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General Counsel Employment Law Report

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It's Official, EEO-1s Must Include Pay Data

A few weeks back, I mentioned the back and forth of EEO-1 pay data. Here's a quick summary of that back and forth:

1. The Obama administration passed new pay data reporting rules that would have required certain employers to submit pay data by race, ethnicity and sex along with EEO-1's. This pay data was to be submitted as of the March 2018 reporting period.
2. In 2017, the pay data reporting provisions were suspended by the Trump administration, leaving employers to believe this data would not have to be submitted by this year's May 31 filing deadline.
3. In March 2019, the suspension of pay data reporting requirements was lifted. The court ordered that employers be provided guidance by April 3rd as to whether pay data would be required for the 2019 filing date and whether the due date would be adjusted.

The guidance was published, and it says that: **Pay data must be included on EEO-1 reports filed in 2019. And it says that the EEO-1 reports, with pay data, must be filed by September 30, 2019.**

But…**that guidance hasn't yet been formally accepted by the EEOC. And, the official word of the EEOC is *still* that 1) pay data isn't required; and 2) that the EEO-1 filing is due May 31, 2019. So, unfortunately, there are *still* some questions out there.**

Keep an eye out on the instructions **here.** We'll do the same and will let you know if and when the guidance is accepted and if and when the instructions have been updated.

Democrats in Congress Say #Timesup, Introducing Legislation Addressing Harassment and Discrimination

#MeToo began making news almost two years ago; and although it resulted in high profile suits against a few powerful men, for many, things haven't changed much in the workplace.

Last week, U.S. Reps. Katherine Clark and Ayanna Pressley introduced legislation that, if passed, would seek to stop workplace inequalities, mistreatment and violence brought to public spotlight by the #MeToo movement.

The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act would provide express federal protection against sexual harassment and sexual orientation discrimination on the job, and close loopholes in federal discrimination law that leave many domestic workers without legal protections from sexual harassment.

The BE HEARD Act adopts a number of recommendations set forth in **a report** compiled by staff of the Senate Committee on Health, Education, Labor, and Pensions, which argued that federal law currently fails to protect U.S. workers. The BE HEARD ACT would:

- Clarify that discrimination on the basis of sexual orientation and gender identity is illegal under the Civil Rights Act.
- Authorize grants for low-income workers to help them seek legal recourse if they are harassed.
- Require employers to report incidents of sexual harassment.
- Bar mandatory arbitration, and pre-employment nondisclosure agreements.
- Extend federal discrimination protections to apply to independent contractors.
- Eliminate the lower minimum wage for tipped workers, which the authors argue makes servers vulnerable to harassment by customers.

Co-sponsors of the BE HEARD Act include Massachusetts U.S. Senators Elizabeth Warren and Ed Markey, and although the bill's future is uncertain, there are some aspects of the BE HEARD Act that have attracted bipartisan support, including mandatory arbitration and forced nondisclosure agreements.

For now, this is one for employers to watch. And, in the meantime, consider the steps your organization can take to address the ongoing issue of inequality and harassment in the workplace.

Unless You Work With Your Mom, Don't Call Anyone in the Workplace "Mom"

Unless you work with your mom, please don't call anyone in the workplace "mom" or "mommy" or any version of a maternal title. And, please don't allow employees to use those names, either. How many possible lines could that cross? Sexual harassment…yep. Gender discrimination…sure. Age discrimination…that too. It should go without saying, but "dad, daddy, grandma, grandpa" and the like should also be strictly off limits.

According to **a case that's currently in the 2nd Circuit**, this *actually* happened. A 54-year-old employee who worked at a trendy retailer was, allegedly, frequently called "mom" and "mommy" by her substantially younger coworkers. She voiced her concern over the use of the title, but the use continued. She also alleges that she was segregated from other employees, given less desirable assignments, and passed over for promotions because "look around…everyone in the company is young…you're too old." Oh, and there's the allegation that she was actually asked to mother the other employees by caring for their cuts, bruises, and other ills. (Side note: I'm pretty sure I know some kindergartners who can put on their own band-aids. Who are these 20-30-year-old employees?) So, it wasn't just the "mom" name-calling that troubled this employee. It was a host of issues and events that she claims created a hostile work environment.

The lower court dismissed her complaint and granted summary judgment for the defendants. But, the 2nd Circuit court of appeals reversed the dismissal and remanded the case to trial court. This will likely settle before it goes to trial, but I'd be interested to see what a jury (which is likely to include at least a few *actual* moms, dad, and grandparents) would do with these alleged facts.

