Midyear Employment Law Update
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Presentation Outline[1]

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[1] *This outline is a broad overview of a complex area of the law. It is not legal advice, and it should not be relied on for any purpose. If you need legal advice, please contact one of the webinar presenters to see if they can assist you.*

New Trends Involving COVID and Disability Management

By Jennifer Berry

We may have returned to aspects of daily life that are seemingly normal, but at least in the human resources and employment law contexts, we are far from returning to normal.

What are the most pressing issues involving COVID-19 today?

Several of our clients are contending with ongoing challenges to decisions regarding vaccine exemptions. Good news: from what we have seen and heard, even employers not subject to state vaccine mandates are prevailing in their defense of employer vaccine requirements. The U.S. District Court for the Western District of Washington also recently upheld the state's requirement that certain state employees must be vaccinated to maintain their employment. The mandate allows for a religious exemption, but plaintiffs, citing the U.S. Supreme Court's recent ruling in *Fulton v. City of Philadephia*, argued that the that view and found that the mandate complies with the requirements of the First Amendment. heightened judicial scrutiny. The court rejected
We are getting calls asking about different and new types of disability leave, after protected leaves under the Family Medical Leave Act and Washington Paid Family Leave has run out. Employers want to know if they are required to grant more leave? Will they be setting precedent for others to take more leave? At what point does an ADA disability leave begin and how long does it last?

We are also getting calls from employers who have returned their operations to the office and have workers who want to remain remote for various reasons, including fear of returning to the workplace because of their own or a relative's preexisting condition, childcare needs, and so on. Employees cannot stay remote forever. Or can they?

Because we predict continued focus on leave and disability accommodation in the context of COVID-19, I've identified a list of three emerging issues in this area.

1. Long COVID

While many COVID-19 infections are brief, especially for the vaccinated, some individuals who initially felt few symptoms will develop more serious symptoms associated with long COVID over time.

According to the CDC, long COVID is now believed to impact a significant population of those who have had COVID:

- more than 10% experience symptoms up to a month after contracting COVID
- a smaller percentage up to six months later
- those percentages go up significantly for those who were hospitalized with COVID

Symptoms, to name a few, may include extreme fatigue, brain fog, ongoing respiratory issues, joint and muscle pain.

Employers are legally obligated to reasonably accommodate a qualified individual with a disability who can perform the essential functions of her job with or without reasonable accommodation. Whether long COVID qualifies as a disability will require a case-by-case assessment, including information from an employee's health care provider.

Under Washington law, a disability is an impairment that is medically cognizable or diagnosable. Generally, if a medical provider can assign a diagnosis to a condition, it will satisfy the definition of impairment. Unlike the ADA, Washington law does not require that a disability substantially limit a major life activity. A disability also need not last any specific duration.

What if a worker exhausts FMLA and PFML, if applicable? Does a diagnosis of long COVID mean that an employee needs to be accommodated through unpaid leave? Potentially. Again, that will likely depend on the duration of the proposed leave and the employer's undue hardship analysis. Note that the EEOC has said that reasonable temporary unpaid leave may be a reasonable accommodation in such cases, subject to a showing of undue hardship.

Governor Inslee's Safe Workers Proclamation, recently extended, further protects from adverse employment action those employees who request *reasonable time off* – whether paid or unpaid - when advised by a health care provider to self-quarantine or isolate due to a positive diagnosis of COVID-19, *or* for workers who are experiencing COVID-19 symptoms and who are seeking a medical diagnosis or treatment.

In determining whether time off is reasonable, again, we need to look at what the provider is saying as opposed to making assumptions about how long someone will likely be out. A doctor's certification for one month at a time of proposed leave may be viewed by the EEOC and the Washington Human Rights Commissions as a reasonable duration. An employer may be hard pressed to show that a temporary unpaid leave subjected it to an undue hardship.

2. Pre-existing conditions

The CDC has identified numerous conditions that can place an individual at higher risk of complications from COVID-19. This list includes conditions that are relatively prevalent among U.S. adults, including diabetes, obesity, hypertension, pregnancy, and physical inactivity.

Given how much is still unknown about the long-term effects of COVID-19, it is foreseeable that individuals who never disclosed these conditions to their employers will now seek accommodation to reduce their risk of contracting COVID-19 and experiencing long-term complications.

In Washington, we have the Health Emergency Labor Standards Act (HELSA), which protects certain employees who obtain a recommendation from a medical provider for removal from the

workforce due to their high risk of contracting a severe illness. To qualify, an employee must be high risk due to age or have an underlying health condition that puts them at high risk of contracting a severe illness from COVID-19, per CDC guidelines, and they must obtain a recommendation from their medical provider recommending they be removed from the workforce. Removal from the workforce means they cannot be present in the workplace.

