A Roundtable Discussion

LABOR AND EMPLOYMENT:

Today's Evolving Legal Landscape

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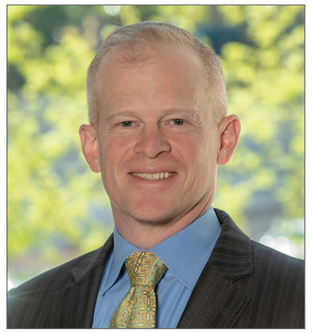

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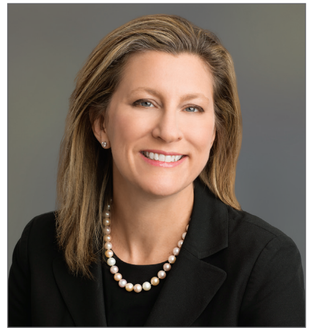

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The complexities of U.S. labor and employment regulation continues to evolve. Legal news service Lexology, in fact, expanded its October monthly summary beyond its normal "top 10" to include 14 stories detailing changes to labor and employment law that, in its view, employers needed to know about.

Crain's Custom Media checked with three local labor and employment attorneys for their takes on issues facing Chicago area employers, and potential strategies for addressing them.

FELICIA FRAZIER is managing partner at Odelson & Sterk, where she chairs its labor practice group, representing municipalities and school districts in labor contract negotiations. Her public sector experience includes personnel issues, contract negotiations, representing employers in state and local labor board hearings, as well as grievance and arbitration hearings. As her firm's first female partner, she has helped grow it from five to 19 attorneys since joining 17 years ago. Earlier this year, she was recognized by Crain's as one of Chicago's Notable Women Lawyers, and by the Women's Bar Association of Illinois as one of four Top Women Lawyers in Leadership.

ANDREW S. GOLDBERG is a partner at Laner Muchin, advising employers on how to navigate state, local and federal employment laws. He helps clients develop strategies for dealing with various disability, sick day and leave laws. He also drafts executive employment agreements, non-compete and confidentiality agreements; negotiates collective bargaining agreements; responds to grievances; and defends against unfair labor practice charges. He is a prolific author of employment-related articles. In 2009, he was named one of Illinois' Top 40 Attorneys Under 40 for, among other accomplishments, his commitment to client service.

MARGO WOLF O'DONNELL is the co-chair of Benesch Law's labor and employment group. She has nearly 25 years of experience litigating and counseling clients on complex employment-related issues, including individual and group discharges, releases, confidentiality agreements, non-compete agreements and internal investigations. She has been recognized as one of the Best Lawyers in America, a "role model" by Chambers, and one of the top ten women employment management attorneys in Illinois by Leading Lawyer. She recently began leading a new group at her firm that provides power coaching and leadership training to women in-house counsel.

What types of employment-law issues do you most frequently help your clients navigate?

Margo Wolf O'Donnell: My work is focused on helping clients protect what they value most, which often includes their trade secrets and confidential information. I help clients hone in on the information that keeps their company profitable, and the restrictions that should be in place to prevent misappropriation and competition that could undermine their business. Employees are less likely to violate restrictive covenant agreements when they know what they can and cannot do, and courts are more likely to enforce agreements with more specific restrictions. Because continued employment might not be sufficient consideration to support an Illinois agreement, I help clients work through this limitation. I also remind clients to ask for any agreements that new hires might have with former employers, and as an experienced trial attorney, I can tell clients when litigation is appropriate to enforce their rights. Sometimes, seeking relief aggressively in court is the best approach.

Felicia L. Frazier: I typically address day-to-day employee matters which range from claims of harassment or discrimination–typically employee on employee–to requests for various leaves with no time on the books, online social media threats and claims of harassment–either employee to employee or employer to employee. Most of my work entails helping the client implement preventive practices as opposed to reactive practices. Clients frequently are unaware of small steps they can take to prevent employment disasters; my job is to help them realize what those small steps are so they can recognize them in the future.