What are the takeaways? First, the obvious one that was stated in the first paragraph: don't allow these types of nicknames to be used. And, as I've written about before, listen to each and every employee complaint, take each seriously, and investigate. Name calling once or twice *might* not create a hostile work environment, but continuous name calling and/or explicitly discriminatory statements ("you're too old") and/or segregation and disparate treatment would, for most reasonable persons, create a hostile work environment.

7 Democrats Flipped GOP-held Governships: Employers Should Pay Attention

Last week, Tim Craig of the Washington Post authored **a piece** following new Democratic governors who flipped previously held Republican states. The article outlines steps these governors are already taking to address climate change, expand the Affordable Care Act, and in some cases increase taxes.

In these states, there may also be some employment related changes to come as well. In the past few years, a number of states with Democratic legislatures and/or governors have adopted paid sick leave, paid family leave, increased minimum wage, and a number of other employment related measures. It stands to reason (and news reports confirm) that one or more of these initiatives could be on the agenda for these states, particularly those that have both a Democratic legislature and governor.

The Maine legislature is already considering a paid sick leave bill, and a Maine Paid Family Leave Insurance Program. Below is an overview of other states where shifting political balances may result in changes to employer obligations.

In Hawaii, the mid-term elections continued the Democrats' control of the state House, Senate and governorship. The state has already appropriated funds to study and evaluate other states' paid leave programs, and legislation is likely to be proposed once the report is released in September 2019.

Colorado flipped the balance in the Senate in the mid-term elections, creating a Democratic trifecta in 2019. Paid Family Leave appears to have strong support from most Democrats in the General Assembly, as well as the new governor.

In Oregon, there is a new three-fifths super-majority in the Oregon Senate and House, which means Paid Family Leave could be on the horizon there.

In New Hampshire, although the Republican governor held on to office, Democrats won control of both branches of the legislature, and Governor Sununu appears open to employment initiatives like paid sick leave and paid family leave.

In Vermont, Democrats won a super majority in the House of Representatives. The Vermont legislature has passed Paid Family Leave twice, and each time is was vetoed by Governor Phil Scott. A super majority means that a third veto could be overridden.

Other states with new Democratic "trifectas" are Illinois, New Mexico, and Nevada; and in Minnesota, Democrats flipped the House and retained the governor's office.

For several years now, the states have been the incubators for new employment laws, and that trend shows no sign of slowing any time soon. Employers, particularly those operating in multiple states and those with remote employees must remain vigilant. We can help.

Action Required: Massachusetts Paid Family & Medical Leave Notice

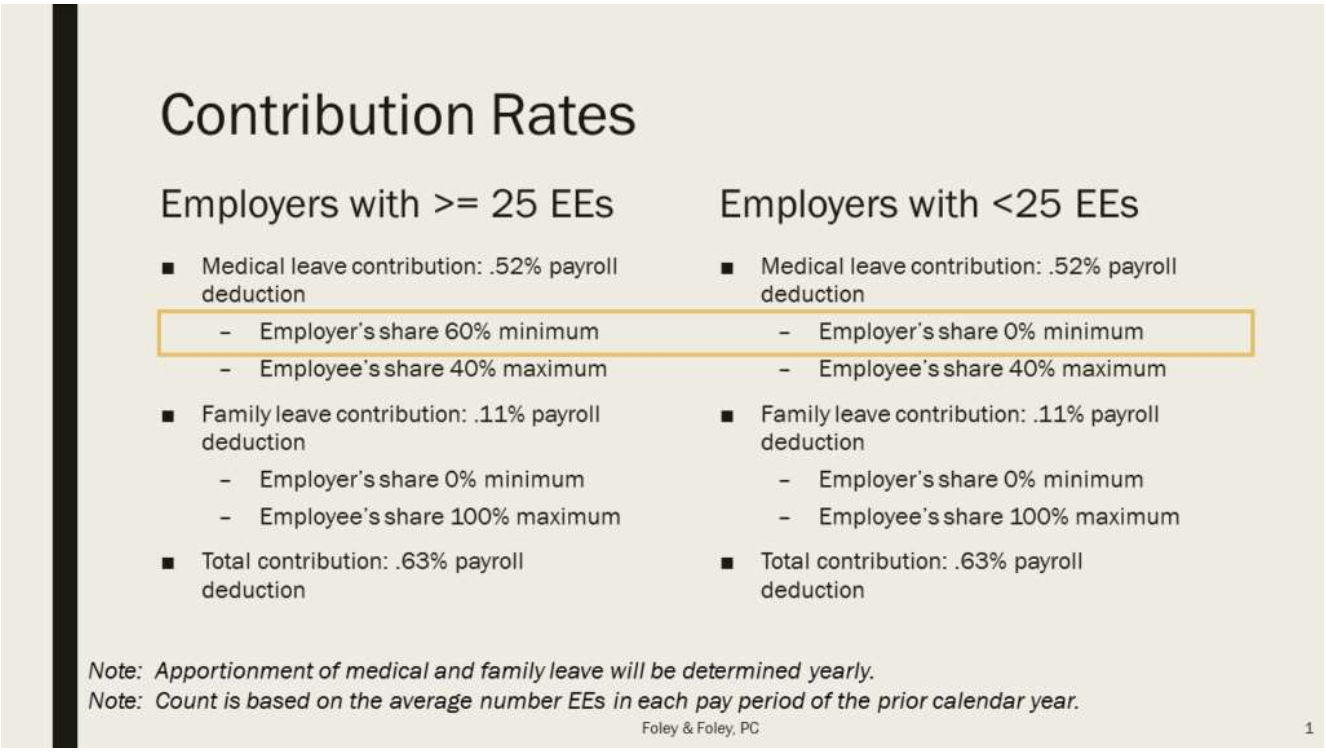
A few weeks back, Massachusetts' newly formed Department of Family and Medical Leave released the workplace poster that employers are obligated to post by July 1, 2019. In true Massachusetts form (putting the cart before the horse, so to speak), the Department *just* released the notices that must be provided to all employees and signed by May 31, 2019.

