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E-UPDATE

May 29, 2020

RECENT DEVELOPMENTS

CDC Issues Interim Reopening Guidance for Employers of High Risk Employees, As Well As Industry-Specific Recommendations

The Centers for Disease Control has issued a lengthy document in support of the President's Plan for Opening America Up Again, containing specific Interim Guidance documents for employers with high-risk workers, as well as for child care programs, schools, bars and restaurants, and mass transit. While all the guidance documents share extensive basic recommendations, they also provide more targeted advice by industry. These guidance documents may be found at Appendix F of the document, and we focus below on the guidance for employers of workers at higher risk of severe illness (meaning those over 65 years old and those with underlying medical conditions). Although this guidance ostensibly targets high-risk workers, it provides suggestions generally applicable to all employees.

The high-risk worker guidance sets forth a gradual three-step process for scaling up operations across all industries, noting that certain industries may require more stringent precautions while other essential businesses may not be able to implement the recommendations. The guidance also states that high-risk workers should be encouraged to self-identify, and employers should take particular care to reduce the exposure to COVID while complying with the Age Discrimination in Employment Act and the Americans with Disabilities Act. In addition, the CDC cautions that all decisions about its recommendations should be made in consultation with local health officials.

Scaling Up - In all Steps:

- Establish and maintain communication with local and State authorities to determine current mitigation levels in your community.
- Protect employees at higher risk for severe illness by supporting and encouraging options to telework.
- Consider offering workers at higher risk duties that minimize their contact with customers and other employees (e.g., restocking shelves rather than working as a cashier), if agreed to by the worker.
- Encourage any other entities sharing the same workspace to also follow this guidance.
- Provide employees from higher transmission areas (earlier Step areas) telework and other options as feasible to eliminate travel to workplaces in lower transmission (later Step) areas and vice versa.

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Step 1: Scale up only if business can ensure strict social distancing, proper cleaning and disinfecting requirements, and protection of their workers and customers; workers at higher risk for severe illness are recommended to shelter in place.
Step 2: Scale up only if business can ensure moderate social distancing, proper cleaning and disinfecting requirements, and protection of their workers and customers; workers at higher risk for severe illness are recommended to shelter in place.
Step 3: Scale up only if business can ensure limited social distancing, proper cleaning and disinfecting requirements, and protection of their workers and customers.

For all steps, the CDC also recommends certain categories of actions, providing specific recommendations as to each:

Safety Action:

- Promote healthy hygiene practices, such as handwashing and the use of face coverings where feasible, as well as the posting of signs on how to stop the spread of infection.
- Intensify cleaning, disinfection and ventilation, particularly of frequent touchpoints and shared items, using appropriate disinfectants. Increase circulation of outdoor air as much as possible, unless doing so poses a safety risk. Water systems should be inspected following prolonged disuse.
- Promote social distancing. The CDC's recommendations include installing barriers and reconfiguring workspaces, closing communal areas, encouraging telework, staggering or rotating shifts, teleconferencing, cancelling group events of more than 10 people at step 1 and 50 people at step 2, and restricting (step 1) or limiting (step 2) non-essential third party access.
- Limit travel and modify commuting practices.

Monitoring and Preparing:

- Screen employees for signs and symptoms of COVID-19, including temperature checks, in accordance with privacy laws and regulations.
- Plan for when an employee becomes sick at work, by isolating and sending those with symptoms home, notifying local health officials and those who were potentially exposed, requiring self-quarantine for confirmed exposure and infections, conducting cleaning and disinfection of areas of exposure.
- Maintain healthy operations by implementing flexible leave and telework policies, training backup staff, designating staff person to respond to COVID-19 concerns, and establishing systems for communicating with employees.

Closing:

- Monitor state and local health department notices, and be prepared to close if necessary due to COVID-19 in the workplace or an increase of cases in the community.

