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RELIGIOUS DISCRIMINATION

U.S. Supreme Court rules in favor of religious employers, Trump administration

AL **FL** **GA** **LA** **MS**

by Wesley C. Redmond and Jeffrey G. Douglas, FordHarrison LLP

On July 8, the U.S. Supreme Court decided two cases, both by 7-2 votes, involving religion's impact on employment. First, the Court clarified the applicability of the ministerial exemption for religious schools and organizations from the federal antidiscrimination laws. Second, the Court upheld two Trump administration interim rules stating employers with sincerely held religious beliefs or moral objections to providing insurance coverage or payments for contraceptive services can't be required to offer the coverage or payments.

Ministerial exception

Facts. For the first ruling, the Court consolidated two cases, each involving educators at Catholic elementary schools. As part of their employment, both teachers signed agreements stating their role was to promote the school's religious mission, and they received employee handbooks declaring the same. After their agreements weren't renewed, both filed discrimination charges with the Equal Employment Opportunity Commission (EEOC)—one under the Age Discrimination in Employment Act (ADEA) and the other under the Americans with Disabilities Act (ADA).

The district court granted summary judgment (dismissal without a trial) to the schools by applying the ministerial exception, a doctrine related to the First Amendment that prevents government interference in religious organizations' ability to hire and fire employees. The U.S. 9th Circuit Court of Appeals reversed, holding the ministerial exception didn't apply because the schools hadn't satisfied the four factors previously recognized (in 2012) by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*. The four factors were whether:

- The individual was given the title of "minister, with a role distinct from that of most of its members";
- The job "reflected a significant degree of religious training followed by a formal process of commissioning";
- The person held herself out as a minister of the church by accepting the formal call to religious services and claiming certain tax benefits; and
- The "job duties reflected a role in conveying the Church's message and carrying out its mission."

In *Hosanna-Tabor*, the Court declined "to adopt a rigid formula for deciding when an employee qualifies as a minister." It identified the four relevant circumstances but was silent on the manner in which they should be analyzed or given any particular weight.

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Court's decision. The Supreme Court determined the four factors examined in *Hosanna-Tabor* weren't a rigid test. In addition, there was enough evidence in the record to conclude both teachers performed vital religious duties that triggered the 2012 case's limitation on judicial interference in employment decisions of a religious nature.

The Court noted the underpinning for the ministerial exception rests on "the general principle of church autonomy to which we have already referred: independence in matters of faith and doctrine and in closely linked matters of internal government." The Court then boiled down the four factors to a critical underlying question: What is the individual's role in conveying the church's message and carrying out its mission? The other factors simply help "shed light on that connection."

In a nutshell, the inquiry must focus on what the employee in question actually does and whether the functions are in the furtherance of conveying the church's message and carrying out its mission. *Our Lady of Guadalupe School v. Morrissey-Berru.*

Ruling's impact. It's too early to know the decision's full practical impact. Nevertheless, it will likely allow religious organizations to assert the ministerial exception as a defense and seek dismissal early in litigation.

Going forward, determining whether the ministerial exception applies will be a fact-specific inquiry examining whether the particular individual's role was conveying the church's message and carrying out its mission. Religious organizations may want to reevaluate their personnel documents to ensure they adequately memorialize the employee's role is to further the church's mission and include specific expectations about how the individual will do so.

Religious beliefs exemption from contraceptive coverage mandate

Facts. The second case dealt with employers that have sincerely held beliefs against providing insurance coverage or payments for contraceptive measures to covered females under the Patient Protection and Affordable Care Act of 2010 (ACA). It focused on two interim rules issued by the U.S. Departments of Health and Human Services (DHS), Labor, and Treasury:

- One Trump administration rule expanded the church exemption to the ACA's contraceptive mandate to include an employer that "objects . . . based on its sincerely held religious beliefs" against providing the insurance coverage or payments for the services.
- The second rule created an exemption for employers with sincerely held moral objections to providing certain forms or any contraceptive coverage.

The two interim rules followed the Supreme Court's 2014 decision in *Burwell v. Hobby Lobby*, which found the ACA's requirement to cover contraceptive services substantially burdened the free exercise of certain businesses with sincerely held religious objections to providing employees with the services.

Court's decision. In a 7-2 decision written by Judge Clarence Thomas (four judges wrote or joined in concurrences), the Court upheld the two interim rules. It found the departments had the authority to establish the rules and they don't have any procedural defects.

According to the Court, the ACA's plain language gave the departments the authority to establish the exemptions based on its provisions allowing a DHS agency to set comprehensive guidelines for preventative care and screenings for women. The Court found the language gave the departments the authority to decide (1) the care applicable health plans must cover and (2) exemptions from the guidelines. The majority rejected the argument the rules were contrary to Congress' intent, finding such concerns couldn't contradict the statute's plain meaning.

