2020 Legislative Update

Robert Noonan & Associates

January 23, 2020

Robert Noonan & Associates

Legal Services

- Advising and Representing Employers
  - Discrimination Litigation
  - Sexual Harassment Investigation and Litigation
  - Employee Benefit Litigation
  - Unemployment Compensation Appeals
- Legal Document Development
  - Separation Agreements
  - Employee Benefits
  - Employee Handbooks
- Training Services
  - Sexual Harassment Prevention
  - Employment Law for Supervisors
  - HIPAA

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Trends

- Tougher recruiting;
- More liability and transparency in sexual harassment cases;
- Marijuana in the workplace is nearing same status as alcohol;
- Expansion of FMLA;
- Greater emphasis on gender discrimination through compensation;

Tougher Recruiting

- 68% of HR Professionals find difficulty in finding candidates;
- Top skill shortages are writing in English, basic computer skills, and spoken English.
- Employees receive most training by seminars and conferences rather than by in-house training;
- Public employment agencies such as American Job Centers tend to be used mostly by smaller employers;
- Baby Boomers are retiring in greater numbers and will continue to do so-retention beyond retirement will be a consideration.

Unemployment

- National December unemployment rate at 3.7%.

The Connecticut Labor Market

- Connecticut's estimated July unemployment rate at 3.6%, down 0.1% from June.
- Private sector employment fell by 700 (-0.1%) to 1,457,800 jobs over the month in July.
- Government sector grew by 600 (0.3%).

Wages and Income

- The consumer price index showed inflation up .3% in July. Equals 3.6% annual.
- Nationally, inflation-adjusted wages 0.1% percent from June to July, seasonally adjusted.
- Real average weekly earnings decreased 0.3% percent over the month due to the decrease of 0.1% percent in real average hourly earnings combined with a decrease of 0.3% percent in the average workweek.

Greater Liability and Transparency in Sexual Harassment

- Connecticut Law (more to come)
- States banning arbitration clauses, confidentiality clauses and no-rehire clauses in sexual harassment settlements:
  - Means cases are in public forum.
  - Accusations remain regardless of outcome.

Marijuana in the workplace is nearing same status as alcohol;

- New York Prohibits Applicant Testing for Marijuana
- Connecticut rules that federal law does not serve as a defense to Connecticut law;
- Call for ‘de-scheduling” marijuana on federal level.

Expansion of FMLA

- More states developing paid FMLA
  - Mass and Connecticut among them.
- More reasons to grant leave.
- Call to bring federal threshold down to 25 employees.

Greater emphasis on gender discrimination through compensation;

- EEOC is making gender disclination through compensation an issue;
- Lawsuits being filed on same premise;
- Gag laws on asking about compensation pre-employment are reflective of emphasis.

Sexual Harassment

New Laws: Sexual Harassment

- SB-3: An Act Combatting Sexual Assault and Sexual Harassment. Effective **October 1, 2019**.
  - Expands sexual harassment prevention training.
    - **Employers with 1 or more employees**:
      - Must provide supervisory employees with two hours of sexual harassment training by October 1, 2020. If employer provided training after October 1, 2018, training does not need to be repeated.
      - Must provide new supervisory employees with two hours of sexual harassment training within 6 months of their assumption of supervisory duties.
    - **Employers with 3 or more employees**:
      - Must provide all employees with two hours of sexual harassment training by October 1, 2020. If employer provided training after October 1, 2018, training does not need to be repeated.
      - Must provide employees hired after October 1, 2019 with two hours of sexual harassment training within 6 months of date of hire, provided the CHRO has made available training videos by that time.

Training

- Employer must provide supplemental training every 10 years.
- Expands definition of “discriminatory practice” in the CHRO statutes to include an employer’s failure to provide sexual harassment training.
  - Allows employee or CHRO to file a complaint alleging discrimination for failure to train.
- Also subjects employer to fine of up to $750.00 if employer fails to provide training as required.

Notices

- If employer has provided employee an email account or the employee has provided employer with an email address:
  - Requires employers with 3 or more employees to send an email within 3 months of hire stating that sexual harassment is illegal and the remedies available to victims.
  - Email's subject line must be similar to "Sexual Harassment Policy".
- If the employer has not provided email accounts to employees, it must post the information on its website if it has one.
- Subjects employer to up to a $750.00 fine for failing to provide notice.

Compliance

- Allows CHRO executive director to assign representatives to enter an employer's business to ensure compliance with notice requirements.
- Also allows representatives to examine the employer's records, policies, procedures, postings, and sexual harassment training material to ensure compliance with posting and training requirements.
- Limits these provisions to:
  - The 12-month period after an employee has filed a complaint against an employer.
  - When the CHRO executive director reasonably believes that the employer has violated posting or training requirements.

Corrective Action

- Prohibits employer, when taking corrective action in response to employee sexual harassment claim, from modifying claimant's conditions of employment unless claimant agrees in writing to the modification.
  - Allows CHRO, even if the employer did not obtain written consent, to find the corrective action was reasonable and not harmful to the claimant, based on the parties' presented evidence.
- Corrective action includes:
  - Relocating the employee
  - Assigning him/her to different work schedule
  - Making other substantive changes to terms and conditions of employment.

Complaint Filing Deadline

- Extends deadline for filing (all types) of discrimination complaints that occurred on or after October 1, 2019 from 180 days of the alleged discrimination to 300 days.

Discovery

- Requires that CHRO and each party to a CHRO administrative hearing must have opportunity to inspect and copy relevant and material records, papers, and other documents not in the party's possession.
- Allows presiding officer to:
  - Order a party to produce these documents
  - Issue a nonmonetary order against a party who fails to comply within 30 days.
- Nonmonetary order may:
  - Find that the matters that are subject of order are established as set forth in other party's claim.
  - Prohibit noncomplying party from introducing designated matters into evidence.
  - Limit that party's participation as to issues or facts relating to the order, and
  - Draw an adverse inference against that party.

CHRO Proceeding Damages

- Permits CHRO presiding officers on a finding of a discriminatory employment practice to:
  - Determine the amount of damages including complainant's actual costs due to discrimination, and
  - Allow reasonable attorneys' fees and costs.

Civil Actions

- Allows CHRO's executive director to assign legal counsel to bring a civil action concerning a discriminatory practice, rather than the case proceeding to an administrative hearing, if it would be in the public's interest and the parties mutually agree.
- Case must be tried without a jury.
- If court finds that the respondent committed a discriminatory practice, requires the court to order the respondent:
  - to pay CHRO its fees and costs in addition to a civil penalty up to $10,000 when evidence of discrimination is established by clear and convincing evidence.

Civil Action Damages

- Allows courts to award punitive damages in discrimination cases that were released from CHRO jurisdiction.
  - (In response to Connecticut State Supreme Court ruling in *Tomick v. United States Parcel Service* that the statute at that time did not authorize court to award punitive damages).

To Do’s

- Your policy may need to be updated.
- Incorporate email to employees with electronic receipts.
- Review your handbook
- Set up training plan
  - Consider training now
  - