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Trends and Developments

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Introduction

Following the transition from President Trump to President Biden in early 2021, there has been a pronounced shift in the approach to labour and employment issues at the federal level. The Biden administration has asserted its commitment to pro-worker issues that are being bitterly contested by political opponents, such as increasing the minimum wage, implementing paid sick or family leave and restricting non-compete agreements.

Although Congress remains mostly stalled, many of the business-friendly agency actions under the prior administration have been withdrawn or reversed, while pro-worker initiatives are being promoted by the Equal Employment Opportunity Commission, the Department of Labor, and the National Labor Relations Board. Among other things, action has already been taken to:

- make findings of joint employer status more likely;
- make independent contractor status more difficult to achieve;
- promote greater wage protection for tipped workers; and
- broaden the scope of discrimination protections.

In particular, the administration's focus on easing barriers to unionisation has found traction across many industries during the past year, resulting in a marked increase in successful union elections following many years of union decline.

However, employers in the US must comply not only with federal law, but also with the laws of the states – and even municipalities – in which they operate. Given the highly partisan environment in the current US Congress, many states and municipalities have taken the initiative to pass employment-related legislation that has foundered at the federal level.

Certain trends have emerged during the past few years in the types of laws that have been widely considered and enacted at the state and local level, including those pertaining to:

- minimum wage;
- paid sick and safe leave;
- medical and recreational marijuana;
- pay equity;
- sexual and other harassment (arising out of the "Me Too" and "Black Lives Matter" movements);
- worker misclassification; and
- non-competition agreements.

Furthermore, in light of the COVID-19 pandemic, state and local jurisdictions have also implemented laws, ordinances, orders and other guidance applicable to the workplace. More recently, the US Supreme Court's decision overturning the constitutional right to abortion has resulted in a return to a dizzying range of state abortion bans that are having an impact in many workplaces.

The Impact of the Dobbs Decision

In Dobbs v Jackson Women's Health Organization, the US Supreme Court overturned the constitutional right to abortion previously recognised in Roe v Wade. Partial or absolute bans on abortion immediately went into effect in many states, leading many employers to seek

to expand benefits that would enable employees to travel elsewhere to obtain legal abortions.

However, these actions have been complicated by many issues, such as:

- coverage of such benefits (or not) by the Employee Retirement Income Security Act (ERISA), which sets minimum standards for private health plans;
- application of the Mental Health Parity Act, which requires equivalent benefits for mental health treatment as for medical/surgical treatment;
- discrimination concerns; and
- various related state law issues, including criminal liability for aiding and abetting abortions.

Employers should consult with experienced counsel before instituting any such benefits.

COVID-19 Laws and Ordinances

The COVID-19 pandemic has had a devastating impact in the workplace. Under the prior administration, the federal government provided enhanced unemployment benefits, limited and temporary paid leave, and certain other economic relief to companies and employees, but was not particularly aggressive about workplace safety requirements. Its belated attempts to impose such standards have mostly been rejected by the courts. Thus, some state and local jurisdictions moved to fill in gaps in the federal response.

These initiatives took many forms, including workplace safety standards, reopening guidance, face covering/mask requirements, and enhanced unemployment benefits, which for the most part have now lapsed. But other initiatives still exist, such as:

- emergency paid leave for COVID-19-related reasons (including vaccinations);
- workers' compensation presumptions;
- business liability immunity; and
- "vaccine passport" initiatives or bans.

Because this is an evolving situation and these efforts are specific to each state and local jurisdiction, employers must be careful to check the current applicable requirements and restrictions in the jurisdictions in which they do business – including for now-remote workers in states other than where their employer has a physical location.

Minimum Wage

Since 2009, the federal minimum hourly wage has been USD7.25. A full-time worker making minimum wage will earn USD15,080 a year, which is slightly above the current federal poverty level for a one-person household (USD13,590) and below that of a two-person household (USD18,310). For many years, workers' advocacy organisations have sought to increase the minimum wage and their efforts found momentum in the union-driven "Fight for $15" campaign to raise the hourly minimum wage to USD15.

While Congress continues to debate an increase at the federal level, 30 states and the District of Columbia currently have minimum wage rates that are higher than the federal rate. A large number of municipalities have also increased their rates. Many of those rates are subject to additional scheduled increases towards – or even beyond – the USD15 mark over the next several years.

Family and Medical Leave Laws, Including Paid Sick Leave

The US is the only advanced economy without a federal law requiring employers to provide paid sick leave. States and municipalities have sought to fill that void, with paid sick and safe leave leg-

islation finding increasing success at that level – albeit creating a patchwork of requirements for multi-state employers.