The Court declined to determine if the Religious Freedom Restoration Act of 1993 (RFRA) required the exemptions in the two rules. The Court ruled, however, the departments could and should have considered the RFRA in developing the rules and that the failure to do so could lead to claims the rules were "arbitrary and capricious for failing to consider an important aspect of the problem." The majority also found the procedure for adopting the rules satisfied any notice requirements, all rulemaking requirements were satisfied, and any error in the notice wasn't prejudicial (or harmful). *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, et al. and Trump v. Pennsylvania, et al.*

Ruling's impact. As the four concurring judges noted, the Court's ruling doesn't end the litigation, and the matter will now go back to the individual states that challenged the rules, where they predicted further challenges will arise. Two concurring judges stated they would have decided one additional question—that the RFRA mandates the two rules—and thus ended the litigation. The other two concurring judges agreed with the majority ruling, although on different grounds, and openly questioned whether the rules would "survive administrative law's demand for reasoned decisionmaking."

Bottom line

The impact likely will be felt for years as lower courts address the two rulings' parameters. For now, religious institutions have some additional guidance and flexibility in asserting the ministerial exemption. In addition, employers with religious or moral objections to providing some or all contraceptive services have valid rules to assert for refusing to provide the coverage until an objection or challenge supports an injunction preventing the enforcement of the rules.

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REGULATIONS

What are employers to do? Judge tosses parts of DOL regs covering FFCRA leave

AL | FL | GA | LA | MS

by Martin J. Regimbal and Heather D. Hearne, The Kullman Firm

On August 3, 2020, a New York district court judge struck down portions of the U.S. Department of Labor's (DOL) final rule implementing the Families First Coronavirus Response Act (FFCRA). The case was filed by the state of New York under the Administrative Procedure Act, which governs the process by which federal agencies develop and issue regulations. Rejecting the DOL's bid to dismiss the claims, the district court vacated (or tossed out) four separate provisions of the final rule on the grounds they exceeded the agency's authority under the statute. How the decision will affect employers outside New York is uncertain. Let's take a closer look.

District court's decision

First, in a move that will greatly expand access to leave under the FFCRA, the court vacated the work availability requirements of the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA). As a reminder, the EPSLA grants leave to employees who are "unable to work (or telework)" due to a need for leave because of six COVID-19-related criteria. The EFMLEA similarly grants leave to employees who are "unable to work (or telework) due to a need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency."

The DOL's final rule takes the position that when work isn't available, leave under some of the qualifying circumstances for EPSLA leave (and the sole circumstance for EFMLEA leave) also is unavailable. The court concluded the "work availability" requirement was unreasoned and "patently deficient."

Second, the court threw out the final rule's broad, sweeping definition of "healthcare provider," finding it improperly "hinges entirely on the identity of the *employer,* in that it applies to anyone employed at or by certain classes of employers, rather than the skills, role, duties, or capabilities of a class of employees." The court concluded the DOL's definition should have focused on the capability of particular employees to furnish healthcare services and not simply that their work is "remotely related to someone else's provision of healthcare services."

Third, while the court rejected most aspects of the state's challenge to the intermittent leave provisions, it nonetheless found the employer consent requirement for such leave was unreasonable. Under the FFCRA, intermittent leave is permitted only for circumstances that don't logically correlate to a higher risk of infection. Even for those circumstances, however, the DOL's final rule demands that employer consent be obtained. The court found no justification for the prerequisite in the context of the qualifying conditions, "which concededly do not implicate the same public-health considerations" as those presenting a higher risk of infection, and it vacated the requirement.

Fourth and finally, the court found the final rule's requirement that employees taking FFCRA leave submit documentation supporting the leave before its commencement to be at odds with the Act's language, which instead requires employees to provide as much notice as practicable and/or follow "reasonable notice procedures." The court vacated the temporal aspect of the documentation requirement— *i.e.,* the rule that documentation be provided before taking leave—but upheld the provision's substance.

Takeaway

While the court's decision could be national in scope, the opinion doesn't specifically indicate that it is, leaving employers outside of New York without clear guidance on whether decisions implicated by the above regulations should be made based on the regulations or the regulations as now affected by the court's ruling. The answer may lie in how the DOL responds to the opinion.

The DOL is likely to appeal and may request a stay of the decision pending the appeal. Absent a stay, however,

companies should check with their labor and employment counsel to assess the ruling's impact in their particular jurisdiction.

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FAMILY AND MEDICAL LEAVE

Hot off the presses: new FMLA notice, certification forms

AL | **FL** | **GA** | **LA** | **MS**

by Lisa K. Berg, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

We're in the midst of a global pandemic with many employers struggling to survive financially. Yet, surprisingly, the biggest recent announcement from the U.S. Department of Labor (DOL) wasn't about new safety rules intended to protect employees from the novel coronavirus. Instead, the DOL just published revised forms to comply with the Family and Medical Leave Act (FMLA).

Public comments taken into account

In early August 2019, the DOL requested public comments on modifications to the FMLA forms. Based on the feedback, the agency has published the updated forms so you can provide employees with their legally required notice and they can certify their specific need for the leave.