Here is a link to the poster **that must be posted by July 1, 2019: https://www.mass.gov/lists/paid-family-and-medical-leave-downloads-for-massachusetts-employers#employer-workplace-poster-** This must be posted in English and each language other than English that is the primary language of 5 or more employees in your workplace, if a poster in that language is available from the department.

Here is a link to notice of this Leave Law that **must be provided to each employee and signed off by May 31st: https://www.mass.gov/lists/paid-family-and-medical-leave-downloads-for-massachusetts-employers#employer-written-notices-to-employees-** This must be provided in English and each language other than English that is the primary language of 5 or more employees in your workplace, if the notice in that language is available from the department. Going forward, employers are obligated to provide this notice with 30 days of hiring a new employee.

I encourage you to review the notices as soon as possible as you'll need to make some decisions before presenting the notices to employees. You'll need to specifically state within the notice the portion the employer will contribute and/or whether your organization offers a private plan.

As a reminder, here are the required deductions and the apportionment for 2019:



It's About Time! US Supreme Court to Decide Whether Title 7 Protects LGBT Employees

I'm a fan of consistency. If you're reading this, you likely are, too. So, anytime there's an opportunity for the SCOTUS to bring some consistency to an area of the law that's currently quite inconsistent, I get excited.

On Monday, the SCOTUS released an "Order List" indicating that it has granted certiorari (meaning that SCOTUS will hear the cases) for three cases: **Bostock v. Clayton County, Georgia**, **Altitude Express v. Zarda**, and **R.G. & G.R. Harris Funeral Homes v. EEOC**. These cases demonstrate the current divide among the Circuit Courts. In Bostock, the 11th Circuit (AL, GA, FL) effectively upheld a lower court decision finding that Title VII *does not* prohibit discrimination on the basis of sexual orientation. In Zarda, the 2nd Circuit (CT, NY, VT) held that Title VII *does* prohibit discrimination on the basis of sexual orientation. And, in Harris, the 6th Circuit (KY, OH, MI, TN) held that Title VII prohibits discrimination related to sex stereotyping, transgender status, and transition status. In taking the three cases, the Supreme Court will correct the inconsistency among the circuits AND provide a ruling not just on sexual orientation (which many state laws protect) but also on a broader list of issues that can face LGBT employees.

SCOTUS' ruling will also eliminate the current conflicting positions (albeit maybe not current ideologies) being taken by the DOJ and the EEOC/OSHA. As I wrote about back in October, the DOJ's current position is that federal law does not prohibit discrimination based on sexual orientation, a position that directly contradicts (somewhat longstanding) guidance by other government agencies, like the EEOC and OSHA.

We don't yet know when the cases will be heard, but we will provide an update here when we do.

General Counsel's Office Hours

Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.