Thus far, 14 states (Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington) and the District of Columbia have passed laws requiring private employers to provide paid sick and safe leave to employees. Sick leave legislation has been proposed in many other states and, in addition, numerous local municipalities have enacted such laws. Of particular interest, in 2019 Maine and Nevada passed laws mandating paid leave that may be used for any purpose, including sick and safe reasons. These recent laws may herald a new and dramatic expansion of paid leave rights for employees at the state level.

In general, the sick and safe leave laws specify that the leave may be used for multiple reasons, including:

- for needs arising from domestic violence (ie, safe leave);
- to care for an employee's or family member's illness or injury; and
- for preventative care.

Some of the laws provide for additional reasons, such as parental leave following the birth/adoption/foster placement of a child, closure of the workplace or a child's school due to a public health emergency, household quarantine, and even leave to attend school conferences or meetings.

The family members covered by these laws encompass a wide range of individuals, typically including a spouse, child, parent, grandparent, grandchild and sibling – whether these connections are by blood or adoption. Some laws cover in-law relationships and also include legal guardians and those standing in loco parentis – or even unrelated individuals with a close personal relationship to the employee.

Most of the laws specifically allow employers to verify the need for leave, although the conditions under which verification may be required differ. Most, but not all, do not require payout of unused leave.

The laws vary greatly depending on the size of employers covered – some laws ease the burden on smaller employers by reducing the amount of leave that must be granted or requiring only the provision of unpaid leave. They also vary in the amounts of leave granted overall, ranging from 24 to 80 hours a year, as well as whether and how much leave can be carried over to the next year, and how much leave may be used in a year. Notice provisions also differ between the various laws.

There has been increased interest in a related type of legislation that sets up a state-run benefits programme, through which employees may receive benefits during certain absences for family and medical reasons. Thus far, 11 states (California, Colorado, Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Rhode Island and Washington) and the District of Columbia have enacted such benefits programmes – and similar legislation is pending in a number of other states.

Depending on the state, the benefits are funded through employer contributions, employee contributions, or a combination of the two. Employees may receive benefits during parental leave and leave for personal or family illness and injury. Some states also include other qualifying reasons, such as qualifying exigencies arising from a family member's call to active duty, bone or

organ marrow donation, or domestic violence. The definition of family member also varies from state to state, with some laws taking an expansive view of the term. In addition, the period of paid leave benefits ranges widely, from four weeks up to 52 weeks. Benefit amounts also vary.

Medical and Recreational Marijuana

Medical marijuana use has been legalised in 37 states and the District of Columbia. Recreational marijuana use has been legalised in 19 states, as well as the District of Columbia. However, marijuana is still illegal under the federal Controlled Substances Act (CSA) and regulations prohibiting the use of marijuana by covered employees still apply to Department of Transportation-covered employers. This, along with varying and sometimes contradictory statements of policy by the federal government, has led to some tension and confusion concerning the use of marijuana by employees.

Medical use

Under federal and state disability laws, employers are required to provide reasonable accommodations to disabled employees that enable them to perform the essential functions of their jobs. The federal Americans with Disabilities Act (ADA) expressly excludes illegal drug use from the definition of a qualified individual with a disability. The ADA is silent on whether permitting the use of medical marijuana is a reasonable accommodation for an otherwise disabled employee; the fact that marijuana is still illegal under federal law suggests that it would not be permitted. The answer may be different, however, under state law.

The law in at least one state (Nevada) specifically requires employers to attempt to make reasonable accommodations for the medical needs of an employee who uses medical marijuana. On the other hand, the law in many states expressly provides that employers are not required to "accommodate" the use of medical marijuana during work hours or on work premises. The remaining states' laws are silent on such accommodations. Under all these laws, employers may prohibit the use or being under the influence of marijuana while at work – the only question is whether off-duty use should be permitted.

Some states' laws specifically protect off-duty use. In other states, some court decisions have examined the interplay of state law and federal law, paying close attention to the language of the state law. Some courts have noted that the CSA does not regulate the employment relationship or expose employers to liability and that state law may thereby require employers to tolerate the off-duty use of medical marijuana. See Noffsinger v SSC Niantic Operating Co LLC, 2018 US Dist LEXIS 150453 (D Conn, 5 September 2018); Barbuto v Advantage Sales & Mktg LLC, 78 N.E.3d 37 (Mass, 2017); Callaghan v Darlington Fabrics Corp, No PC-2014-5680 (RI Super Ct, 23 May 2017).