Andrew S. Goldberg: My clients' most frequent issues involve a lack of coordination between operations and human resources in managing under-performing employees. HR personnel are often asked to approve a discharge of an employee who the operational team decides is not going to be successful. Unfortunately, many times the operational team has not progressively disciplined, counseled, trained, accurately appraised or otherwise provided the employee with a clear understanding of the deficiencies, expectations, steps to meet expectations, and consequences of failing to meet those expectations. We then must develop a strategy to be fair to the employee, protect the company from claims of discrimination and other possible legal violations, and from the effects of retaining an underperforming employee. The key to avoiding these situations is to make sure the operations team understands the legal, cultural and reputational risks associated with insufficiently communicating concerns with and issuing corrective actions to employees.

What's the most commonly overlooked employment issue that you encounter, and what can be done to avoid it?

MO: The most overlooked issue that I encounter is the risk involved with responding to requests for leave. Although a request for time off can seem innocuous, it's important to consider the intersection of laws such as the Americans with Disabilities Act, the Family Medical Leave Act and the Pregnancy Discrimination Act. The timing and length of the leave plays a large role in whether an employer needs to accommodate it, or suggest other equally effective accommodation. Employers run into issues when their policies dictate restrictions that don't comply with current and applicable laws. For example, requiring employees to show that they're completely healed or to provide a release without restrictions before returning to work can violate the ADA if the employee, with reasonable accommodations, could perform the essential functions of the job.

AG: Many clients struggle with proper salary administration. This has gotten worse with recent laws prohibiting employers from inquiring about salary history, and with general salary inflation in the marketplace. If you're hiring someone very young and paying them more than a person age 40 or over, you've got potential age discrimination issues. Conversely, some employers will push back on increasing everyone's wages because of legitimate budget concerns. We advise employers to keep tabs on wage and benefit trends in their industry, region and country so that they can compete for the best talent. If they need to attract talent outside the typical salary ranges, hiring bonuses or other temporary incentives are more easily defended, as are incentive payouts, profit sharing and other programs that reward high performers.

FF: Obesity is an increasing health problem, yet many employers aren't prepared to deal with leaves or ADA claims based on obesity. While obesity in general is not a disability, morbid obesity is. The growing prevalence of obesity has forced many companies to introduce benefits and programs aimed at helping employees choose healthful lifestyles, and some are targeting spouses and children as well. Employers' willingness to take on such personal matters continues to grow as the true costs of care attributable to obesity become clearer. Employers have a responsibility to consider direct and indirect costs of obesity such as absenteeism, depression, diabetes and cardiovascular disease. Employers must also be mindful to remain sensitive to any requests for accommodation from overweight individuals.

How can employers best handle claims of harassment and gender discrimination in light of the #MeToo movement?

MO: This is the top employment question of 2018. Rather than waiting for a lawsuit to

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HARASSMENT, GENDER DISCRIMINATION

"Employers should put in place solid anti-harassment and anti-discrimination policies and procedures, and hire a well-respected employment attorney or other third party to conduct employee training regarding current policies, including procedures for reporting and investigating complaints."

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happen, employers should take steps now to prevent or mitigate such claims. Employers should put in place solid anti-harassment and anti-discrimination policies and procedures, and hire a well-respected employment attorney or other third party to conduct employee training regarding current policies, including procedures for reporting and investigating complaints. All complaints of discrimination, whether written or oral, and even those that are anonymous—for example, via blogs, tweets or a hotline—may likely need to be investigated. An investigation works best if it starts with the complainant, then interviews of any other individuals who might have knowledge, and ends with an interview of the accused. Along the way, confidentiality is essential.

What steps can employers take to avoid claims under the Americans with Disabilities Act?

AG: Most ADA claims we see are for a failure to accommodate. Employers either fail to discuss possible accommodations or they fail to fully understand the essential functions of the job the employee is performing. The first step to take is gain a full and complete understanding of every aspect of the jobs performed in your workplace. This includes the physical and mental skills and exertions needed to perform the job, the individual tasks a person performs, how long it takes to complete each task and the work environment itself. Once you have this understanding, create a job description that sets out these aspects in detail and notes which tasks are essential. Essential under the ADA means that the job would not exist if the task were taken away. If an employer determines that an accommodation is not possible because it would create an undue hardship, they should be prepared to show the economic, operational, staffing and other adverse impacts that prevent the accommodation. Obviously, double-checking with legal counsel before denying an accommodation is a prudent course of action.

