2020 Employment Law: What to Expect & What to Do

By John Vering and Brenda Hamilton

1. **Expect more sexual harassment claims.** In light of the #MeToo movement, expect that your employees are going to be more willing to make sexual and other harassment claims than they have in the past. **What to do**: Ensure that your policies prohibiting sexual and other types of harassment, discrimination, and retaliation are up-to-date and ensure that your personnel receive required and appropriate training regarding those policies. Be aware of state law requirements. For example, New York, Delaware, California, Connecticut and Maine now have mandatory sexual harassment training requirements. New York requires special policies and training for employees working in New York, even if an out-of-state employer has only one employee working in New York.

1. **Missouri employers and employers with employees in states that allow medical marijuana – get prepared**. Missouri employers should expect to see some applicants and employees using medical marijuana in the next few months. Thirty-three states and the District of Columbia allow medical marijuana, and eleven states allow adult recreational use of marijuana. **What to do**: Consider having your employee handbook and drug testing policies reviewed and updated to take into account legal requirements in the states where your employees work, and consider how best to deal with potential requests from applicants and employees who are likely to claim that you should reasonably accommodate their medical use of marijuana under Missouri or other states' disability and/or marijuana laws. Consider training management employees to recognize marijuana impairment. Keep in mind that employee's legal rights regarding medical marijuana vary from state to state and Missouri courts have yet to interpret Missouri's new medical marijuana laws.

1. **Comply with new wage and hour laws and regulations**. **What to do:** Make sure you pay

overtime to qualified workers who do not make at least $684 per week ($35,568 per year). Also, most Missouri employers need to pay non-exempt employees a minimum wage of at least $9.45 per hour. Tipped employees in Missouri must be paid half of the minimum wage rate (i.e., $4.73 per hour) and their wages plus tips must total at least $9.45 per hour. Kansas and federal minimum wage remains at $7.25 per hour. Tipped employees in Kansas must be paid a minimum cash wage of at least $2.13 per hour, and their wages plus tips must total at least $7.25 per hour. Other states and some cities have higher minimum wages (e.g., $16.00 per hour in Seattle for large employers, $12.00 per hour in Colorado, and $10.00 per hour in Arkansas). The U.S. Department of Labor (DOL) has issued new regulations on how to calculate the regular hourly rate of pay for properly paying employees for overtime hours and has issued new guidance regarding when bonuses have to be added into the regular rate for purposes of calculating overtime pay. The DOL has also issued proposed regulations attempting to clarify the rules regarding how to compute overtime for salaried non-exempt employees who work hours that vary from week to week.

1. **Become familiar with new laws, regulations, and interpretations regarding joint employment.** In 2016, the Obama Administration's DOL Wage and Hour administrator issued guidance making it easier for two employers to be deemed "joint employers" by adopting a standard requiring a finding of joint employment unless the two employers are "completely disassociated" from each other. When two employers are deemed to be joint employers, both are legally responsible for failing to pay workers required minimum wages and overtime. On January 13, 2020, the DOL issued a new four factor test for determining joint employment status. This new test looks at whether the alleged joint employer can hire or fire the employee at issue, controls the employee's schedule or job condition, sets the employee's pay and payment methods, and maintains the employee's employment records. While this new test is not binding on courts and may be reversed if Democrats re-take the White House in November, it does provide helpful guidance to employers trying to avoid the extra liability associated with being deemed a joint employer of someone else's employee. The EEOC and NLRB are also working on guidance regarding who is a joint employer, and we may see final rules issued by those agencies later this year.

1. **Expect more state laws defining who is an independent contractor.** Expect some states to follow the lead of California, Massachusetts, and New Jersey in setting state standards for defining who is an independent contractor. Due to changes in these states' laws, some individuals who previously had been classified as independent contractors will now be classified as employees. **What to do:** Review applicable federal and state statutes, rules, regulations, and guidance with legal counsel to determine whether persons performing services for you are truly independent contractors or whether they are legally employees subject to tax withholdings and entitled to applicable employee benefits regardless of language in an agreement calling them independent contractors.