On the other hand, a Maine state court found the CSA to pre-empt state law. Bourgoin v Twin Rivers Paper Co, 187 A.3d 10, 14 (Me, 14 June 2018). Other court decisions have offered protections to medical marijuana users under state discrimination law without reference to federal law. See Whitmire v Wal-Mart Stores, Inc, 2018 US Dist LEXIS 198407 (D Ariz, 21 November 2018); Gordon v Consolidated Edison, Inc, 2018 NY Misc LEXIS 2105 (NY Sup Ct, 29 May 2018). Thus, employers will need to pay close attention to both the language of the particular state law in question, as well as how courts in those states react to this issue.

Recreational use

A different analysis applies when considering the recreational use of marijuana. A number of the recreational use statutes do not require

employers to allow such use, whether at work or off-duty. However, several states (including Nevada, New York, New Jersey, Connecticut, Montana and Rhode Island) specifically protect an employee's off-duty use. In addition, some states have statutes that prohibit an employer from taking adverse action against employees for generally legal off-duty conduct, which may arguably include recreational marijuana use. At least one court, however, has rejected the argument that recreational or even medical marijuana use is legal under state law, noting that such use is still illegal under federal law. See Coats v Dish Network, LLC, 350 P.2d 849 (Colo, 2015).

Another aspect of marijuana testing legislation has developed recently. New York, Nevada, Philadelphia and the District of Columbia have banned pre-employment testing for marijuana use. Furthermore, New York bans testing of current employees (with certain exceptions). This type of legislation is likely to find traction in other states as our society grows increasingly tolerant of marijuana use, despite the continued federal prohibition.

Pay Equity

Although Congress passed the Equal Pay Act in 1963, women's earnings continue to lag behind those of their male counterparts. According to a Pew Research Center analysis of US median earnings, in 2020 women earned 84% of what men earned – a number that has remained relatively stable over the past decade and a half. Recent state and local laws have targeted this pay gap through different approaches.

With the addition of Mississippi in 2022, all states have also passed equal pay laws (requiring equal pay for equal work, regardless of sex) or laws that prohibit discrimination in wages based on sex. Recently, however, states have taken measures to strengthen these laws. Some have added protected characteristics, such as race or gender identity. They have also extended the time period in which employees may sue and more specifically defined factors that may be taken into account in establishing legitimate wage differentials.

An increasing number of states have added pay transparency provisions to their equal pay laws or passed separate pay transparency laws. These laws protect workers' ability to freely discuss their pay, with the idea that the transparency will encourage equity in compensation. Interestingly, this right already existed for non-management employees under the National Labor Relations Act, regardless of union or non-union status. Additionally, President Obama signed Executive Order 13665 in 2015, providing these protections for employees of government contractors.

Another approach that has been taken by at least 17 states and many municipalities is a salary history ban, under which private employers are prohibited from asking about an applicant's compensation history. The premise behind such laws is that compensation is often based on prior earnings and – because women have traditionally been paid less and/or are arguably less assertive in negotiating pay than men – this reliance on past salary perpetuates the wage gap.

Sexual and Other Harassment

Since 2017, the "Me Too" movement has brought about a rapid wave of legislation at the state level, covering a wide range of measures intended to combat sexual harassment. These laws have three primary areas of focus:

- non-disclosure or confidentiality provisions in settlement agreements;
- mandatory arbitration or "waiver of rights" agreements; and
- training and policies.

The "Me Too" movement was followed by the "Black Lives Matter" movement, which focused on discrimination against Black and African-American people. In the wake of the "Black Lives Matter" movement, there have been some laws expanding race discrimination protections. Several states have also expanded workplace harassment protections generally in response to both movements.

Non-disclosure or confidentiality provisions

The concern about non-disclosure or confidentiality provisions is that they may protect the identity of alleged harassers, thereby enabling them to continue harassing others. On the other hand, such provisions may be desired by victims in order to protect their privacy. Additionally, some employers may be loath to enter into settlements without some guarantee of confidentiality.

At the federal level, Congress included a provision in the Tax Cuts and Jobs Act of 2017 that eliminated tax deductions for payments made by a company or organisation to settle sexual harassment or abuse claims if the settlement agreement contained a non-disclosure or confidentiality provision that prevents the disclosure of the terms of the agreement. Several states have also enacted laws that restrict – although do not ban outright – the use of such provisions in sexual harassment settlement agreements.

A variation on these non-disclosure laws extends beyond the settlement agreement context and instead more broadly prohibits employment agreements that would prevent employees from discussing sexual harassment in the workplace. It is worth noting that the ability of non-management employees to engage in this conduct is already protected by the National Labor Relations Act.