While this information is useful generally, we note that each industry will have specific issues that must be addressed. As noted above, the CDC has issued some industry-specific guidance. Other agencies at the state level are also poised to provide targeted guidance by industry. Employers should keep monitoring developments at the federal and state level for updated guidance relevant to them.

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OSHA Revises COVID-19 Enforcement and Workplace Illness Recording Policies

After initially easing its enforcement and recording rules in light of the COVID-91 pandemic, the Occupational Safety and Health Administration has reversed direction, with increased in-person workplace inspections and recording obligations.

Revised Enforcement Guidance – On April 10, 2020, OSHA issued an Interim Enforcement Response Plan, setting forth the instructions and guidance to OSHA personnel with regard to handling COVID-19-related complaints, referrals and severe illness reports. On-site inspections were essentially limited to situations involving high risk of transmission, with non-formal phone/fax investigations for those involving employees in medium or lower exposure risk jobs. In an updated Enforcement Guidance, effective May 26, 2020, OSHA states that it is increasing in-person inspections at all types of workplaces, although it will continue to prioritize COVID-19 inspections.

Revised Recording Requirements – According to OSHA, employers must record confirmed cases of COVID-19 if they are work-related and meet the criteria for recording, such as medical treatment beyond first aid or days away from work. Such illnesses must be recorded on OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Report). In an April 10, 2020 Enforcement Guidance, OSHA announced that most employers would not be required to make work-relatedness determinations for COVID-19 cases for purposes of recording workplace illness. OSHA has now issued a revised policy that all employers "must make reasonable efforts, based on the evidence available to the employer, to ascertain whether a particular case of coronavirus is work-related."

SBA Issues Two Additional Final Rules on PPP Loan Forgiveness

On May 22, 2020, the Small Business Administration ("SBA") issued two interim final rules providing guidance on the requirements for loan forgiveness and loan review procedures and related borrower and lender responsibilities under the Paycheck Protection Program ("PPP").

Loan Forgiveness Guidance

The first interim final rule issued by the SBA provides noteworthy guidance on loan forgiveness.

Payroll Costs: The guidance reaffirms that payroll costs must comprise 75% of the amount for which a borrower seeks forgiveness. Payroll costs paid or incurred during the eight-week covered period of the loan are eligible for forgiveness. The interim final rule explains that borrowers may elect the eight week period by selecting either 1) the date the loan is disbursed, or 2) an "alternative payroll covered period" in which the covered period begins on the first day of the borrower's first payroll cycle following loan disbursement. The guidance clarifies that payroll costs for employees not performing work but still on the payroll are incurred based on the schedule established by the borrower (typically, each day the employee would have performed work).

Furthermore, if an employee's total compensation does not exceed $100,000 on an annualized basis, bonuses and hazard pay are eligible for loan forgiveness. Additionally, the salary, wages, or commission payments to furloughed employees are forgivable payroll costs.

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Loan forgiveness for owner-employees and self-employed individuals' payroll compensation is also addressed in the guidance.

Nonpayroll Costs: Nonpayroll costs may be forgiven if they were paid during the covered period or incurred during the covered period and paid on or before the next regular billing date, even if the billing date falls after the covered period. The example provided in the guidance states that if the covered period is from June 1-July 26, and the company's July electric bill is paid on August 10, the company may seek forgiveness for the portion of the electric bill through July 26. Advance payments of interest on mortgage obligations are not eligible for loan forgiveness. Payments of principal on mortgage obligations remain ineligible for loan forgiveness.

Reductions to Loan Forgiveness Amount: Under the CARES Act, forgiveness may be reduced if 1) there is a reduction to a borrower's full-time equivalent ("FTE") workforce during the 8 week period as compared to the FTEs in a previous period, or 2) wages are reduced more than 25% as compared to the most recent quarter (for FTEs or non-FTEs).

The interim final rule provides that the loan forgiveness amount will not be reduced if the borrower laid off or reduced the hours of an employee and the borrower made a good faith, written offer to rehire the employee for the same salary and the same number of hours, or if the borrower offered to restore the reduction in hours, but the employee declined the offer. The borrower must maintain records documenting the offer and its rejection, and inform the state unemployment insurance office of the employee's rejected offer of employment within 30 days of the employee's rejection of the offer.