The revised forms are electronically fillable PDFs and can be saved in your system. They include:

- Notice of Eligibility & Rights and Responsibilities, Form WH-381;
- Designation Notice, Form WH-382;
- Certification of Health Care Provider for Employee's Serious Health Condition, Form WH-380-E;
- Certification of Health Care Provider for Family Member's Serious Health Condition, Form WH-380-F;
- Certification for Military Family Leave for Qualifying Exigency, Form WH-384;
- Certification for Serious Injury or Illness of a Current Servicemember for Military Caregiver Leave, WH-385; and
- Certification for Serious Injury or Illness of Veteran for Military Caregiver Leave, Form WH-385-V.

The forms contain a new expiration date of June 20, 2023.

Significant changes

The new model notices and forms are more colorful and contain the employee's name on the top of each page. In addition, you'll see more response boxes and an electronic signature feature. Here are some other critical changes.

Notice of eligibility. The new FMLA notice form more clearly outlines employees' rights and responsibilities. It requires them to identify which family members they will be caring for. It also explains how their paid leave will run concurrently with the Act (and provides additional boxes for employers to check on the issue).

Although the new notice form says employees have 15 days to return the certification (similar to the old form), that isn't accurate. The DOL's regulations state they must return the certification within 15 calendar days of receipt (unless you as the employer provide them with more time to return it). So the statement in the new notice is accurate only if you hand-deliver or e-mail it.

Designation notice. The new form includes a statement in Section I specifying employers are responsible for designating leave as FMLA-qualifying (to avoid employees who want to "opt out" of it). The pronouncement is consistent with the DOL's 2019 opinion letter, which stated:

> An employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates the need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave.

The DOL included separate boxes for an employer to check when an employee's medical certification is "incomplete" or "insufficient."

Medical certification. The new form includes a box in which the healthcare provider can confirm there is *no* "serious health condition." In contrast, the old form left the impression the provider was obligated to check one of the boxes confirming the employee or family member had a serious health condition, even if the medical facts didn't support the determination.

The form includes a new section requiring the healthcare provider to offer a "best estimate" of the employee's or immediate family member's future treatment. In addition, it states in the first paragraph of Section I that an employer "*may not*" request a certification for FMLA leave to bond with a healthy newborn baby or a child placed for adoption or foster care.

Questions and answers about new forms

Can my company still use the old DOL forms? Yes. The FMLA doesn't require you to use any specific form or format.

If we already provided an employee with the old certification form, can we require him to repeat the process using the new form? No. If the employee received the old form and came through with the requested information, you can't require him to provide the same material using the new form.

Can we make changes to the FMLA forms? You can use the DOL forms or create your own versions containing the same basic information. When you ask for a medical certification, however, you may request only information related to the serious health condition for which the current need for leave exists. No other information may be required beyond what is specified in the FMLA regulations.

Do we have to accept a certification if the employee didn't use our form? You must accept a complete and sufficient certification, regardless of the format. You may not reject a certification containing all the information needed to determine if the leave is FMLA-qualifying. You can't refuse:

- A fax or copy of the certification;
- A certification that isn't completed on your company's standard form; or
- Any other record of the medical documentation, such as a communication on the healthcare provider's letterhead.

Are the old DOL forms still effective, even though the expiration date has passed? Yes. The content of the information contained within the optional-use DOL form is still applicable, regardless of the expiration date.

Do the FMLA forms have any applicability to the Families First Coronavirus Response Act (FFCRA)? No. The FFCRA has different documentation requirements.

Request for more comments

Finally, the DOL also published a request for input from the public about potential changes to the current FMLA regulations. The agency is accepting comments through September 15, 2020. We will continue to monitor the developments.

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ADMINISTRATIVE AGENCIES

COVID-19 causes EEOC to change office practices and employer policies

AL | FL | GA | LA | MS

by JW Furman, Lehr Middlebrooks Vreeland & Thompson, P.C.

Like almost everyone else, the Equal Employment Opportunity Commission (EEOC) has been doing some things differently since COVID-19 arrived. The changes range from office procedures and charge processes to the policies the agency allows under the laws it enforces.

Changes to procedures

Although most companies have been trying to reopen in some form, EEOC offices have remained closed to outside traffic. All contact with the agency, including filing new charges, is either electronic (via e-mail or the Web portal) or by phone. Investigations are relying on documentary evidence and phone interviews, which, for the most part, is no different than before the pandemic. Fewer mediation conferences are being held (and none in person).

EEOC employees tell me they have been advised to expect at least two weeks' notice before the office sites reopen, and they haven't heard anything further yet.

To preserve charging parties' rights, the EEOC temporarily stopped issuing charge closing documents (right-to-sue letters) on March 21, 2020, unless the party specifically requests it. The document gives the individual the right to file a federal lawsuit within 90 days.

As a reason for taking the step, the EEOC says it was concerned people with pending charges might believe they had to choose between "jeopardizing their safety and protecting their right" to file a lawsuit during the COVID-19 pandemic. The time limit is statutory, and the agency has no authority to change it.

The agency has made no official announcement about the right-to-sue letters or any other changes to its charge processing procedures but did confirm the above when questioned. It hasn't indicated when it will release the closure documents it has been holding.

