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YOUR HOT EMPLOYMENT ISSUES

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A. Introduction

The world of human resources and labor and employment law has never been stagnant. In recent years, however, labor and employment laws have changed at rapid speed. Once general counsel or a human resources professional can catch their breath from the latest swath of changes, another new change is on the horizon. This article highlights some of the most significant recent changes to labor and employment law and how employers may address these challenges with confidence.

B. Impacts of the COVID-19 Pandemic Continue

The COVID-19 pandemic continues to pose significant challenges for employers. Most recently, the Emergency Temporary Standard ("ETS") issued by the Occupational Health and Safety Administration ("OSHA") presents many questions. Aside from the OSHA ETS, an employer must also consider whether it is subject to other federal testing or vaccination requirements, such as the requirement applicable to federal contractors, or whether it is subject to a COVID-19 vaccine mandate issued by a state or local government. Further, employers are still grappling with questions presented by state and local COVID-19 paid sick leave laws.

On November 4, 2021, OSHA issued its ETS concerning COVID-19 vaccine and testing requirements. The ETS applies to private sector employers with 100 or more employees.

As anticipated, various parties challenged the ETS in different federal courts immediately. The Fifth Circuit Court of Appeals issued a national stay on implementation of the ETS. The Sixth Circuit Court of Appeals, however, "won" a multi-district litigation lottery and will decide the fate of the ETS. As of the date of this article, the Sixth Circuit has not heard arguments on the ETS or decided the merits of the ETS. Likewise, as of the date of this article, the Sixth Circuit has neither lifted nor modified the stay issued by the Fifth Circuit. Nonetheless, important aspects of the ETS are discussed in detail below.

The ETS requires private sector employers with 100 or more employees to either impose a COVID-19 vaccine mandate or require unvaccinated employees to undergo weekly COVID-19. It requires covered employers to take the below steps:

1. adopt "a mandatory vaccination policy unless they adopt a policy in which employees may either be fully vaccinated or regularly tested for COVID-19 and wear a face covering in most situations when they work near other individuals";
2. determine the COVID-19 vaccination status of each employee, obtain proof of vaccination, establish a roster of each employee's vaccination status, and maintain supporting records;
3. provide employees with information about the ETS (either electronically or in print), workplace policies and procedures implemented to comply with the ETS, the efficacy of the COVID-19 vaccine and its safety and benefits, protections against retaliation and discrimination, and criminal penalties for supplying false information or documentation to an employer;
4. report a work-related COVID-19 fatality to OSHA within eight hours of learning about the fatality; and
5. report work-related COVID-19 hospitalizations within twenty-four hours of the employer learning of the hospitalization.

To comply with the employee notice requirements described above, employers must provide employees with guidance issued by the Centers for Disease Control and Prevention titled "Key Things to Know About COVID-19 Vaccines."

If employers are not already adhering to the following practices, the ETS further requires that employers ensure that employees promptly provide notice of a positive COVID-19 test result, and that employees who are not fully vaccinated wear a face covering when indoors or when occupying a vehicle with another employee for work purposes.

Employers who do not implement a mandatory COVID-19 vaccine policy must ensure that employees who are not fully vaccinated wear face coverings and are tested for COVID-19 every week.

In determining whether an employer is subject to the ETS, OSHA requires an employer to count all employees (including part-time employees) across all workplaces located in the United States, including employees who work remotely. Independent contractors do not need to be counted by an employer in determining its total number of employees. However, seasonal and temporary employees must be counted if they are employed at any point while the ETS is in effect. Finally, OSHA expressly advised that an employer should not consider an employee's vaccination status when counting the number of employees. In other words, if an employer has 150 employees who are all fully vaccinated against COVID-19, the ETS still applies to that employer. The ETS does not apply to employers who are covered by OSHA Healthcare ETS or are subject to the COVID-19 vaccine requirements of the Safer Federal Workforce Task Force COVID-19 Workplace Safety Guidance.

Employees who work from home and are not fully vaccinated against COVID-19 are not subject to the weekly testing requirements. Further, if an unvaccinated employee reports to work infrequently (such as once a month), the employee is not required to undergo weekly testing. Instead, the employer must ensure that the employee is tested for COVID-19 at least seven days before reporting to the worksite and provides the employer with proof of the test results.