The interim final rule further states that a full-time equivalent ("FTE") employee is an employee who works 40 hours or more each week. In calculating its number of FTEs, borrowers divide the average number of hours paid for each employee per week by 40, capping this quotient at 1. For example, an employee who was paid 48 hours per week on average during the covered period would be considered to be one FTE.

For part-time employees, the borrower can decide to count all such employees either (i) using their average hours worked per week divided by 40 and rounding to the nearest tenth, or (ii) by counting each employee working fewer than 40 hours as 0.5. Borrowers may select only one of these two methods and must apply it consistently.

The interim final rule restates prior guidance that a reduction in an employee's salary or wages in excess of 25% will result in a reduction in the loan forgiveness amount, unless an exception applies. The salary or wage reduction will apply only to the portion of the decline in salary and wages that is not attributable to the FTE reduction. For example, if an employee goes from FTE to 20 hours per week, that is entirely attributable to the FTE reduction and not a reduction in salary. This ensures borrowers are not penalized twice for reductions.

The "safe harbor" provision continues to allow borrowers the ability to avoid reductions in the loan forgiveness amount if FTE counts and salary reductions (which the borrower implemented between February 15 and April 26) are restored by June 30.

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Critically, the SBA weighed in on an issue that was quite unclear and clarified that borrowers will not be penalized for voluntary resignations, employees who request schedule reductions, or for-cause terminations. Borrowers must maintain records documenting these events.

The Process of Loan Forgiveness: The interim final rule provides that lenders must issue decisions on loan forgiveness to the SBA within 60 days from receipt of a completed forgiveness application. If the lender determines that the borrower is entitled to forgiveness of some or all of the amount applied for under the statute, the lender must request payment from the SBA at the time the lender issues its decision to the SBA. The SBA must remit the appropriate forgiveness amount to the lender, plus any interest accrued through the date of payment (subject to any SBA review of the loan or loan application) not later than 90 days after the lender issues its decision to the SBA.

If the SBA determines that the borrower was ineligible for the PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application, the loan will not be eligible for forgiveness. The lender is responsible for notifying the borrower of the forgiveness amount. The borrower is responsible for paying any balance on the loan on or before the two-year maturity of the loan.

Loan Review Guidance

In its second interim final rule, the SBA addressed loan review procedures and responsibilities of borrowers and lenders.

The guidance states that the SBA may review "any PPP loan," at any time in its discretion. Accordingly, it stands to reason that the SBA may undertake review of loans under $2 million, despite the safe harbor announced regarding the necessity certification for such loans. Such a review may entail borrower eligibility, the amount and use of loan proceeds, and the borrower's entitlement to loan forgiveness. If the SBA undertakes such a review, it will notify the lender in writing and the lender must notify the borrower in writing within five business days of receipt.

If the SBA believes that the borrower may be ineligible for a loan or ineligible for loan forgiveness, the SBA may require the lender to obtain additional information from the borrower, or the SBA may request information directly from the borrower. Borrowers must retain all PPP documentation for a period of six years after the loan is forgiven or repaid in full, and permit the SBA access to such files as requested.

In reviewing loans, each lender must (1) confirm receipt of the borrower certifications in the application, (2) confirm receipt of documentation to aid in verifying payroll and nonpayroll costs, (3) confirm the borrower's calculations on the loan forgiveness application (including cash compensation, non-cash compensation, and compensation to owners, as well as nonpayroll costs) by reviewing the documentation submitted with the application, and (4) confirm the borrower made the calculation correctly by dividing eligible payroll costs by .75.

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Borrowers are responsible for the forgiveness calculations they submit; however, lenders are expected to perform a good faith review in a reasonable amount of time. The interim final rule permits minimal review by lenders of forgiveness calculations based on recognized third-party payroll company provided data; however, more extensive review is required in the absence of recognized third-party payroll company provided data.