Changes to guidance for employers

The EEOC has issued helpful guidance for employers recalling employees or hiring new staff during the pandemic. Even though the U.S. Centers for Disease Control

and Prevention (CDC) has said individuals over the age of 65 are at greater potential for severe illness if they contract COVID-19, an employer may not involuntarily exclude an employee from the workplace because of the risk.

The Americans with Disabilities Act (ADA) requires you to explore reasonable accommodations for disabled individuals who request them but might allow an exception if the employee's presence poses a direct threat. The Age Discrimination in Employment Act (ADEA) doesn't require accommodations but does permit employers to favor older workers. Thus, workers over 65 can be offered more flexibility than younger ones but cannot be mandated to follow different rules.

According to the EEOC, there's no requirement to allow telecommuting for employees who live with or are caregivers for people at higher risk of catching the coronavirus. If you let them do so, however, you must have a policy and apply it consistently. The agency also stated telecommuting isn't the only way to help older and at-risk workers minimize contact with others. Other options to consider include adjusting work schedules, moving workstations to lower traffic areas, and providing protective gear.

The EEOC recently said when employees do return to worksites during a pandemic, employers don't violate the ADA by:

- Asking workers if they're experiencing coronavirus symptoms;
- Measuring their body temperature; and/or
- Checking for active COVID-19 infections with an accurate and reliable test.

Antibody tests (which determine whether an individual has ever been infected) don't meet the ADA's standard for medical examinations and cannot be mandated by covered employers.

Under the ADA, you must maintain all health information in a confidential file separate from employee personnel records. Access to the records is strictly on a need-to-know basis. Also, many states have their own privacy laws you may need to consider.

Employers may not disclose the identity of any employee who tests positive for COVID-19. Without disclosing identifying information, you should notify other employees with whom the individual has interacted about the potential exposure and encourage them to be tested. If an employee requests an alternative method of screening because of a medical condition or religious belief, you should treat it as any other accommodation request under the ADA or Title VII of the Civil Rights Act of 1964.

Finally, as employees come back together in the workplace, you should be cognizant of discrimination or harassment related to COVID-19. The EEOC has identified workers of Asian (particularly Chinese) descent and older workers as potential targets. Watch for signs of harassment against the groups and take immediate corrective action.

Stay tuned

As the workplace evolves during the pandemic, the EEOC has been releasing regular guidance for staying compliant with the laws. As we receive new information about the agency's policies and processes, we will let you know.

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COMMUNICABLE DISEASES

What to do when an employee refuses to return to work during pandemic

AL | FL | GA | LA | MS

by Shawntel R. Hebert, Taylor English Duma LLP

When states and localities first began sheltering in place because of COVID-19, many employers scrambled to determine whether to furlough or terminate employees, while others set up work-from-home policies and procedures. Although most states have moved into phases two or three of reopening, the ever-growing number of positive coronavirus cases presents ongoing hurdles for employers seeking to bring employees back into the workplace. So what happens if an employee refuses to return?

Preliminary steps

Before bringing employees back to work, you should have a plan in place to follow the latest guidance and recommendations from state and local health departments, the Centers for Disease Control and Prevention (CDC), the Occupational Safety and Health Administration (OSHA), and other reliable sources. It's important to have a plan so you can clearly show employees the steps you're taking to ensure their health and safety as well as that of vendors, clients, and others.

Next, decide whether to have all employees return at once or use a rolling or voluntary return as a better option for your workforce. Also consider having your HR professionals provide training to managers and supervisors who may be the first line of contact when employees ask questions or raise COVID-related concerns. Then you're ready to communicate a return-to-work date to employees and reopen for business.

5 possible scenarios

If an employee calls or e-mails to let you know he won't be returning to work, you first need to find out why. Depending on the answer, any number of scenarios can play out. Here are five.

Employee has been exposed to or tested positive for COVID-19. Your organization is safer if the employee remains home, quarantines for the appropriate amount of time, and preferably gets a negative test before returning to work.

During the away time, you can have the employee check in weekly with a supervisor or a designated HR person to determine when it's suitable for him to return to work. He also may be eligible for paid leave under the Families First Coronavirus Response Act (FFCRA) if your organization is covered.

Employee says she is part of a higher-risk group and doesn't feel comfortable returning to work. Your organization has the right to ask more questions and/or request medical documentation confirming she falls into the higher-risk group. If her status in the group is confirmed, your organization must determine whether it's covered by the FFCRA and, if so, whether the employee is also covered (beyond the initial two weeks). If yes, let her know she is eligible for pay and leave benefits under the Act.

If your organization isn't covered by the FFCRA, you still need to determine whether you fall under the jurisdiction of the Family and Medical Leave Act (FMLA) and, if so, whether the employee is eligible for protected leave. If yes, your organization should send the appropriate FMLA notification and allow her to take up to 12 weeks of unpaid leave.

If your analysis under the FFCRA and the FMLA both result in a no answer, then you must determine whether the employee is seeking to work from home, work with modifications, or not work at all. If she is aiming to work from home or with modifications (for example, relying on a different schedule or a modified work environment with plexiglass or limited exposure to others), you must go through the interactive process under the Americans with Disabilities Act (ADA) to determine whether you can provide a reasonable accommodation. If the answer is no, you're free to terminate the individual.