HELSA protects qualified workers from termination, permanent replacement, or discharge if they request a reasonable accommodation, or if no accommodation is available because their work must be in-person, if they decide to use any of the available leave options, *including unpaid leave*.

HELSA qualifying employees must be provided all available leave, including unpaid leave, while an employer's decision on their requested accommodation is pending and/or while a charge is pending before the WA HRC. The Act applies through the state of emergency which Gov. Inslee recently extended.

With regard to high-risk family members, there is no ADA requirement that an employer accommodate an employee's relatives' medical impairment. However, an employee must be allowed to use accrued paid time off to care for family members with illnesses under Washington law.

3. Psychological, Emotional and Mental Health Issues

Employers should anticipate an increase in ADA claims based on psychological and emotional impairments. Throughout the pandemic, individuals have voiced fears related to their perceived risk of contracting COVID-19 or to transmitting it to a vulnerable family member. Some claim that their underlying anxiety or depression has been exacerbated. The EEOC has noted that employees with certain preexisting mental health conditions, e.g., anxiety disorder, obsessive-compulsive disorder, or PTSD, may have more difficulty handling the disruption to daily life that accompanied COVID-19.

Moreover, in settings where employees have been working remotely for two years or longer, many have suffered the effects of prolonged social isolation on their mental health and may find it difficult to readjust to working alongside others in person. This may be compounded in workplaces without a vaccine requirement.

When fielding requests for accommodation due to psychological or emotional impairments, remember to rely on the information provided by employees' health care providers. Sometimes employers need more information from the employee's physician, and there are ways to get more information while complying with disability laws. But it is very important that we not substitute our judgment for a provider's judgment on whether an employee needs an accommodation to meet the essential functions of a job.

Finally, employers have done a terrific job making their workplaces safer than ever before. Don't forget to broadcast the steps you have taken to keep employees safe. It's worth repeating to reassure employees who are still feeling uncertain.

What does all of this mean? Even after exhausting all available types of leave, employers are likely to see requests for new types of leave and time off. It is important to track exactly when available leave runs out to anticipate when accommodations may be sought, especially because leave itself may be an accommodation under the ADA.

Do employers need to provide unpaid leave in these situations? It depends. State pandemic-related laws may protect workers seeking reasonable durations of unpaid leave. Beyond this, employers should assess each request on a case-by-case basis.

NEW WASHINGTON LAWS

By Karen Sutherland

Highlights from ESSB 5761, wage and salary information disclosure requirements

- Employers with 15 or more employees must include the wage scale or salary range, and a general description of all benefits and other compensation to be offered, in each job posting.
- "Posting" means any electronic or printed solicitation intended to recruit job applicants for a specific available position if the posting includes qualifications for desired applicants.
    - "Posting" includes recruitment done directly by an employer or indirectly through a third party.
- Upon request by the employee, employers must provide the wage scale or salary range for the new position to employees who are offered internal transfers or promotions.
- ESB 5761 does not specifically address employees who work out of state.
- ESB 5761 is effective January 1, 2023.

Practical advice for employers implementing ESSB 5761

Develop a wage scale or salary range for each position

- "Wage scale" is not a defined term. It probably has the same meaning as in collective bargaining, which is a scale that includes a starting salary for each position with step increases that are normally based on years of service in the position.

- "Salary range" is not a defined term. It probably means the lowest and highest salaries the employer pays anyone in the position, but the lack of definition means there is some uncertainty if the employer is seeking, with this new hire, to set a lower floor or higher ceiling than the employer has used in the past, or if the employer has an existing salary range but no current employees are at the top or bottom of the range.
- Now may be a good time to do a classification and compensation study if you have not done one recently.
    - Any change to classifications, duties, wages, and benefits of employees who are union members will need to be bargained with their union.

Develop a general description of all the benefits and other compensation

- "All the benefits" is not a defined term. It isn't limited to taxable fringe benefits, so it probably includes insurance; health savings account (HSA) contributions; retirement benefits; personal use of vehicles, laptops, cell phones, etc.; transit passes and parking; health club and gym memberships; educational assistance; association dues; employee discounts; meals and lodging; moving expenses, etc.
- "Compensation" is not a defined term. It probably includes salary or hourly wages; paid time off; stock options; retirement plan contributions; bonuses, incentive payments, and awards; shift differential premiums, pay premiums for education or certificates, mandatory overtime, etc. It is unclear whether the intent was to include voluntary overtime.
- It is possible that definitions of these terms will be clarified during the rulemaking process.