1. **Expect possible groundbreaking decisions from the United States Supreme Court.** The United States Supreme Court will likely decide whether sexual orientation and gender identity bias is covered by Title VII, the principal federal law prohibiting discrimination based on sex and prohibiting sexual harassment, given that there is a split of authority on this issue in lower federal courts. Neither Missouri nor Kansas state laws prohibit discrimination based on sexual orientation, but some cities in both states have ordinances that prohibit discrimination based on sexual orientation and/or gender identity, including but not limited to Kansas City, St. Louis, and Columbia, Missouri, and Lawrence, Manhattan, Roeland Park, Leawood, Merriam, Mission, Mission Hills, Olathe, Prairie Village, Shawnee, Westwood, Westwood Hills, and Wyandotte County, Kansas. Moreover, Missouri employers should note that there is a recent Missouri Court of Appeals ruling that permitted an employee to proceed with litigation under the Missouri Human

Rights Act on a claim that he was discriminated against because of unlawful sexual stereotyping because his behavior and appearance contradicted the stereotypes of maleness held by his employer and managers. **What to do**: Do not discriminate based on sexual orientation or gender identity because it is legally risky.

1. **Expect more states to take action to limit non-compete agreements.** In the last two years, Illinois, Maryland, Massachusetts, Oregon, and Washington have enacted laws restricting the enforceability of non-compete agreements, joining the states of California, Montana, North Dakota and Oklahoma which prohibit or significantly restrict employers' ability to use non-compete agreements. **What to do**: While there have not been dramatic changes in non-compete law in Missouri and Kansas, you are well-advised to have your non-compete, non-solicitation, and non-disclosure agreements regularly reviewed, particularly if you have employees in multiple states, in light of changing statutes and new court decisions restricting the use of non-compete agreements.

1. **Expect more wage and hour class action lawsuits**. Plaintiffs' attorneys continue to file wage and hour class action lawsuits against employers. **What to do**: Continue to be vigilant in making sure that employees are not working off the clock and that overtime is paid for hours worked over 40 hours in a week – except for employees who meet all the tests for being exempt from overtime under applicable federal and state wage and hour laws. Also, take action to guard against potential claims by non-exempt employees who are working after hours without pay reviewing and/or responding to emails or talking to customers or co-workers.

1. **Expect more restrictions on pre-employment inquiries of applicants regarding salary history and criminal backgrounds.** An increasing number of cities (e.g., Kansas City and Columbia, Missouri and St. Louis County) and, at last count, California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington have mandated the removal of conviction history questions from job applications for private employers. In 2019, Kansas City, Missouri enacted an ordinance that generally prohibits a private employer from inquiring about or considering a prospective employee's salary history. Moreover, 17 states have some kind of restrictions on inquiries of prospective employees regarding salary history. **What to do:** Make sure that you comply with the law in the states and cities where you are hiring employees to make sure you are not running afoul of a salary history ban.

1. **Expect possible claims of failure to preserve emails and documents in connection with employment-related lawsuits.** We have observed a trend in recent years of plaintiffs' lawyers asserting that employers failed to adequately preserve evidence (e.g. documents, emails, and text messages) relating to employment claims and that such failures should result in sanctions and monetary penalties against the employer up to and including entering a judgment in favor of the employee. **What to do**: Have your document retention policy reviewed by counsel. Work with counsel to establish a procedure requiring that a litigation hold letter be sent when you reasonably expect litigation so that potential evidence (which may be quite helpful in defending the case and which an employer may have a legal duty to preserve) is not inadvertently lost or destroyed. Remember that a duty to preserve evidence can arise before a lawsuit is filed. Lawsuits can sometimes drag on for years, and personnel and computer system changes can make preserving relevant evidence a challenge.

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