If the SBA determines a borrower is ineligible for a PPP loan, the loan cannot be forgiven and the SBA will direct the lender to deny forgiveness. The SBA may also seek repayment or pursue other remedies.

Within 60 days, lenders must issue a decision to the SBA, either approving a Forgiveness Application in whole or in part, denying it, or, if directed by the SBA, issuing a denial without prejudice due to a pending review of the loan. If denied in whole or in part, a borrower may appeal. Additional guidance will be issued addressing appeals of forgiveness and eligibility determinations.

TAKE NOTE

EEOC Delays Annual EEO-1 Filing Period Due to COVID-19. The Equal Employment Opportunity Commission announced that it is delaying the submission of this year's EEO-1 forms until March 2021 because of the COVID-19 pandemic.

Normally, employers must submit demographic workforce data for the prior calendar year by March 31. This year's submission had been delayed due to issues with the short-lived and ill-fated addition of compensation data to the required collection. The EEOC will be collecting the EEO-1 data for both 2019 and 2020 in March 2021.

DOL Updates Its Model COBRA Notices. The Department of Labor's Employee Benefits Security Administration published updated COBRA notices that may be used to notify eligible individuals of their rights to continued healthcare coverage following a triggering event, such as a termination of employment or a reduction in hours – events that are becoming more frequent in light of the COVID-19 pandemic. In addition to the model general notice and model election notice, EBSA also provides Frequently Asked Questions about the updated notices on its webpage. Because use of the model notices are deemed to constitute compliance with COBRA, employers should begin using them immediately.

NLRB Permits Employer to Prohibit Cell Phones in Working Areas. In *Cott Beverages*, the National Labor Relations Board held that employer rules prohibiting cell phones on the production floor and in the warehouse were lawful.

The employer, a beverage manufacturer, maintained work rules prohibiting employees from possessing cell phones while on the production floor and in the warehouse. The administrative law judge previously held the rules to be unlawful, reasoning that the rules infringed on employees' Section 7 rights to take photos, record audio and video in the workplace, and make legally protected phone calls from work areas.

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In *The Boeing Company* (which we discussed in detail in a December 2017 E-lert), the Board divided workplace rules into three categories, depending on whether they (1) are lawful, (2) warrant individualized scrutiny, or (3) are unlawful under the National Labor Relations Act. Applying the *Boeing* framework, the Board reversed the ALJ and held the rules to be lawful. While acknowledging that the rules potentially infringed upon the employee rights cited by the judge, the Board found that the impact of the rule was tempered by the fact that it was limited to working areas as opposed to nonworking areas. Turning to the employer's justification, the Board found the rule's broad prohibition of personal items, including cell phones, from work areas to be a "reasonable, lawful effort to ensure the integrity" of the employer's beverage production process and to satisfy FDA requirements for food-production facilities. Additionally, because of the distractions posed by cell phones, "a blanket prohibition on usage in work areas is a reasonable restriction" to reduce on-the-job accidents and product contamination. The Board found that the employer's justifications for the rule far outweighed the impact of the rule on employees' rights. Accordingly, the Board consider the rule prohibiting cell phones in work areas to be a "Category 1" (lawful) work rule under *Boeing*.

This is a good decision for employers. Employers may now prohibit employees from using cell phones in work areas, particularly where the distractions caused by cell phones would pose safety risks or product integrity issues.

DOL Issues Religious Freedom Directive. In support of President Trump's Executive Order 13798, "Promoting Free Speech and Religious Liberty," the Secretary of Labor issued a directive to advance religious liberty protections in the Department of Labor's daily operations.

Of relevance to certain employers, the directive instructs DOL agency heads to:

- Verify DOL rules adhere to the First Amendment of the Constitution, the Religious Freedom Restoration Act, and other applicable Federal laws.
- Assess consistency of new DOL documents and guidance with existing religious freedom protections.
- Enforce all legal prohibitions against religious discrimination entrusted to the DOL.
- Respect the full scope of legal religious exemptions, including the ministerial exception.