Employers must ensure that unvaccinated employees who report to work provide COVID-19 test results. Even if an unvaccinated employee reports to work, wears a face covering, and is isolated from others, the unvaccinated employee still must present the employer with proof of COVID-19 test results.

Not all forms of COVID-19 testing are acceptable under the ETS. To pass muster, a COVID-19 test must: (1) be approved or authorized by the FDA (including tests approved by an Emergency Use Authorization); (2) be administered in accordance with the authorized instructions; and (3) not be both self-administered and self-read, "unless observed by the employer or an authorized telehealth proctor." Tests that satisfy the requirements of the ETS include COVID-19 tests processed by a laboratory, proctored over-the-counter tests, point-of-care tests or tests conducted by or observed by an employer.

Employers must maintain records of each test that must be conducted by the ETS for each

employee. The records should be kept separate from employees' personnel files. Further, employers must retain the testing records for as long as the ETS is in effect.

Significantly, and in a departure from past guidance from the federal government, the ETS permits covered employers to pass the costs associated with the weekly COVID-19 testing of unvaccinated employees onto those employees. The ETS notes that other laws, regulations, or collective bargaining agreements may require the employer to pay for the testing. Before deciding whether to charge employees for this cost, employers should consider the possibility of conflicting obligations under state law and the potential for any bargaining obligations (if the employer operates in a union setting).

The ETS further provides guidance concerning employees who cannot receive the COVID-19 vaccine due to a disability or sincerely held religious belief. If an employee cannot receive the COVID-19 vaccine due to a disability or sincerely held religious belief, the employee still must be tested on a weekly basis. The ETS advises that if an employee claims that COVID-19 testing conflicts with their sincerely held religious belief, the employee may be entitled to a reasonable accommodation.

As some employers who already have COVID-19 testing requirements in place have experienced, an employee subject to the testing requirement who tests positive for COVID-19, but then recovers and returns to work, may continue to test positive. The ETS advises that if an unvaccinated employee tests positive for COVID-19, the employer should not require the employee to undergo weekly COVID-19 testing for 90 days following the date of the employee's positive test result.

The ETS further requires employers to provide up to four hours of paid time off for employees to get vaccinated, which includes paid time off for multiple doses if the vaccine selected by the employee requires two doses. This may not be a new requirement for employers some states. In New York State, for instance, employers have been subject to paid time off requirements for employees to receive the COVID-19 vaccine since March 2021. *See* N.Y. Lab. Law § 196-c. Employers must also offer "reasonable time and paid sick leave" to an employee experiencing negative side effects from the vaccine. The ETS does not define what is reasonable.

Finally, covered employers who refuse to comply with OSHA's ETS face serious penalties. An employer that fails to comply with the ETS may be cited by OSHA up to $13,653 for each violation of the ETS. Likewise, if OSHA determines that an employer "willfully" violated the ETS, it can fine the employer up to $136,532 for each violation.

C. Recreational Marijuana

Recreational marijuana continues to cause headaches for employers. At least eighteen states have fully legalized the use of recreational marijuana. The legalization of recreational marijuana is perplexing for most employers because marijuana remains a Schedule I Controlled Substance on the federal level. This tension causes problems for employers concerning the extent to which an employee's use of recreational marijuana outside working hours is protected, effective implementation

of drug-free workplace policies, and challenges with drug testing.

First, the extent to which an employee's use of recreational marijuana outside working hours is protected varies upon state law. Perhaps surprisingly, California law does not protect employees who consume recreational marijuana, even outside work hours (although there are efforts underway to change this). *See generally* Cal. Bus. & Prof. Code § 26001. Other states expressly protect an employee's off-duty use of recreational marijuana. In New York State, for example, the New York State Labor Law makes it unlawful for an employer to refuse to hire an individual or otherwise discriminate against an employee because of that person's lawful use of recreational marijuana before or after the employee's work hours, off the employer's premises, and without the use of the employer's equipment. N.Y. Lab. Law § 201-d. In other words, an employer in New York State may not refuse to hire an applicant, or discipline or terminate an employee, because that individual lawfully consumed marijuana outside of the workplace during non-work hours without use of the employer's equipment and the consumption of marijuana did not impact his or her ability to perform necessary job duties. New York State law provides limited exceptions to this if: (1) the employer's actions were required by New York State or federal law; (2) an employee exhibits "specific articulable symptoms" during work hours; (3) the employer's actions would require it to be in violation of federal law or lose federal fundings. *Id*. Likewise, in New Jersey, an employer cannot take adverse action against an employee or applicant "solely" as a result of a positive marijuana drug test result. *See* N.J. Stat. Ann. § 24:6I-51.

