What You Don't Know Can Hurt You: Hot Topics in Employment Law – 2020

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Today's Discussion

- Beware: particularly "hot" equal employment laws
- Important wage & hour developments
- Specific issues for MI employers
- Impact of COVID-19
- Questions & answers

“At-Will Employment”: It’s a trap!

Just *some* employment laws…

- **Michigan's Elliott Larsen Civil Rights Act (ELCRA)**
- Michigan's Whistleblowers' Protection Act (WPA)
- **Title VII of the Civil Rights Act (Title VII)**
- **Americans with Disabilities Act (ADA)**
- Michigan's Persons with Disabilities Civil Rights Act (PWDCRA)
- **Age Discrimination in Employment Act (ADEA)**
- Genetic Information Non-Discrimination Act (GINA)
- Pregnancy Discrimination Act
- Equal Pay Act (EPA)
- Fair Labor Standards Act (FLSA)
- Michigan's Payment of Wages and Fringe Benefits Act
- Family and Medical Leave Act (FMLA)

EEOC Charges – Important Insights

- Charges filed with the EEOC (2019)
  - Overall: all-time low
  - Race discrimination: 33%
  - Sex discrimination/harassment: 32.4%
    - 1.2% decrease from 2018 (after #MeToo)
  - **Retaliation: 53.8%**
  - Disability: 33.4%
    - *Biggest increase in percentage*
    - *Has increased every year since 2008*

See https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

Key EEOC Takeaways

- **RETALIATION** should be a primary concern of employers
  - Often far easier for an employee to demonstrate than the underlying allegations of discrimination or harassment
- An employee must demonstrate that: (1) he engaged in protected activity; (2) he suffered an adverse employment action; and (3) there was a causal connection between 1 & 2.
- Adverse employment action: something that "might well dissuade a reasonable worker from making or supporting a charge of discrimination."
  - Beware: not necessarily termination, demotion, suspension, etc.

Biggest Retaliation Trap – The Empty File

- If it's not in writing, it did not happen.
- Employees with disciplinary issues often sense impending termination/action, and can "pack their parachute" by making a claim of harassment, discrimination, wage and hour violation, safety violation, etc.
- Even MI's workers' compensation statute has a standalone retaliation prohibition.
- Be very, very careful with employees who have made a claim regarding a potential legal violation or participated in an investigation.
- Don't wait to fire or discipline – numerous claims created in the "waiting" period.

Key EEOC Takeaways

- Make sure you understand the far-reaching implications of the Americans with Disabilities Act – *post 2008* when ADAAA (Amendments Act) was passed.
- Helpful resource: https://www.dol.gov/agencies/ofccp/faqs/americans-with-disabilities-act-amendments
- Beware: definitions of “disabled” and “undue burden”.

ADAAA Key Definitions

- ADAAA retains the basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment AND then BUT expanded coverage by:
  - expanding the definition of "major life activities";
  - redefining who is "regarded as" having a disability;
  - modifying the regulatory definition of "substantially limits";
  - specifying that "disability" **includes any impairment that is episodic or in remission if it would substantially limit a major life activity when active**; and
  - prohibiting consideration of the ameliorative effects of "mitigating measures" when assessing whether an impairment substantially limits a person's major life activities, with one exception- ordinary glasses/contacts.

ADAAA Key Definitions

- Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense, after assessing:
  - the nature/cost of the accommodation;
  - the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
  - the overall financial resources, size, number of employees, and type and location of facilities of the employer;
  - the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;
  - the impact of the accommodation on the operation of the facility.

ADA Traps!

- No Fault Leave policies – i.e. automatic termination after 3, 4, 5, 6 months of leave
  - Be wary of employees who go on approved leave (FMLA, etc.) and then become "Casper" the not-so-friendly employee ghost.
- *You cannot have restrictions to perform this job – "you can return to work when you have been cleared, without restrictions" – very common*
  - Per se violation of the Americans with Disabilities Act

What do you do with an accommodation request?

- 1. Is the disability apparent?
  - If not, you can request specific information from the doctor.
- 2. What if the request is for leave?
  - Is there a specific return-to-work date?
  - What is the position of the person requesting a leave?
  - Is the leave an "undue burden"? (Likely not)
- 3. What if the request is for equipment/modification of policies?
  - Is the request unreasonable?
  - Is there a different accommodation that would allow the employee to perform the essential functions of his/her job?

Wage & Hour Developments

- September, 2019: “Final Rule” issued by DOL re: FLSA – changes to the salary threshold for white-collar exempt employees.
- Must be paid to qualify as exempt from the OT requirements under the FLSA to **$35,568 annually**.
  - Effective date = January 1, 2020
  - Generally considered non-controversial
  - DOL estimates that 1.3 million additional US workers were eligible for overtime effective January, 2020.