ADA Permits Employers to Require Medical Examinations for Problematic Behavior. Two federal appellate courts this month affirmed the right of employers under the Americans with Disabilities Act to require a medical examination to assess an employee's fitness for duty based upon troubling conduct.

In *Johnson v. Old Dominion University*, the U.S. Court of Appeals for the 4th Circuit found that the employer had a basis for requiring the employee to undergo a fitness for duty examination based on his increasing inability to communicate and his "adversarial and erratic behavior," as demonstrated by the excessive number of meritless grievances and document requests that he filed, and his interactions with his manager and co-workers that caused them to fear that he would harm them. Because he refused to undergo the examination on four separate occasions, he was disciplined and then terminated from employment.

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In *Lopez-Lopez v. The Robinson School*, the U.S. Court of Appeals for the 1st Circuit also upheld the employer's requirement that the employee undergo a medical examination and obtain treatment following a meeting to discuss the teacher's inappropriate classroom behavior, during which she had a breakdown that resulted in her crying on the floor and threatening suicide.

In both cases, the courts found that the examinations met the standard under the ADA of being job-related and consistent with business necessity, as there was a reasonable basis – Johnson's impaired communications skills and Lopez's breakdown and suicidal statements – to believe that the individuals in each situation were unable to perform their essential job functions. As the 1st Circuit stated, "requiring medical examinations may be justified based on business necessity where there is a basis to believe that the employee's ability to perform her job may be impaired or the employee presents a troubling behavior that would impact the work environment."

Powerpoint Presentation Statements Support Claim for Uncapped Commissions. An employee's claims that his employer unlawfully "capped" his sales commissions was allowed to proceed, despite language in the governing Incentive Plan Letter (IPL) that the employer reserved the right to adjust the plan's terms.

In *Fessler v. IBM Corps.*, the employee's IPL stated that it did not constitute a promise and that the employer could adjust the terms. Subsequent powerpoint presentations, however, repeatedly asserted that commissions would be uncapped, which was consistent with the employee's past experience. When the employee received commissions lower than expected, he sued for fraud, among other things, on the grounds that if the employer told its salespeople that commissions are capped, its recruiting efforts would be hampered. Thus, the employer had a practice of telling salespeople that their commissions will be uncapped, and then capping certain high-commission deals.

Although the IPL contained a disclaimer that the employer reserved the right to adjust the plan, the 4th Circuit held that "a contractual disclaimer of reliance is not a prophylactic against a claim of fraud." In this case, the 4th Circuit determined that a jury could find the powerpoint statements to be adjustments to the plan's terms on which the employee reasonably relied. Thus, this case warns employers to be careful about making statements about compensation – whether in writing or orally, and formally or informally – that could be deemed to modify any existing compensation plans.

False Statements in Connection with Protected Actions Are Not Immunized from Discipline. The fact that an employee's misconduct occurred in the context of otherwise legally protected conduct does not insulate him from discipline, according to the U.S. Court of Appeals for the 6th Circuit.

Although this case arises under the federal Railway Safety Act, the principle is generally applicable. In *Lemon v. Norfolk Southern Railway Co.*, the employee reported to his supervisor that he had injured himself on the job. Once the supervisor began investigating the injury, however, he discovered that, although the employee denied speaking to others, he told a different story about his injury to each of three co-workers, his mother, and the doctor. The employee was terminated for making false statements.

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The Railway Safety Act prohibits termination for making an injury report, and the employee argued that his injury report was a contributing factor to his termination, because, without the injury report he would not have lied to his supervisor, which led to his termination. The 6th Circuit, however, observed that this argument "would authorize employees to engage in banned behavior so long as it occurs during protected conduct." Thus, the 6th Circuit rejected the idea that the protected behavior – the injury report – "immunized the employee from discipline for his rule violation."