An employer that operates in states that have legalized recreational marijuana has particular challenges if the employer contracts with the federal government or receives grants from the federal government. Employers in this situation should review their specific federal contract and/or grant requirements to determine how the legalization of recreational marijuana in a state it operates in may impact its workforce. Employers should be cautious of simply relying on the fact that it is a federal contractor as a way of refusing to comply with a state law that permits consumption of recreational marijuana.

Employers that operate in a state, or states, where recreational marijuana has been legalized should conduct a review of its relevant employment policies. For instance, employers should review their drug testing policies. Employers should even review their reasonable suspicion testing policies in light of the challenges posed by testing for marijuana given that marijuana stays in an individual's system long after an individual consumed marijuana. Further, employers should review employment applications, job postings, and other hiring materials to ensure compliance with developments concerning the legalization of recreational marijuana.

D. Medical Marijuana

Even if an employer operates in a state where recreational marijuana may not be legal, most states have legalized medical marijuana, which also presents challenges for employers. In fact, at least thirty-seven states have legalized medical marijuana in some form. Employers should be mindful that courts have upheld protections for individuals who may consume medical marijuana pursuant to state law, notwithstanding the prohibition of marijuana consumption on the federal level.

For example, in *Noffsinger v. SSC Niantic Operating Co., LLC*, a health and rehabilitation center withdrew an applicant's job offer after her drug screen revealed she tested positive for marijuana. 338 F.Supp.3d 78 (D. Conn. 2018). The applicant, however, was a qualifying patient who was authorized to consume medical marijuana pursuant to the Connecticut Palliative Use of Marijuana Act ("PUMA") and informed her prospective employer about this. PUMA expressly prohibits an employer from refusing to hire an individual solely because that individual consumed medical marijuana under state law. Conn. Gen. Stat. § 21a-408p(b)(3). The employer argued that compliance with the Drug Free Workplace Act prohibited it from hiring her because it received federal funding. The U.S. District Court for the District of Connecticut disagreed. The court noted the Drug Free Workplace Act requires only limited actions from federal contractors, such as making a "'good faith effort' to maintain a drug-free workplace by taking certain measures, such as publishing a statement regarding use of illegal drugs in the workplace and establishing a drug-free awareness program." *Noffsinger*, 338 F.Supp.3d at 84. The court further stated that nothing in the Drug Free Workplace Act requires drug testing, let alone prohibits federal contractors "from employing someone who uses illegal drugs outside of the workplace, much less an employee who uses medical marijuana outside the workplace in accordance with a program approved by state law." *Id*.

Even more telling, a New York State court even held that an employee's use of marijuana ***before*** the employee was certified to use medical marijuana was protected. In *Gordon v. Consolidated Edison, Inc.*, an employee was subject to random drug testing and her drug screen revealed she tested positive for marijuana. 190 A.D.3d 639 (1st Dep't 2021). At the time of the positive drug screen, the employee was not authorized to use medical marijuana. Shortly after the employee's drug test, she became a certified medical marijuana patient in New York State. When the employer informed the employee of the positive drug screen, the employee said she was authorized to use medical marijuana. Nevertheless, because the employee failed her drug test before she was a certified medical marijuana user, the employer terminated the employee's employment.

The employee subsequently sued, claiming that her employer failed to reasonably accommodate her in violation of New York's Compassionate Care Act and the New York State Human Rights Law. The employer argued that, because the employee was not yet a certified patient at the time of her drug test, she was not a member of a protected class. It further argued that it would have been an undue hardship to accommodate the employee because doing so would have required it to violate the federal Drug Free Workplace Act. The court disagreed. Overall, the court noted that the employer failed to demonstrate, at least at the summary judgment stage, that accommodating the employee would have created an undue hardship, especially given the fact that, in some instances, it allowed other employees to continue working after failing a drug test. *See generally*, *Gordon* 190 A.D.3d at 639.

As with recreational marijuana, employers that operate in states where medical marijuana is lawful should review their employment policies to ensure that nothing in their policies violates state law. Employers should be mindful of whether a state they operate in treats an individual who can consume medical marijuana as having a disability under state law. Where that is the case, an employee may be entitled to anti-discrimination protections under state law. Again, federal contractors or recipients of federal grants should review specific contract and/or grant requirements to determine how operating in a state where medical marijuana is lawful impacts compliance with the contract and/or grant.