While the process may seem cumbersome, it's necessary to protect your organization from future litigation.

Employee is caring for a relative subject to coronavirus-related quarantine or a child under 18 whose school or childcare facility is closed. Your organization must go through the above analysis with regard to eligibility under the FFCRA and the FMLA. If the answer is no to eligibility under both statutes, then you're free to provide a discretionary leave of absence (advisably for a set period of time) or terminate the individual.

Additionally, while the third scenario doesn't require the ADA analysis, there's no law prohibiting you from allowing the employee to work from home or have other modifications if feasible for the position. Just be consistent across race, age, sex, and other protected categories.

Employee is uncomfortable returning to work until a cure for COVID-19 is found. Your organization is under no obligation to keep the employee employed. Americans are having to make difficult and deeply personal decisions about whether to return to work during the pandemic. Likewise, employers are balancing employee safety with the business necessity to resume operations. In some instances, you'll choose to reopen, and employees will decide not to return.

If feasible, you may allow employees to work from home for an extended period, which would help morale. But if you need them to be physically present in the workplace, you may have to make the tough decision to discharge those who refuse to return.

Employee wants to put off returning until after jobless benefits run out. Your organization is again under no obligation to keep the employee employed. Unemployment benefits are for people who don't have work—not for employees who don't *wish* to work.

Bottom line

The list of scenarios isn't exhaustive. You would be wise to rely on seasoned HR professionals and/or trusted employment counsel as you navigate the return-to-work waters. It also may be prudent to select a COVID-19 point person within your organization to review all virus-related employment decisions and ensure consistency.

Under the global pandemic's shadow, employment decisions won't be easy for the foreseeable future. Yet, with the right planning and advisers, you can have confidence you're making the best moves.

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WAGE AND HOUR LAW

Make wage and hour compliance priority during time of COVID-19

AL | FL | GA | LA | MS

by Maggie Spell, Jones Walker LLP

Wage and hour compliance is an area that can trip up even the most diligent employers under the best of circumstances—let alone during a global pandemic when you're trying to keep employees healthy, safe, and employed. While the health and safety concerns are unquestionably important, it's prudent to make wage and hour compliance a priority, too. Frankly, it would be foolish to think employees and their legal counsel are going to take it easy on employers simply because of COVID-19 and the ensuing and still ongoing business complications. Given how technical the wage and hour laws are, this can be seen as low-hanging fruit to plaintiffs' lawyers. In fact, we're already seeing wage and hour cases related to COVID-19 being filed across the country.

Wage and hour areas that need extra attention

Given the landscape, Jim Davis was kind enough to have me as a guest on the *HR Works* podcast so we could unpack some of the areas that may need extra attention right now and how they tie into the litigation trends we're anticipating. I'm going to run through the key takeaways from my chat with Jim, but for a more in-depth look, give the entire episode, "HR Works COVID-19 Update: When the Pandemic Creates Wage and Hour Violations" a listen at https://hrdailyadvisor.blr.com/podcast/hr-works-covid-19-update-when-the-pandemic-creates-wage-and-hour-violations/. (And stay tuned for part two, in which we talk more about the expected wage and hour litigation.)

Changes to duties of exempt employees. Make sure you're monitoring the duties your exempt employees are performing. To qualify for exemption, they have to meet certain tests for their job duties and be paid on a salary basis at not less than $684 per week.

Whether an exempt employee who's performing nonexempt duties can still be treated as exempt depends on a few things. There's a regulation that states otherwise-exempt employees may temporarily perform nonexempt duties required by a public health emergency declared by a federal, state, or local authority without losing the exemption. The U.S. Department of Labor (DOL) has stated in recent guidance that COVID-19 is consistent with the criteria for such emergencies. But the duties have to be performed because of the public health emergency and on a temporary basis.

If you have concerns about an employee's duties, the reason they're being performed, or their temporary nature, you may want to consider reclassification (but work with your employment counsel to make sure it's handled—and messaged—properly).

Pay cuts caused by pandemic. When considering whether pay cuts are acceptable, it's important to be clear whether you're talking about exempt or nonexempt employees. For nonexempt employees, it's pretty easy. Make sure they are still receiving minimum wage for every hour worked and getting overtime for all hours worked over 40 in a workweek. And if nonexempt employees are asked to work from home and need to pay for Internet or additional phone, they shouldn't be required to pay for such business expenses when doing so reduces their earnings below the required minimum wage. Check state law because some states have higher minimum wages, other overtime triggers, and specific requirements applicable to employee expense reimbursements.

Turning to exempt employees, you can prospectively reduce salaries, but they still must receive at least $684 per week on a salary basis for any workweek in which work is performed—otherwise, you may lose the exemption.

Restoring full pay. For nonexempt employees, you can change their hourly pay rates, but make sure to administratively change the overtime rate, too. If you're contemplating some sort of payment to nonexempt employees for taking one for the team with the pay cut, be sure you're talking with an employment lawyer about what the compensation is and what promises may have been made to employees when their pay was reduced. Depending on the factors, the payment may or may not need to be added back into the regular rate to recalculate and pay additional overtime.