Employee Need Only Show that Comparator Engaged in Similar – Not the Same – Misconduct. The U.S. Court of Appeals for the 6th Circuit emphasized that, while a plaintiff alleging discriminatory discipline must show that comparators received more favorable treatment, the misconduct need not be identical for purposes of comparison.

In *Spratt v. FCA US LLC*, an African-American buyer falsified an initial bid summary, which he then corrected on the final bid summary sheet. He was terminated for his conduct. In his lawsuit against the employer for race discrimination, he pointed to a white buyer who had conspired with a supplier to receive kickbacks. The white buyer was removed from his role, but reassigned to a higher-level position.

The company argued that the employees had engaged in different misconduct, and thus were not comparable. The 6th Circuit, however, held that "the relevant inquiry is whether the comparator's conduct was substantially identical `in all of the *relevant* aspects," which includes "the type of misconduct involved and its relative severity." In this case, the 6th Circuit found the two employees engaged in the same type of misconduct, implicating serious concerns of ethics and trust. The 6th Circuit further found the circumstances to be the same, as both violated well-known company policies. Additionally, a jury could find the wrongdoing to be of comparable seriousness, based on the actual and potential harm to the company.

The 6th Circuit rejected the company's contention that the African-American buyer had violated more policies, noting that pretext for discrimination could be found where the same underlying misconduct was "inexplicably" divided into multiple violations instead of a single violation. In addition, "the relative severity of two actions is not determined solely by whether those actions violated the same company rule or policy." Thus, in reviewing discipline to ensure consistency, employers must be mindful to compare the underlying misconduct to instances beyond the exact same violations.

Request for FMLA Leave Must Actually Qualify for Such Leave to Be Protected. An employee requesting leave under the Family and Medical Leave Act is only entitled to the protections of the Act if she actually has a qualifying serious health condition, according to the U.S. Court of Appeals for the 11th Circuit.

In *Martin v. Financial Asset Mgmt. Systs., Inc.*, after a contentious meeting in which the employee was berated by her manager, she complained to human resources about her manager and stated that she needed to take a few days off because of her health. She met with a licensed professional counselor who stated that the employee suffered from an adjustment disorder with depressed mood and anxiety, but that she was functioning within normal range. The counselor did not find that the employee was unable to work. In the meantime, the manager decided to terminate the employee for

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failing to respond to his calls. The employee then sued, in part, for interference and retaliation under the FMLA.

The 11th Circuit rejected the argument that the FMLA protects a request for FMLA leave regardless of whether the employee is eligible for the leave. Rather, the employee must show that she has a serious health condition, as determined by a health care provider, that qualifies her for the leave – and in this case, the employee could not do so. The licensed professional counselor was not a "health care provider" within the meaning of the FMLA. Accordingly, the employee was not eligible for FMLA leave, and was not entitled to the protections of the FMLA.

EEOC Issues First Opinion Letter, on Work Opportunity Tax Credit Form. The Equal Employment Opportunity Commission issued its inaugural Commission Opinion Letter, addressing the legality of an IRS form used for the federal Work Opportunity Tax Credit (WOTC) program. Formal opinion letters have been used by other federal agencies, like the Wage and Hour Division of the Department of Labor, to reflect official agency positions on topics of (more or less) general interest to businesses that may then be relied upon as official guidance.

In this opinion letter, the EEOC notes that the purpose of the WOTC program is to encourage employers to hire and train those experiencing severe difficulties often linked to employment. To qualify for the tax credit, employers must obtain official confirmation of applicants' WOTC status, by using IRS form 8850. This form asks a broad question about whether the job applicant qualifies for the WOTC under one of several bases (*e.g.*, member of family that has received assistance from TANF for any 9 months during the past 18 months; veteran and member of a family that has received food stamps for at least 3 months during the last 15 months; individual referred by a rehabilitation agency, employment network, or Department of Veterans Affairs; individual convicted of a felony or released from prison for a felony during the past year). The form also asks questions about whether the job applicant is a veteran entitled to compensation for a service-connected disability.