E. Military Leave

Within the past year there have been developments concerning military leave that employers should know, particularly if employers operate in either the Third Circuit or Seventh Circuit. Generally, the Uniformed Services Employment and Reemployment Rights Act ("USERRA") protects an employee's leave of absence from work due to either voluntary or involuntary military service. USERRA does not require an employer to pay an employee during a military leave of absence. USERRA does, however, entitle an employee on a military leave of absence to the "other rights and benefits" that an employer provides to similarly-situated employees. 38 U.S.C. § 4316 (b)(1). Decisions issued by both the Third and Seven Circuit Courts of Appeals in 2021 may impact when an employee's military leave of absence should be ***paid***. Both cases hinge upon the meaning of "rights and benefits" in the text of USERRA.

First, in *Travers v. Fed. Express Corp.*, an employee served in the Naval Reserve and also worked at FedEx. While at FedEx, the employee received orders to fulfill Naval Reserve duties and, although his job was protected for the duration of his reserve duties, he was not paid for his military leaves of absence from work. The employee sued, arguing that his employer provided other forms of paid leave, such as for jury duty, sick leave, and bereavement leave, and that he was denied the same "rights and benefits" that were provided to the other employees. *See generally, Travers v. Fed. Express Corp.*, 8 F.4th 198, 202 (3d Cir. 2021). FedEx argued that it did not provide "'paid leave' generally," but offered paid leave for specific kinds of time away from work and that USERRA does not require paid military leave. *See id*.

The Third Circuit noted that USERAA defines "rights and benefits" as:

> terms, conditions, or privileges of employment, including any advantage, profit, privilege, gain, status, account, or interest (including wages or salary for work performed) that accrues by reason of an employment contract or agreement or an employer policy, plan, or practice and includes rights and benefits under a pension plan, a health plan, an employee stock ownership plan, insurance coverage and awards, bonuses, severance pay, supplemental unemployment benefits, vacations, and the opportunity to select work hours or location of employment.

Travers, 8 F.4th at 205 *c*iting 38 U.S.C. § 4303(2).

The Third Circuit reasoned that because FedEx paid employees who took non-military leaves of absence, it placed employees who took military leaves of absence at a disadvantage. *Travers*, 8 F.4th at 205 – 206. The court concluded that FedEx extended "a right and benefit in the form of pay" to employees "who miss work for non-military reasons, but denies pay to the group absent for military service." *Id*. at 203. The court therefore reasoned that the employee ***may*** state a claim under USERRA as a result of being denied pay for military leave when his employer extended paid leave to employees for non-military leaves. *Id*. at 204. The Third Circuit remanded the case to the United States District Court for the Eastern District of Pennsylvania.

The Seventh Circuit addressed a similar issue. In *White v. United Airlines, Inc.*, an airline pilot employed by United Airlines also served in the United States Air Force. He served the United States Air Force as a reservist

while employed by United Airlines, and periodically attended military-training sessions while a reservist. While attending these training sessions, United Airlines protected the employee's job, but did not pay him. The employee's employment was governed by a collective bargaining agreement that provided paid short-term leaves of absence like sick leave or jury duty leave. The collective bargaining agreement also provided for a profit-sharing plan for pilots whereby "pilots are credited with a share of the company's profit based on the wages they earn over the relevant period." *White v. United Airlines, Inc*., 987 F.3d 616, 619 (7th Cir. 2021). The employee argued that, because the credits earned under the profit-sharing plan are based upon wages, "pilots who take paid sick leave or paid leave for jury duty earn credit towards their profit-sharing plan, while pilots who take short-term military leave do not." *Id*. The employee sued, arguing that United Airlines' failing to provide paid leave and credits in the profit-sharing plan to those on military leave denied them "rights and benefits" provided for similar, non-military leaves and violated USERRA. *Id*.

The U.S. District Court for the Northern District of Illinois dismissed the employee's claim under USERRA. The employee appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit noted that "[a]n employer's policy of paying employees during a leave of absence is a 'term, condition, or privilege of employment.' The language in USERRA that follows confirms this reading, by specifying that receiving pay from one's employer is an "advantage, profit, privilege, or gain" of employment." *White*, 987 F.3d at 621. The court concluded "this essentially ends our inquiry" and the employee could proceed with his claim under USERRA. *Id*.