Mandatory arbitration and waiving of rights

Another primary area of focus in this type of state sexual harassment legislation is mandatory arbitration and "waiver of rights" agreements. Many employers require employees to sign an agreement at the time of hire that binds the parties to arbitrate any disputes that arise during the employment relationship. Other agreements may require employees to waive certain substantive rights or remedies, which may include the right to a jury trial.

One concern that has been expressed about such agreements is that they force employees to give up their right to go to court and therefore that they may protect the identity of harassers. The laws that have been enacted and are being considered in many other states prohibit such agreements in the case of sexual harassment claims. At least one court in New York has found that the state's mandatory arbitration ban is preempted by the Federal Arbitration Act; whether other courts will agree remains to be seen.

Training and policies

The last primary area of focus concerning state sexual harassment laws is training and policies.

Prior to 2018, three states – California, Connecticut and Maine – required employers to provide certain employees with sexual harassment prevention training. Since then, several other states (Delaware, Illinois and New York) – in addition to municipalities, such as Chicago – have also passed mandatory training laws. A number of other states are considering similar legislation.

With regard to policies, some of the recently enacted laws mandate the development of a written anti-harassment policy that meets certain specified requirements.

Further protections

The above-mentioned individual laws may also contain other provisions aimed at strengthening sexual harassment protections, such as those for:

- reporting to the state;
- loosening the definition of "harassment";
- bans on no-rehire provisions in settlement agreements; and
- expanding remedies and statutes of limitations on sexual harassment claims.

As a consequence of the "Black Lives Matter" movement, there has been an increased focus on diversity, equity and inclusion in the workplace. One type of race-related law that has spread rapidly throughout the US is known as the CROWN (Creating a Respectful and Open World for Natural Hair) Act. To date, 16 states have enacted CROWN Acts, which typically clarify that "race" under the state anti-discrimination laws includes natural or protective hair textures and styles.

Some states and local jurisdictions have recently enacted laws to expand harassment protections more generally. These laws typically establish a lower standard for imposing employer liability for harassment (primarily by deleting the "severe and pervasive" requirement for harassment that exists under federal law). They also extend the time periods in which harassment complaints or lawsuits may be filed against the employer.

Worker Misclassification

As a result of the rapidly expanding "gig" economy, there has been heightened interest in the issue of worker misclassification – ie, where employees are improperly classified as independent contractors who are not entitled to the benefits and protections granted to employees. Employers additionally avoid employment taxes on compensation paid to independent contractors, which may be a significant cost saving. Although many individuals may be called "independent contractors", the reality is that the employing entity must exercise sufficient control over aspects of the relationship for the worker to be rendered an employee.

Consequently, there have been a number of state laws enacted to address worker misclassification. These laws typically set forth stringent criteria that must be met in order to be deemed an independent contractor. They may require that the independent contractor be certified or given specific mandatory forms. They also typically impose civil or even criminal penalties, monetary and otherwise, on employers who engage in misclassification. Other states have set up task forces to study the issue for future action.

Non-competition Agreements/Covenants Not to Compete

As previously noted, the Biden administration is seeking to restrict or ban many non-compete agreements that restrict an employee's ability to be employed in the same line of work. The Department of Justice (DOJ) has criminally prosecuted agreements not to poach a competing business' employees on the grounds that such agreements violate antitrust law. It recently submitted briefing to a state court suggesting that antitrust principles should be relied upon to invalidate a private non-competition agreement between an employer and its employees.

To date, however, the validity of non-competition agreements is a matter of state law, and it is an issue that has come under increasing attack. States are taking an aggressive approach to limiting the use of non-competition agreements, particularly with regard to low-wage workers. Several states have banned non-competition

agreements altogether, whereas some have only banned them for low-wage workers. Others have significantly weakened non-competition agreements in general.

Shawe Rosenthal is one of the first law firms in the US devoted exclusively to the representation of management in labor and employment matters. The firm represents employers throughout the country in federal and state courts and arbitral forums, as well as before the Equal Employment Opportunity Commission, the National Labor Relations Board, the Department of Labor, and other administrative agencies. Shawe Rosenthal's 15 attorneys have joined the firm from judicial clerkships and federal agencies, as well as large and small firms, and bring with them a wealth of practical experience on labour and employment matters. Shawe Rosenthal is the sole Maryland law firm belonging to two major alliances of management labour and employment lawyers: The Employment Law Alliance and Worklaw Network. Both of these alliances afford the firm access to resources of the highest calibre across the country and around the world to better serve its clients, wherever they may be.

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