Additional FLSA Final Rule Notes

- Does not change the duties test, which also must be met for a white-collar employee to qualify as exempt **(beware the "they are paid a salary" trap!);**
- Provides that up to 10% of the standard salary level may come from non-discretionary bonuses and incentive payments (including commission) that are paid at least annually;
- Raises the salary threshold necessary to qualify for the highly compensated employee exemption from $100,000 to $107,432 annually (in addition to receiving a salary of at least $684 per week);
- Does not set automatic updates to the salary thresholds.

DOL Final Rule Regarding Joint Employer Status

- Issued on January 12, 2020
- Revised regulations interpreting joint employer status under the FLSA.
- Effective date of the final rule is March 16, 2020.
- Satisfies one of the business lobby's top priorities.
- Limits the circumstances under which employers, such as a franchiser and its franchisees, can be considered to jointly employ a group of workers.

Joint Employer Final Rule Keys

- When an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
- Provides a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
- Clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
- Specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and
- Provides several examples applying the DOL's guidance for determining FLSA joint employer status in a variety of different factual situations.

Joint Employer 4-Factor Test

- Central to the final rule is DOL's adoption of a four-part test for assessing whether one company is a joint employer of another company's workers.
- The test, which considers all factors collectively, probes whether the potential joint-employer (1) hires or fires an employee; (2) supervises or controls work schedules; (3) sets pay rates; and (4) maintains employment records.

Common Wage & Hour Mistakes

- Independent contractor v. employee
- Ignorance of duties test
- Deductions from salaried employees
- Automatic deductions for rest breaks/meal periods
- Paying non-exempt employees by the shift or exception basis
- Failing to pay OT for pre/post-shift activities
- Failing to pay non-exempt employees for time spent in meetings or training
- Failing to pay for travel time
- Failing to include shift differentials, on-call pay or other "extras" in OT pay calculation
- Failing to pay OT on bonuses/commissions

New Michigan Laws

- Paid sick leave and increases to minimum wage
  - Somewhat tortured history
  - IGNORE articles and advice dated before December, 2018
  - **Significant** changes to citizen-led ballot proposals during lame duck session

"Well, that was another lame-duck session."

Paid Medical Leave Act

- Public Act 338 of 2018 as amended by Public Act 369 of 2018
- Effective March 29, 2019
- Applies to Employers who have 50 or more employees
  - Count full-time and part-time employees regardless of how many hours they work
- Non-exempt employees are eligible to receive paid medical leave under this law if they work 25 hours per week on average or more

PMLA – Exclusions

- Employees who are NOT eligible for Paid Medical Leave include:
  - Exempt Employees
  - Employees who worked less than 25 hours per week on average in the preceding calendar year
  - Employees of the US Government, or other State Governments/political subdivisions of same
  - Employees who are not employed by a public agency and who are covered by a CBA
  - Individuals employed by an employer for 25 weeks or fewer in a calendar year for a job scheduled for 25 weeks or fewer
  - Individuals whose primary work location is not in this state

PMLA – Accrual & Usage Rules

- Two allowable methods of awarding sick time:

  1. Employer may provide at least 40 hours of paid medical leave at the beginning of the benefit year or on the date that the employee becomes eligible during the benefit year on a prorated basis.
     - If an employer chooses this method, it does not have to permit employees to carry over unused leave to the next benefit year.

PMLA – Accrual & Usage Rules

2. The employee may accrue 1 hour of paid medical leave for every 35 actual hours worked.
   - If this accrual method is used, the employees must be allowed to carry over up to 40 hours of unused accrued medical leave to the next benefit year.
   - They do not have to be allowed to use more than 40 hours of paid medical leave in a single benefit year.
   - Employees must begin accruing paid medical leave when they begin their employment or on March 29, 2019, whichever is later.

Payment of PMLA

- Leave must be paid out at a pay rate equal to the greater of either an employee's regular rate of pay or the Michigan minimum wage rate.
- The regular rate for a tipped employee is the applicable minimum wage rate.
- Paid leave for purposes of this Act includes paid vacation, personal days, and PTO IF employees are allowed to use such time for purposes consistent with this Act.
- No requirement that accrued unused medical leave be paid out upon termination. Practice note: **PUT THIS IN WRITING!**