Turning to exempt employees, you can restore their pay to prepandemic levels, but whether it's advisable depends on how much time has passed since their pay was reduced. If you change it too much, the salary starts to look less like a salary and may put the exemption at risk. It's best to leave it alone for about a quarter (but a month at the very minimum to be safe).

Bottom line

If you'd like to hear more, check out the *HR Works* episode. HR professionals have a lot on their plates these days to keep the workplace safe. To stay up to speed on the details, keep in regular communication with your employment lawyer—we can help you spot issues, see the big picture, and comply with the current iteration of guidance as it keeps changing. Everyone needs a little extra help right now, so be sure to ask and use your resources.

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COMMUNICABLE DISEASES

New CDC guideline obviates need for COVID-19 retesting

AL | FL | GA | LA | MS

by Glianny Fagundo, Taylor English Duma LLP

Based on previous guidelines and advice, many business owners have been telling employees who tested positive for COVID-19 to stay away from the workplace until they test negative. New guidance from the Centers for Disease Control and Prevention (CDC), however, has obviated the need for retesting if certain symptom-based hurdles can be met.

How we got here

Sometimes, obtaining a negative retest after a coronavirus diagnosis can mean waiting weeks and even months. Numerous reasons are contributing to the problem:

- Some people test positive for weeks after fully recovering and no longer being contagious;
- It's getting harder to schedule a test, and the results are taking longer and longer to come back; and
- The tests themselves are still unreliable, with the "quick" ones having the highest rates of false positives and false negatives.

In the meantime, businesses are seeing an uptick in activity but can't fill orders or client needs because they have no workers. Some have even had to shut down. It's therefore very surprising the CDC's new guideline saying a negative test isn't necessary has flown under the radar.

What new guideline says

Quietly, on July 22, the CDC published the guideline allowing the use of a symptom-based strategy—rather than a negative test—for ending the isolation and precautions for persons with COVID-19. Specifically, the CDC said patients who have experienced mild to moderate infections may discontinue isolation 10 days after the symptoms' *onset* and at least 24 hours after resolution of fever (without the use of fever-reducing medications) and with improvement in other symptoms.

For people who tested positive but were asymptomatic, the CDC said, "Isolation and other precautions can be discontinued 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA." For those with a more severe to critical illness or who are severely immunocompromised, they may remain infectious for longer than 10 days, but no more than 20 days after the symptoms' onset.

Most important, the guidelines apply only to those who have tested positive, not those who have been exposed to the virus and told to quarantine. The consensus remains that COVID-19 has a 14-day incubation period, and those who know they have been exposed should wait at least that long to see if symptoms develop.

So what should employers do?

A negative test can provide you with the greatest defense in litigation and the court of public opinion (which shouldn't be discounted in today's climate). But, to the extent waiting on retesting isn't practical or affordable, the CDC's guidelines may assist you in getting employees back to work faster.

One caveat: Be careful to avoid developing or revising a COVID-19 return-to-work policy in a vacuum. Remember, most if not all coronavirus-related issues can trigger employer liability under the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Families First Coronavirus Response Act (FFCRA), the Health Insurance Portability and Accountability Act (HIPAA), and other federal, state, and local statutes.

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AGE DISCRIMINATION

Staying on the clock for bridal shower gets employee fired

AL | FL | GA | LA | MS

by Maggie Spell, Jones Walker LLP

Most of the time, the employer is the one who gets burned by timekeeping troubles. In a recent ruling from the 5th Circuit (whose rulings apply to all Louisiana and Mississippi employers), however, an employee was told to clock out before attending a bridal shower at work but chose to ignore the direct order and clocked out at her normal time (after the party). When she was fired for the falsification of her time records, she vowed to prove it was age discrimination but failed.

Paid for partying?

Christine Tingle, who is over 40 years of age, worked for Merchants & Marine (M&M) Bank as an hourly employee in the loan department. On a Thursday afternoon in September 2017, M&M Bank hosted a bridal shower for an employee.

A manager notified employees, including Tingle, that the loan department would be closing at 4:00 p.m. for the shower and instructed all employees to clock out at that time. Nevertheless, Tingle didn't clock out. Instead, she

attended the shower and changed into tennis attire before clocking out at 4:30 p.m.

After the shower, the manager checked the time records to confirm her employees had clocked out at 4:00 p.m. as instructed. When she discovered Tingle had not done so, she reported the matter to HR.

The following Monday morning, when Tingle next reported to work, she was called into the HR office and asked why she hadn't clocked out at 4:00 p.m. as instructed. She said she "just got [her] hours in" and decided to clock out at her normal time of 4:30 p.m. despite her manager's instructions. During the conversation, Tingle changed her story to say she forgot and asked HR to change the time record.

The HR director told Tingle the correction should have been made earlier, as M&M Bank used an exception form by which hourly employees could fix timekeeping errors, but changes had to be made on the following day at the latest. She further explained that changing the timecard would be fraudulent, especially considering Tingle's admission she intentionally disobeyed the instructions.

Based on the conversation, the HR director decided to terminate Tingle for falsifying the timecard. M&M Bank later hired a replacement who was under the age of 40.

