A ROUNDTABLE DISCUSSION

LABOR AND EMPLOYMENT LAW:

ISSUES AND STRATEGIES FOR EMPLOYERS

>>Since the beginning of the year, employers across the nation have been addressing a host of new or amended federal, state and/or local laws, and more changes are coming in 2020.

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JILL P. O'BRIEN is an equity partner at Laner Muchin, Ltd., where she is the firm's hiring chair and member of its Executive Committee. Throughout her 30 years of practice, she has represented public and private sector employers in a wide variety of employment and labor relations matters, including collective bargaining negotiations, grievance handling, mediation and arbitration hearings; representation/certification and unfair labor practice hearings before the National Labor Relations Board and the Illinois Labor Relations Board; and discrimination and harassment claims filed in various state, federal and local administrative agencies. In 2018 and 2019, Illinois Super Lawyer named her one of the state's top 50 women attorneys.

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What's the most common labor or employment law concern you're hearing from clients?

Jill P. O'Brien: We're hearing concerns about the necessary updates to recruiting practices and employee handbooks to comply with the expansive changes in state and local employment laws that become effective for the new year. While employee handbooks are an important tool to help promote fairness and consistency in the workplace—which can translate to fewer legal claims and more productive employees—outdated policies actually create significant legal exposure for employers. It's critical for employers to pay particular attention to several things, including changes in the laws related to time off entitlements for employees and their covered family members; restrictions on the right to use data obtained through background and salary screening practices; new wage and hour reporting and scheduling obligations; and even mandated language changes for published anti-harassment policies.

In light of the new laws legalizing cannabis, how can employers maintain a drug-free workplace?

O'Brien: The key is to be sure that policies are carefully tailored to ensure they don't infringe upon an employee's privacy right to use cannabis during non-working time. In all other respects, employers are free to maintain their existing "zero tolerance" policies related to use, possession, sale or impairment during working time and breaks. Many employers also plan to modify or eliminate the practice of conducting pre-employment and random drug testing for cannabis, given that the test results may reveal lawful use and not actual impairment of an employee during working time. If an employee is asked to submit to a drug test based on an employer's good faith belief that they're impaired by or under the influence of cannabis, the employee must have a right to contest the employer's facts relied on to support that belief. Therefore, employers should begin training supervisors now on how to detect and document objective facts of possible impairment.

How has the #MeToo movement changed what employers need to do to keep their workplace free of litigation?

O'Brien: Beginning in 2020, Illinois employers are legally required to conduct annual training programs to educate both supervisory and non-supervisory employees about their rights and obligations under the laws related to sexual harassment. This is an excellent way to start good habits for the new year while also reminding employees how this topic fits within the company's overall culture. The Illinois Department of Human Rights will offer a sample training program that satisfies this requirement, but nothing beats in-person interactive training to ensure that the concepts are heard and understood.

How can employers comply with the salary law ban in Illinois; are there any exceptions to the law?

O'Brien: By now, clients have revised their employment applications and on-line hiring forms to delete any questions that may cause an employee to reveal information about their current or past salary or benefits received from other employers. We've trained our clients' supervisory staffs who are involved in the interview process to recognize the distinction between asking a candidate about their salary expectations—which is lawful—and avoiding questions that may cause an employee to feel the need to reveal their current or past salary history. The salary history ban amendment to the Illinois Equal Pay Act does not apply to circumstances where an existing employee is a candidate for an internal transfer or promotion within the same organization. And the salary history ban does not apply to circumstances where the salary history is a matter of public record or available through a Freedom of Information Act request.

How should employers handle requests for short-term or long-term leave for employees who don't qualify for leave under the Family Medical Leave Act?

O'Brien: Many companies elect to treat all employees the same, regardless of FMLA eligibility, when responding to requests for unpaid time off and insurance continuation rights due to a documented medical condition of the employee or a covered family member. The logic is that the ADA and pregnancy discrimination laws require employers to grant reasonable periods of leave and/or flexible work schedules as a form of reasonable accommodation anyway. However, at the expiration of an approved leave, employers are required to reinstate an employee who is FMLA eligible, whereas non-FMLA eligible employees need only be reinstated when their prior position remains open in many—but not all—cases. Those issues are best addressed on a case-by-case basis.

What impact will next year's extra day of work for leap year have on employees who are paid an amount computed on an annualized basis?

O'Brien: Employers who pay their employees in weekly or bi-weekly intervals may experience 53 or 27 pay periods during leap year 2020 instead of the normal 52 or 26. Some employers will pay the year's final paycheck on top of the employee's regular salary—resulting in about a 4 percent raise during the 366-day leap year. Others will simply redistribute the annualized salary among the 53 or 27 paychecks so that the employee's total earnings for the year remain the same. Employee benefits contribution amounts and payroll deductions that are computed on an annualized basis also will need to be redistributed to account for the additional pay period. It's important for employers to communicate with employees in advance about how this issue will be handled. Otherwise, employees may feel their annualized salary level was cut due to the slightly smaller paychecks they receive throughout the year. For employees paid on an hourly basis, the 366th day will not make a difference because they're paid for each hour they work, regardless of the number of paychecks they receive in a given year.