PMLA – Consequences

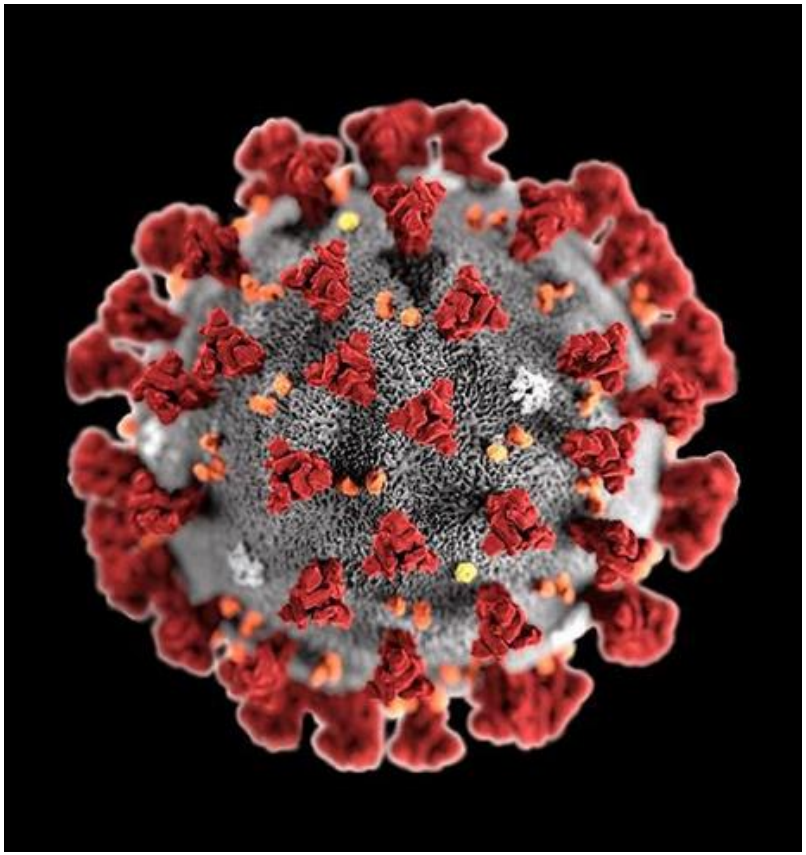
- Employees can file claim with Wage and Hour Division within six (6) months of the violation.
- Employer penalties –
  - Failure to provide paid medical leave – $1,000 administrative fine.
  - Failure to post – $100 administrative fine for each separate violation.

Most Common MI-Specific Issues

- PMLA
- Questions re: recreational marijuana (note: *no impact on private employers*)
- Improper deductions (very specific processes must be followed per MI Payment of Wages and Fringe Benefits Act)
- Payout of accrued/unused sick/PTO time (what the written policy says governs, if no policy – need to create one without retroactive punishment)
- Independent contractor analysis: passion project of current AG

COVID-19 EMPLOYMENT ISSUES

- New federal laws mandating paid sick leave
- Compliance with Michigan executive orders
- OSHA Requirements
- HIPAA Concerns
- ADA – Medical Examination Limitations



FFCRA – Overview

- Families First Coronavirus Response Act ("FFCRA")
- Two components:
  - Emergency Paid Sick Leave Act ("EPSLA"); and
  - Emergency Family and Medical Leave Act Expansion Act ("EFMLA")
- Both components apply to "Covered Employers"
  - Private employers with less than 500 employees
  - Some public employers
  - Small businesses with fewer than 50 employees may qualify for exemption from the requirement to provide leave due to school closings or child care unavailability if the leave requirements would jeopardize the viability of the business as a going concern.

FFCRA – Overview

An employee qualifies for paid sick time (maximum of 80 hours) if the employee is unable to work (**or unable to telework**) due to a need for leave because the employee:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
2. has been advised by a health care provider to self-quarantine related to COVID-19;
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
5. is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
6. is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

An employee qualifies for expanded family leave (12 weeks total, 10 weeks paid) for reason #5 **only** .

FFCRA – Overview

- **For leave reasons (1), (2), or (3):** employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to $511 per day and $5,110 in the aggregate (over a 2-week period).
- **For leave reasons (4) or (6):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $2,000 in the aggregate (over a 2-week period).
- **For leave reason (5):** employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

FFCRA – KEY EXEMPTIONS

- Sections 3105 and 5102 of FFCRA provide that an employer of "a health care provider or an emergency responder **may elect to exclude** such employee from the application" of the paid sick leave and paid family leave requirements. 29 CFR § 826.
- DOL has significantly broadened the "health care provider" exception to essentially cover anyone employed by healthcare employers, including non-clinical employees.

FFCRA – HEALTH CARE PROVIDER EXEMPTION

For the purposes of employees who may be exempted from paid sick leave or expanded family and medical leave by their employer under the FFCRA, a **health care provider** is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

FFCRA – HEALTH CARE PROVIDER

This definition includes any individual employed by an entity that contracts with any of the above institutions, employers, or entities institutions to provide services or to maintain the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a state or territory, including the District of Columbia, determines is a health care provider necessary for that state's or territory's or the District of Columbia's response to COVID-19.