Both above cases were decided at the motion to dismiss stage of the proceedings and are still being litigated. They remain significant, nonetheless. Employers that conduct business in the Seventh Circuit and Third Circuit should review and, if needed, update their military leave policies. Employers in these jurisdictions should further consult their other leave policies. If an employer's leave policies provide paid leaves of absences for many forms of non-military leave, but the employer does not provide paid military leave, then the employer may need to consider updating its military leave benefits. Even if employers do not operate in either of these jurisdictions, these cases are important to remember because it is possible other federal circuit courts will adopt this precedence.

F. EEOC Enforcement

Finally, employers should be aware of recent developments at the EEOC. EEOC enforcement efforts are on the rise over the past two years. One area of note concerns employer denials of disability accommodation requests. Prior to the COVID-19 pandemic, many employers grappled with employee accommodation requests to work remotely. Employers were often successful in arguing that requests to work remotely were unreasonable because working in person was an essential function of the employee's job. The COVID-19 pandemic has, however, caused us to reconsider that requirement in many professions. The ability of some employees to work remotely during the pandemic in ways has challenged the notion that "in-person" interactions are an essential function of an employee's job. At the outset of the pandemic, many employment lawyers were concerned that the dramatic increase in remote work arrangements would weaken employers' arguments that requests for remote work were unreasonable. The EEOC is now pursuing this issue.

In September 2021 the EEOC filed a lawsuit in the U.S. District Court for the Northern District of Georgia alleging an employer, ISS Facility Services, Inc., violated the Americans with Disabilities Act ("ADA") when it failed to continue a remote working arrangement with an employee and subsequently

terminated her employment. The employee worked as a Health Safety & Environmental Quality Manager. In the complaint, the EEOC alleges that the employee suffered from Obstructive Lung disease and received this diagnosis shortly before the start of the COVID-19 pandemic. The employee's doctor recommended that she be able to work from home and take breaks while working.

Shortly after the employee's doctor diagnosed her with Obstructive Lung disease, the COVID-19 pandemic caused the employer to place most of its employees on a work schedule where employees worked in the facility on a limited basis. Employees had the ability to work remotely when not in the facility. According to the EEOC, the employee worked from home four days per week during the peak of the pandemic. However, on June 1, 2020, the employer required all of its employee to return back to working in-person every day. The employee requested an accommodation to work from home two days per week and have the ability to take breaks when working. The EEOC's complaint alleges the employee "needed the accommodation because her past and recent bouts with severe pulmonary disease made her a high-risk for contracting COVID-19" and the employee's job required her to have "close contact with many employees and often shared a desk with co-workers." Compl. at ¶ 19, *Equal Emp. Opportunity Comm'n v. ISS Facility Servs., Inc.*, 1:21-CV-3708 (N.D. Ga. 2021). The complaint further alleges that the employer denied the accommodation request but allowed similarly-situated employees to work from home. Within two months of the employer denying the accommodation request, the EEOC contends the employer terminated the employee's employment for poor performance. The EEOC alleges that, at the time the employee was terminated, the employee "had not been informed by management that her job performance warranted termination" and that the employee otherwise met performance standards. *Id*. at ¶ 24. As a result, the EEOC alleges the employer violated the ADA in terminating the employee's employment. Given that the EEOC recently filed this lawsuit, the case is currently pending, and it remains to be seen how the merits of the case will be decided.

Other employers are likely finding themselves in a similar situation to the above. If an employee with a disability requests a remote working arrangement, employers should engage in an interactive process with the employee to determine whether a remote work arrangement is reasonable. Before an employer denies an employee's accommodation request to work remotely, the employer should consider whether this employee was permitted to work from home during the pandemic and assess whether the essential functions of the employee's position were performed effectively remotely and can continue to be so. As with denials of any accommodation request, denial of an employee's request to work remotely should be well-documented by an employer. Moreover, employers should ensure that similar requests are handled consistently among similarly-situated employees.

Finally, considering the remote working arrangements prompted by the COVID-19 pandemic, employers should review their current job descriptions and job duties. Job descriptions may need to be updated to reflect the current realities of an employer's workforce. Given the dramatic increase of remote work arrangements during the COVID-19 pandemic, employers may now find it more difficult to argue that an accommodation request to work remotely is unreasonable and that in-person presence in the workforce is an essential function of an employee's job.