Compare compensation for similar jobs to ensure any differences are based on skill, effort, and responsibility

- This is a quick check to confirm ensure that the Equal Pay Act criteria have been met; it is not part of the new law.
- If there are compensation differences between employees of different genders, determine whether the differences are for acceptable reasons, which include:
    - Differences in education, training, or experience.
    - Seniority.
    - Merit/work performance.
    - Measuring earnings by quantity or quality of production.
    - Regional differences in compensation.
    - Differences in local minimum wages.
    - Job related factors consistent with business need.

- Employers bear the burden of proof to justify why pay differences exist. An employee's previous wage or salary history cannot be used to justify gender pay differences.

Update job postings to include the required information as of January 1, 2023

- Remember to update not only internal and external postings, but also postings by third-party recruiters.

Highlights from ESHB 1795, the "Silenced No More Act"[2]

- A provision in an agreement by an employer and an employee not to disclose or discuss conduct, or the existence of a settlement involving conduct, that the employee reasonably believed to be illegal discrimination, illegal harassment, illegal retaliation, a wage and hour violation, or sexual assault, or that is against a clear mandate of public policy, is void and unenforceable.
- Prohibited nondisclosure and nondisparagement provisions in agreements concern conduct that occurs at the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.
    - Prohibited nondisclosure and nondisparagement provisions include those contained in employment agreements, independent contractor agreements, agreements to pay compensation in exchange for the release of a legal claim, or any other agreement between an employer and an employee.
- Employers cannot request or require that an employee enter into any agreement provision that is prohibited by ESHB 1795.
- ESHB 1795 does not prohibit the enforcement of a provision in any agreement that prohibits the disclosure of the amount paid in settlement of a claim.
- It is illegal under ESHB 1795 for an employer to discharge or otherwise discriminate or retaliate against an employee for disclosing or discussing conduct that the employee reasonably believed to be illegal harassment, illegal discrimination, illegal retaliation, wage and hour violations, or sexual assault, that is recognized as illegal under state, federal, or common law, or that is recognized as against a clear mandate of public policy, occurring in the workplace, at work-related events coordinated by or through the employer, between employees, or between an employer and an employee, whether on or off the employment premises.

[2] https://app.leg.wa.gov/billsummary?BillNumber=1795&Initiative=false&Year=2021#:~:text=Washington%20State%20Legislature&text=Prohibiting%20nondisclosure%20and%20nondisparagement%20provisions,hour%20violations%2C%20and%20sexual%20assault

- Employers cannot attempt to enforce a provision of an agreement prohibited by ESHB 1795 whether through a lawsuit, a threat to enforce, or any other attempt to influence a party to comply with a provision in any agreement that is prohibited by this law.
- ESHB 1795 does not prohibit an employer and an employee from protecting trade secrets, proprietary information, or confidential information that does not involve illegal acts.
- "Employee" means a current, former, or prospective employee or independent contractor; and the law covers nondisclosure or nondisparagement provisions in any agreement signed by an employee who is a Washington resident.
- ESHB 1795 is retroactive from June 9, 2022 only to invalidate nondisclosure or nondisparagement provisions in agreements created before June 9, 2022 and which were agreed to at the outset of employment or during the course of employment.
    - This subsection allows the recovery of damages only to prevent the enforcement of those provisions.
    - This subsection (on retroactivity) does not apply to a nondisclosure or nondisparagement provision contained in an agreement to settle a legal claim.
- ESHB 1795 goes into effect on June 9, 2022. It repeals the 2018 statute limiting nondisclosure agreements (RCW 49.44.210), but the repeal of the 2018 statute does not affect any existing right acquired or liability or obligation incurred under the 2018 statute or under any rule or order adopted under that statute, nor does it affect any proceeding instituted under that statute.

Practical advice for employers implementing ESHB 1795

Review your agreements with current employees and independent contractors

- If you have any agreements that were signed before June 9, 2022 that contain prohibited language, you don't need to negotiate new agreements, but you can't attempt or threaten to enforce any provisions in the old agreements that violate the new law.
- If you have an agreement that is partially void, you may want to amend the agreement to omit the void parts instead of relying on a court or arbitrator to blue-pencil the agreement.
- If you amend an existing agreement that includes prohibited language, remove the language that is void and unenforceable.