Unhappily ever after

Tingle sued, alleging her termination was intentional age discrimination in violation of the Age Discrimination in Employment Act (ADEA). M&M Bank clearly had a legitimate nondiscriminatory reason to fire her—she engaged in dishonest conduct and falsified her timecard. So, she had to prove the incident wasn't the bank's true reason for firing her but rather was a pretext (or excuse) for discrimination. When she failed to do so, the court granted the employer's request and dismissed the lawsuit.

Unsatisfied, Tingle asked the appellate court to take another look. She raised two principal arguments in support of her pretext claim. First, she alleged she was treated differently than a younger employee who also falsified timesheets but wasn't fired. But the circumstances between Tingle and the other employee were very different:

- Tingle was discharged for intentionally remaining on the clock despite not working and being told to clock out.
- The younger employee wasn't trying to obtain pay for unworked time but rather clocked out for her lunch break in the afternoon instead of during the lunch period.

The court focused on the fact that Tingle's timekeeping error, from M&M Bank's perspective, was intentional and done for the purpose of obtaining pay for unworked time.

Second, Tingle argued her supervisor and the HR director intentionally refrained from alerting her about the timekeeping issue until it was too late to fix it so they could replace her with a younger employee. Not only was there was no evidence to back the allegation, but no one was obligated to notify Tingle about her mistake—she knew it was her responsibility to initiate the process for submitting a time exception form and correcting the issues. Her manager explained she reported the incident after Tingle ignored a direct order and remained on the clock despite not working. And the manager checked with payroll to see if the employee had submitted a time exception form before contacting HR.

Essentially for the same reasons, Tingle's argument that her supervisor, who wasn't involved in the termination decision, used leverage to get her fired because of her age also failed. As a result, the dismissal stood. *Tingle v. Merchants & Marine Bank*, Case No. 19-60925 (5th Cir., June 8, 2020).

Advice for successful (employment) relationship

Make sure your timekeeping policies are clear and communicated to your employees—and you're enforcing them. There should be no question that (1) working off-the-clock is prohibited and (2) staying clocked in and trying to get paid for time not worked means the employee is falsifying records.

If you have expectations about hours worked or a specific event, be sure employees know what they are. M&M Bank benefited from the manager's e-mail instructing department members to clock out for the shower, so Tingle's violation of the direct order was unquestionable. Consult with employment counsel if you aren't sure your wage and hour policies are in order, which is especially important while employees may be working remotely during the COVID-19 pandemic.

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IMMIGRATION

Discord over foreign workers has long history, elusive solution

AL | FL | GA | LA | MS

The fate of foreign workers in the United States remains up in the air amid the worldwide public health crisis and political disputes related to immigration and foreign worker programs. The COVID-19 pandemic had already slowed or stopped authorization of many foreign workers when the Trump administration in June restricted visas for some classes of foreign workers. The administration's action came on the heels of a U.S. Supreme Court decision that was at least a temporary win for certain young immigrant workers already in the United States. Then President Donald Trump hinted at more change on the way

for those immigrants. So, the signals are mixed, making uncertainty the key word for foreign workers and their employers.

Visa changes

Many employers were distressed in June to learn that new restrictions would be in place throughout the rest of the year for workers in a variety of visa categories. On June 22, Trump issued a proclamation limiting entry into the United States for temporary foreign workers in the H-1B, L, certain J, and H-2B categories.

Those categories include workers in specialty occupations who must have higher education degrees or their equivalents (H-1B visas), workers in exchange programs (J visas), intracompany transferees who work in managerial or executive positions (L visas), and people who work temporary or seasonal nonagricultural jobs (H-2B visas).

The June announcement followed an Executive Order in April suspending immigration to the United States as part of the government's response to COVID-19. That order affected people seeking green cards, not temporary foreign workers, and was to last 60 days. But Trump's June action extended the order through the end of the year and added the visa limitations.

The stated reason for the administration's actions was to put Americans "first in line for American jobs as the economy reopens," Department of Homeland Security Acting Secretary Chad F. Wolf said in making the announcement.

The administration's policy ran into opposition from many in the business community. U.S. Chamber of Commerce CEO Thomas J. Donohue called the proclamation "a severe and sweeping attempt to restrict legal immigration."

"Putting up a 'not welcome' sign for engineers, executives, IT experts, doctors, nurses, and other workers won't help our country, it will hold us back," Donohue said. "Restrictive changes to our nation's immigration system will push investment and economic activity abroad, slow growth, and reduce job creation."

International students

Another administration policy running into opposition from business leaders was the announcement from Immigration and Customs Enforcement (ICE) in July that international students in the United States would have to leave the country if their schools switch to online-only courses.

The outcry from universities and state governments took the form of lawsuits claiming the rule would violate the Administrative Procedure Act. Foes of the plan also called the policy a politically motivated attempt to force schools to hold in-person classes even as the pandemic continues.

Even though the defunct ICE rule applied to students instead of employees, many business interests feared the effect would be to put U.S. employers at a disadvantage in the talent war if international students chose to study in countries such as Canada that are seen as more welcoming to students—students likely to choose to stay in the country where they studied.