The EEOC states that use of this form does not violate either the Americans with Disabilities Act or the Age Discrimination in Employment Act. It finds that the form's single, broad question is not a disability-related inquiry under the ADA. The specific questions for disabled veterans are subject to an exception under the ADA, as responses are voluntary and being used to for affirmative action purposes. Additionally, the information requested is necessitated by another law, which is another defense under the ADA. As for the ADEA, it does not prohibit employers from asking age-related questions, and applicants who are hired to enable the employer to qualify for the tax credit include both individuals under and over 40.

Federal Contractor Update – New Self-ID of Disability Form, Ombuds Service, VEVRAA Focused Review Guidance, Webpage on Past Drug Use, Indian and Native American Employment Rights Program. There have been a slew of developments at the Office of Federal Contract Compliance Programs this past month, including the following:

- An updated **Voluntary Self-Identification of Disability form**. This mandatory form – the content of which cannot be altered – is used for applicants at both the pre-offer and post-offer stages, and to survey the workforce every 5 years. Contractors must begin using the new form by August 4, 2020. The OFCCP also has Frequently Asked Questions about the form.

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- A webpage on the newly established **Ombuds service**, which serves as a neutral and confidential resource to assist contractors and other stakeholders with their rights and obligations under federal affirmative action laws, executive orders and regulations. Among other things, the webpage provides contact information and a biography for the ombudsman, Marcus Stergio, and frequently asked questions. The ombudsman offers the following:
    - Informal, one-on-one conversations by phone;
    - A series of more in-depth, strategizing and/or conflict coaching sessions;
    - Facilitation between OFCCP and stakeholders;
    - Mediation to resolve an ongoing dispute between OFCCP and stakeholders;
    - Design and delivery of conflict resolution trainings and workshops;
    - Implementation of other dispute resolution systems, as necessary; and
    - Referral to other resources within or outside of DOL, when applicable
- A new webpage on the upcoming **VEVRAA focused reviews** (following the implementation of Section 503 focused reviews last year), which examine a contractor's compliance with affirmative action and non-discrimination obligations for protected veterans. The OFCCP provides Frequently Asked Questions and recommended Best Practices and Resources for contractors related to these reviews.
- A new webpage providing information and resources for federal contractors and workers related to their obligations and rights on **past drug misuse**.
- A new landing page for the **Indian and Native American Employment Rights Program**, which is intended to foster outreach and inclusion of Native Americans by federal contractors in the workplace. The webpage includes Indian Preference Frequently Asked Questions and Best Practices.

New D.C. Laws – Voting Leave and Transportation Benefits. The District of Columbia has recently passed two employment laws, requiring employers to provide leave to vote and benefits to encourage the use of shared or public transportation – although they are not likely to take effect until 2022.

Voting Leave – The Leave to Vote Amendment Act requires D.C. employers, upon request, to provide up to 2 hours of paid leave to vote if the employee would have been scheduled to work during the time the leave is requested. Employers may require employees to request the leave a "reasonable time in advance." They may also specify the hours to be taken for the leave, including during any early voting period or at the beginning or end of the work shift. Employers will be required to post a mandatory notice to be issued by the government. Employers may not deduct from employees' wages or accrued leave to cover this leave, may not deny or interfere with the use of this leave, and may not retaliate against employees for taking the leave.

Transportation Benefits – The Transportation Benefits Equity Amendments Act requires employers to encourage employees to reduce private vehicle commuting. If the employer offers a "parking benefit" (meaning free or subsidized parking) to an employee it must also offer one of the following "Clean-air Transportation Fringe Benefits" in lieu of, and at least equal to the amount of, the parking benefit: (1) employer-provided mass transportation; (2) a transit pass; or (3) a bicycle commuting reimbursement. If the Clean-air Transportation Fringe Benefit is less than the parking

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subsidy, the difference must be paid as additional compensation or health coverage. Alternatively, the employer may pay a Clean Air Compliance Fee of $100 per employee with a parking subsidy to the D.C. Department of Transportation, or may submit a proposed transportation demand management plan (in compliance with forthcoming regulations) that will reduce employee use of private commuter vehicles over time to 25% of all commuter trips. The law also imposes a biennial reporting requirement.