Revise your form employment agreements, NDAs, confidentiality agreements, settlement agreements, and severance packages

- Depending on how they are written, the provisions that are most likely to need revising are:

- Nondisclosure
- Confidentiality
- Nondisparagement

Revise your employee handbook and employee policies

- Depending on how they are written, the policies that are most likely to need revising are:
  - Nondisclosure
  - Confidentiality
  - Nondisparagement
  - Courtesy
  - Nondiscrimination and anti-harassment
  - Social media use
- In workplaces with unions, management and HR employees need to be aware that any changes to existing policies and practices that are mandatory subjects of bargaining will need to be bargained.

Train supervisors, managers, and HR professionals

- Managers and supervisors need to understand what provisions of existing policies and agreements are void and unenforceable.
- Employees who conduct workplace investigations may need to re-word their confidentiality directives to comply with ESHB 1795 since "It is a violation of this section for an employer to discharge or otherwise discriminate or retaliate against an employee for disclosing or discussing conduct that the employee reasonably believed to be illegal harassment, illegal discrimination, illegal retaliation, wage and hour violations, or sexual assault…"
  - It is possible that the issue of confidentiality during ongoing investigations will be clarified during the rulemaking process.

Highlights from SSB 5649, Paid Family Medical Leave ("PFML") amendments[3]

- As of June 9, 2022, PFML includes bereavement leave for seven calendar days following the death of a family member if the family member is someone who they would have been able to take time off to care for under the other PFML provisions.

[3] https://lawfilesext.leg.wa.gov/biennium/2021-22/Pdf/Bills/Senate%20Passed%20Legislature/5649-S2.PL.pdf?q=20220401062628.

- As of June 9, 2022, employees can use PFML for the first six weeks after giving birth without needing to obtain a certification of a serious health condition. Leave during this postnatal period is medical leave unless the employee chooses to us family leave.
- Collective bargaining agreements that have paid leave provisions that predated the PFML must be renegotiated to be consistent with the PFML as of December 1, 2023.
- Beginning July 1, 2022, and until the 12 months after the end of the state of emergency declared by the governor due to COVID-19, the ESD "must ask the employee applicant whether their family or medical leave is related to the COVID-19 pandemic. Initial disclosure of this information is solely for purposes related to the administration of this title, including monitoring potential impacts on the solvency and stability of the family and medical leave insurance account…."

Highlights from recent PFML rulemaking

On April 26, 2022, the Employment Security Department ("ESD") adopted rules explaining that:

- "A waiting period does not reduce the maximum duration of an employee's available paid family or medical leave."
- The waiting period does not apply to "Medical leave taken upon the birth of a child." [4]
- The proration of benefits rule and the calculation of typical work week hours do not apply to the waiting period.[5]
- ESD also amended the rule regarding delivery of petitions for review to permit delivery via email.[6]
- These new rules are effective June 9, 2022.[7]

ESD has not yet proposed any rules to implement SSB 5649. When ESD does, the rules will be posted on the PFML "Current Rulemaking" website.[8]

Practical advice for employers implementing SSB 5649 and the new PFML rules

Update your PFML policies to include bereavement leave

- If your employees are members of a union, you may need to bargain the effects of this change to PFML

[4] WAC 192-500-185, as amended, https://paidleave.wa.gov/app/uploads/2022/04/OTS-3635.1-For-Filing.pdf.
[5] WAC 192-620-035, as amended, https://paidleave.wa.gov/app/uploads/2022/04/OTS-3636.1-For-Filing.pdf.
[6] WAC 192-800-125, as amended, https://paidleave.wa.gov/app/uploads/2022/04/OTS-3637.1-For-Filing.pdf.
[7] https://paidleave.wa.gov/rulemaking/?utm_medium=email&utm_source=govdelivery.
[8] https://paidleave.wa.gov/rulemaking/?utm_medium=email&utm_source=govdelivery.

Update your PFML leave tracking system, if needed

- If your PFML leave tracking process includes the waiting period when you calculate the maximum duration of the employee's available paid family or medical leave, it needs to be updated to add the waiting period to the total amount of time the employee can be absent due to PFML.
- If your PFML leave tracking process applies a waiting period to medical leave taken upon the birth of a child, it needs to be updated to remove the waiting period.

Check for new PFML rules and regulations

- If you subscribe to ESD's updates, you will receive notice of PFML rulemaking.[9]
- You can also find ESD's rulemaking on its website.[10]

[9] To subscribe, you can go online to ESD's website and fill out the subscription form located at https://public.govdelivery.com/accounts/WAESD/subscriber/new?preferences=true#tab1.
[10] https://paidleave.wa.gov/rulemaking/?utm_medium=email&utm_source=govdelivery.