Donohue was among those opposing the ICE rule. "The chilling effect it will have on international student enrollment will inflict significant harm upon American colleges and universities, their students, the business community, and our economy," he said, adding that international graduates of U.S. universities are "a critical source of talent for American businesses."

DACA

The Supreme Court's 5-4 decision in *Department of Homeland Security v. Regents of the University of California* in June was encouraging to businesses employing people with work authorization documents made possible because of Deferred Action for Childhood Arrivals (DACA), the Obama-era program that provides temporary deferral from deportation for certain young people who were brought to the U.S. as children. DACA recipients receive a renewable two-year deferral from deportation and can become eligible for work permits.

The court case stemmed from Trump's attempt to end DACA, and the ruling was a relief for employers worried they would soon lose their DACA employees. Trump had vowed during his 2016 campaign that he would end DACA, and he did rescind it in 2017. His rescission was blocked by litigation, which ended with the Supreme Court ruling in June.

The Court's decision didn't rule out a rescission of DACA. Instead, it found that the administration didn't follow the federal Administrative Procedure Act. In July, Trump sparked more questions when he told an interviewer he planned to take further action related to immigration that would include a road to citizenship for DACA recipients.

Bottom line

All the recent changes likely won't be the last, meaning employers will need to stay tuned to future developments. ■

WORKPLACE ISSUES

Adapt or die? Looking ahead to a post-COVID workplace

AL | **FL** | **GA** | **LA** | **MS**

It didn't take a worldwide public health crisis to pique people's curiosity about what the workplace of the future will look like. Managers and frontline staff alike have always pondered the best designs for productivity, efficiency, and safety. But COVID-19 has changed everything. The workplaces that are reopening in many cases have a different look and feel than anyone expected prepandemic. Temperature checks at building entrances, plexiglass barriers, spaced-out desks, and occupancy

limits for elevators are just a few of the changes now in place in many workplaces. Some of the modifications may be short-lived, but experts, including designers and futurists, expect others will be long-term or even permanent.

New mission for office buildings?

Who would have thought prepandemic that an office building might not be the place where people go to work at a desk in their own or in a common space? Of course, office buildings have always had conference rooms for meetings and gathering spaces for collaboration, but some forecasters expect the individual work function to take a backseat to group activities as the world adapts to the coronavirus.

Rather than companies having large central headquarters buildings teeming with employees working pretty much the same hours, the headquarters of the future may be in for a cultural shift.Brent Capron, design director of interiors for the Perkins and Will architecture firm in New York City, was quoted in a CNBC article in April as saying people will still frequently gather for work. But with many people continuing to work from home, he expects office buildings to become the gathering places while individual, focused work will more frequently be done remotely. That cultural shift may mean office buildings will have fewer closed offices and more spaces to hold meetings and events.

The open office floor plan also is likely in for a change, with desks spaced to allow more social distancing and partitions between workstations getting more common. Also, workers likely will want personal rather than common space on the days they do work in the office. And they also will want assurances of frequent deep cleaning and touchless features such as voice-activated elevators.

Office architecture and design firm Gensler also predicts a new day for offices. Research published in May as part of Gensler's analysis of change resulting from COVID-19 says the new role of the workplace will be focused on community, culture, and mission. The report predicts more people will work at home for "intense heads-down work and virtual collaboration meetings," and in-office days will be a time "to come together to be with our teams, colleagues, and clients in person."

Work from home trend

When so many workers fled their offices for at-home work early in the COVID-19 outbreak, some prognosticators predicted an end to the office as it has always been known. The CEO of Twitter was even reported as telling his employees that most won't need to come back to the office at all.

But the Gensler research package challenges that idea. The company's U.S. Work from Home Survey reports that most people want to return to the workplace, but they want changes. Why do people report wanting at least some in-office work? Gensler reports the top reason is interaction with people.

Survey respondents cited meetings with coworkers, socializing with colleagues, and impromptu face-to-face interaction among the most important reasons for being in the office. Feeling a part of a community, access to technology, and professional development/coaching also were popular responses.

'Work-ready homes'

Even though many workers will enthusiastically return to the office as soon as the pandemic subsides, many will prefer to skip the commute, the distractions, and the rigid schedule of life in the office. They have gotten good at working from home, and the few glitches they endured can be fixed with a few technology upgrades.

Just as design changes are predicted for office buildings, homes also may see permanent changes. In an article published by *Forbes* on May 7, William Arruda, a personal branding professional, predicts one of the lasting changes brought on by the pandemic will be "work-ready homes." He expects internet in homes will improve and home offices—even home video studios—will become more important to homeowners.

Even if more employers and employees embrace the working from home model, many workers will eventually return to the office, but they will want more space, less desk sharing, and more support for at least occasional mobile and virtual work, according to the Gensler research.

"Workers want their workplaces to adapt to new paradigms—but how workplaces should adapt is still open for debate," according to the U.S. Work from Home Survey. "The most important workplace changes appear to be policy-based and include stricter policies about staying home when sick and increasing opportunities to work from home. Cleaning and other efforts to establish social distancing rank next." ■

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