MO: Employers should ensure that they have a consistent procedure in place for conducting the interactive process with an employee once it's understood that the employee has a disability that needs to be accommodated. Whether an employee is a qualified individual under the ADA should be determined by the individual's ability to perform the job, with or without an accommodation, at the time of the employment decision. Factors to be considered include whether the request for accommodation is reasonable, whether the accommodation would actually be effective, and whether there's an alternative accommodation that could cure any existing undue hardship posed by the request. As a last-ditch effort, employers should consider the possibility of reassignment; however, employers are not required to place employees in positions for which they're not qualified.

With medical marijuana being prescribed for a number of illnesses, how are employers addressing the request to accommodate its use?

AG: Currently there's no legal protection in Illinois for having marijuana in your system while at work; consequently, there's no obligation to accommodate its use. Thus, employers need not agree to openly allow employees to use marijuana at work or to have marijuana in their systems. However, does an employer want to lose a valuable employee over a positive test versus an employee who showed signs of impairment? I think all employees should be held to the same standard of being physically and mentally prepared to successfully perform their job. If employers test only on some form of reasonable suspicion, then a balance is struck because, presumably, someone will not be tested if they're not acting impaired.

FF: Many employers are still wrestling with how to balance a drug-free workplace policy with employees who hold valid cards for medical marijuana and request to use it during work hours. Employers are not sure what to ask or not to ask when interviewing candidates, but sooner or later they must develop workplace substance abuse policies that are updated and reviewed annually to ensure compliance and consistency. Employers must also realize and educate their employees on the increase in occupational accidents and injuries due to short term effects of the drug, such as memory loss and impaired sense of timing. These are the tough conversations that I'm starting to have with clients. Medical marijuana laws vary from state to state and employers must become knowledgeable about what they can and cannot allow.

How are bullying and social media concerns being addressed in the workplace?

FF: Employers are realizing the importance of regular trainings and workshops related to these issues. They're also developing policies that limit the use of social media during work hours and informing employees that company websites, blogs and other online destinations are regularly monitored. While the benefits of social media are unquestionable, employers are now facing difficult policy decisions as they balance employee rights with business interests. Many of these policy decisions impact workforce morale and can lead to significant employer liability if handled improperly. Helping the employer to understand the pitfalls of regulating employee social media access is a big part of what I do on a regular basis.

AG: Employers are expanding their anti-harassment training to include specific instruction related to bullying—which can be quite subtle and difficult to recognize—and some companies are going so far as to block workplace access to social media sites, which can contribute to bullying and create a drain on productivity. The National Labor Relations Act allows employees to support one other with respect to the terms and conditions of employment, meaning that employees can criticize employers, supervisors, wages, benefits and working conditions through social media or otherwise, as long as the criticism is on behalf of two or more people or relates to a claim that the employer violated a collectively bargained agreement. Employers should consult labor counsel before taking action based on someone's social media postings.

How are you helping your clients deal with Chicago's sick day ordinance, which has been in effect for over a year?

FF: The biggest challenge for employers is understanding exactly what is and isn't required. Workshops for employers and employees help educate everyone as to exactly what the ordinance allows for, and define those absences where employees are allowed to use sick leave benefits. In general, employers aren't comfortable addressing this topic with union organizations. Many aren't aware that If a collective bargaining agreement entered into prior to July 1, 2017 contains provisions that address paid sick leave, but is less generous than the ordinance, the ordinance doesn't apply.

BULLYING, SOCIAL MEDIA

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Chicago is considering a law dictating how employers schedule employees to work. How will this impact Chicago businesses?

FF: Predictive scheduling has many benefits, such as increase in employee productivity—which directly impacts the employer—and cost reductions for companies that have to deal with increased hiring and training costs for a workforce that gets burned out because of an unpredictable schedule. However, the ordinance would impose record retention requirements on employers, and the cost of noncompliance would result in huge fines to employers.

AG: When you take away a company's ability to set its own schedules, you greatly hamper its ability to compete. Several clients have told me they'll either move their businesses out of Chicago, shut down or operate with fewer employees to avoid the penalties that would come from reducing someone's hours or otherwise changing their schedule. The city needs to consider the unintended consequences of its actions, and before it passes a law of this nature, get input from the business community. The current draft of the law indicates a lack of sensitivity to the realities of most workplaces.