

Effective: 9/10/2019

https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=22&pt=9&ch=165&rl=5

Licensure

Professional engineers

The Board of Professional Engineers adopted an amendment to the rule concerning the waiver of examinations to limit applicants from applying for a waiver of the Fundamentals of Engineering exam if they have failed the exam three or more times in any jurisdiction, without prohibiting an applicant from retaking the exam to achieve a passing score.

Cite: 22 TAC § 133.69 (44 TexReg 4867, 09/06/2019) (2 pages)

Adopted: 8/26/2019

Effective: 9/15/2019

https://texreg.sos.state.tx.us/public/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=22&pt=6&ch=133&rl=69

Utah

Licensure—Healthcare Professionals

Nurse practice act rule

The Division of Occupational and Professional Licensing amended rules to further define, clarify, and establish certain standards regarding nurse delegation of tasks, defining a delegator as the "licensed nurse directly responsible for a patient's care," and establishing methods for documentation and review of delegated tasks.

Cite: Utah Admin. Code r. 156-31b (2019-18 Utah Bull. 99, 09/15/2019) (7 pages)

Adopted: 9/15/2019

Effective: 8/22/2019

https://rules.utah.gov/publicat/bull_pdf/2019/b20190715.pdf

Virginia

Healthcare Professionals

Opioid and buprenorphine prescriptions

The Board of Medicine adopted emergency regulations effective through March 17, 2021, that require prescriptions for a controlled substance that contains an opioid be issued as an electronic prescription consistent with § 54.1-3408.02, with a one-time, one-year waiver available upon written request demonstrating economic hardship.

Cite: 18VAC85-21-21 (36 VA Regs Reg. 254, 09/30/2019) (1 page)

Adopted: 9/18/2019

Effective: 9/18/2019

http://register.dls.virginia.gov/details.aspx?id=7732

Wisconsin

Licensure—Healthcare Professionals

Respiratory care practitioners

The Medical Examining Board updated rules for examination and licensing practices for certified respiratory therapists, with amendments to identify the correct accreditation organization, specify the passing score for the Therapist Multiple-Choice Examination, clarify that the requirement to complete further professional training or education before retaking an exam after a third failure does not apply to the National Board for Respiratory Care examination, void the application of an applicant who uses a recording device when reviewing an examination, and update outdated notes and other language.

Cite: Wis. Admin. Code § Med. 20, CR 18-101 (Wis. Admin. Reg. No. 765B, 09/30/2019) (5 pages)

Adopted: 9/26/2019

Effective: 11/1/2019

http://docs.legis.wisconsin.gov/code/register/2019/766B/register/final/cr_18_101_rule_text/cr_18_101_rule_text