MI Executive Orders

- Ensure compliance with current orders, found at: https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705---,00.html
- Pertain to anti-retaliation, unemployment, shelter-in-place
- Current shelter-in-place order: EO 2020-59
  - As of now, in place until 11:59 on May 15, 2020
  - New requirements for employers

EO 2020-59

- Although there is generally more freedom for individuals and some businesses were cleared to reopen, beginning April 27, there will be face covering requirements for individuals in enclosed public spaces and for many workers, so employers should plan ahead.
- All businesses with workers who perform in-person work must provide at least non-medical grade face coverings to their workers.

EO 2020-36

- **"Protecting workers who stay home, stay safe when they or their close contacts are sick"**
- Even if permitted to leave home under EO 2020-59, individuals who display symptoms, test positive for COVID-19, or come into close contact with an infected individual should stay at home and cannot be required to work (absent specific exceptions).
- Order 2020-36 outlines the following timelines for quarantining at home:
  - Individuals who display symptoms or test positive for COVID-19 — **three days** after symptoms are resolved and **seven days** after symptoms first appeared or a positive test.
  - Individuals who have been in close contact with a confirmed case or a symptomatic individual—**14 days** after the contact.
  - If an individual returns to work before the specified quarantine periods, they are not entitled to the new protections against discharge, discipline, or retaliation.

EO 2020-36 – Exceptions

- The order's quarantine periods do not apply to:
  - Health care professionals
  - Workers at health care facilities
  - First responders (e.g. police officers, fire fighters, paramedics)
  - Child protective services employees
  - Workers at childcare institutions
  - Workers at correctional facilities

But: their employers' rules governing occupational health must allow them to go to work.

COVID-19 PREPAREDNESS AND RESPONSE PLAN

- Businesses, operations, and government agencies that continue in-person work must adhere to sound social distancing practices and measures, which include but are not limited to:

- Developing a **COVID-19 preparedness and response plan**, consistent with recommendations in Guidance on Preparing Workplaces for COVID-19, developed by the Occupational Health and Safety Administration. Such plan must be available at company headquarters or the worksite.

OSHA Requirements RE: COVID-19

- Best resource: https://www.osha.gov/Publications/OSHA3990.pdf
- Measures for protecting workers from exposure to, and infection with, COVID-19 depend on the type of work being performed and exposure risk, including potential for interaction with people with suspected or confirmed COVID-19 and contamination of the work environment.
- Employers should adapt infection control strategies based on a thorough hazard assessment, using appropriate combinations of engineering and administrative controls, safe work practices, and personal protective equipment (PPE) to prevent worker exposures.

OSHA Guidance for ALL Employers

- Frequently wash your hands with soap and water for at least 20 seconds. When soap and running water are unavailable, use an alcohol-based hand rub with at least 60% alcohol. Always wash hands that are visibly soiled.
- Avoid touching your eyes, nose, or mouth with unwashed hands.
- Practice good respiratory etiquette, including covering coughs and sneezes.
- Avoid close contact with people who are sick.
- Stay home if sick.
- Recognize personal risk factors. Certain people, including older adults and those with underlying conditions such as heart or lung disease or diabetes, are at higher risk for developing more serious complications from COVID-19.

OSHA Guidance – Health Care Professionals

- Need to follow: **Interim Guidance for Workers and Employers of Workers at Increased Risk of Occupational Exposure**
  - Some keys:
    - *Identify and Isolate Suspected Cases*
    - *Environmental Cleaning and Decontamination*
    - *Worker Training*
    - *Identify workers who may be at increased susceptibility for COVID-19 and consider adjusting their work responsibilities or locations to minimize exposure.*
    - *Assess PPE ensembles for various categories of workers*

Required Testing of Employees?

- Helpful EEOC guidance: https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm
- Generally, measuring an employee's body temperature is a medical examination. Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees' body temperature. However, employers should be aware that some people with COVID-19 do not have a fever.

Record Keeping Requirements

- The ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information. An employer may store all medical information related to COVID-19 in existing medical files. This includes an employee's statement that he has the disease or suspects he has the disease, or the employer's notes or other documentation from questioning an employee about symptoms.
- A log of screening results can be maintained, but must be done confidentially.

Required Testing of Employees?

- The ADA requires that any mandatory medical test of employees be "job related and consistent with business necessity." Applying this standard to the current circumstances of the COVID-19 pandemic, employers may take steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others. Therefore, an employer may choose to administer COVID-19 testing to employees before they enter the workplace to determine if they have the virus.

Further COVID-19 Developments

- RAPIDLY evolving situation
- Expect continued guidance from DOL, EEOC
- Numerous issues have come up under the Paycheck Protection Program (CARES Act) – awaiting additional guidance from Department of Treasury and Small Business Association.
- Information may quickly become outdated, so regularly check state and local government and agency websites to ensure accurate information.

Questions?