When the laws take effect - The laws will not take effect, however, until they are funded through inclusion of their fiscal effect in an approved city budget and fiscal plan, which likely will not take place until 2022 at the earliest.

NEWS AND EVENTS

Appointment – Fiona W. Ong was appointed General Counsel of the Maryland Chamber of Commerce and the Maryland Chamber Foundation. In this role, Fiona will serve on the Executive Committees of both entities. She is the first minority and second woman to serve in this position, following Elizabeth Torphy-Donzella. The Chamber is the leading voice for businesses in Maryland.

Victory – Mark J. Swerdlin represented a public sector university in a unit clarification petition before the Maryland State Higher Education Labor Relations Board (SHELRB) filed by a Fraternal Order of Police (FOP) local union. SHELRB denied the union's request for reconsideration and affirmed its initial decision that police sergeants should not be added to a unit of sworn officers represented by the FOP local.

Article – Courtney B. Amelung authored "Teleworking arrangements prompted by COVID-19 might impact employer's income tax withholding and paid leave obligations," which was featured as a Strategic Perspective article in the May 19, 2020 edition of *Labor and Employment Daily*, a publication of Wolters Kluwer.

Presentation – Fiona W. Ong and Lindsey A. White conducted a webinar, "Bringing Them Back or Letting Them Go," for HR Executive Edge, a networking group of chief human resources officials, on May 13, 2020.

TOP TIP: Privacy Implications of Workplace Temperature Screening

Federal government agencies, including the Centers for Disease Control and Prevention and the Equal Employment Opportunity Commission, and many state and local governments have approved of the use of temperature screening as part of a business's return-to-work strategy during the COVID-19 pandemic. Businesses deciding to implement temperature screening are presented with a variety of contact and non-contact temperature-taking device options, but the use of these may implicate privacy issues.

Non-contact thermometers include non-contact infrared scanners, thermal imaging devices, and wearable devices. The Food and Drug Administration states that one of the benefits of thermal imaging devices is that the person operating the device is not required to be physically close to the person being evaluated. However, it is important for businesses to be aware of the privacy issues that may arise from non-contact thermal imaging systems that use facial recognition.

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Biometric data concerns. Thermal imaging systems that use facial recognition may collect personal information that is regulated by privacy laws in various states. Many of these state laws, like Maryland's Personal Information Protection Act, define "personal information" to include biometric data. These state laws generally require businesses collecting and storing personal information to notify all affected individuals in the event of a data breach. Some, like Illinois, may also require employers to provide notice and obtain consent to collect biometric data.

As a general rule, an employer should not collect any personal information beyond what is needed by the business. Employers deciding whether to select a thermal imaging system that uses facial recognition should consider the following questions:

- Will the use of the device implicate any privacy laws in the states where the employer operates?
- Is biometric data collected by the device?
- Does the employer need all of the information, including biometric data, that is collected by the device?
- Does the employer need to provide notice and obtain consent to collect biometric data?
- How the information is stored?
- Is the information shared with third parties?
- Does the company selling the device have a history of information security issues?
- Is the business prepared to respond in the event of a data breach? (Many states have laws setting forth required actions in the event of a breach).

Medical information privacy concerns. It is also important to note that taking the temperature of an employee is a medical examination under the ADA and the temperature must be kept confidential. Thus, an employer must consider the following:

- Can the employer ensure that the taking of an employee's temperature is not observable by others waiting to be screened?
- Will the employer use an employee or outside vendor to take and record employee temperatures?
- If an employee is assigned to take co-worker temperatures, has the employer trained the employee on the need to maintain confidentiality of the results, including any written log?
- If an employer chooses to keep records of its employees' temperatures, has it arranged for the information to be maintained confidentially and securely, apart from regular employee files?

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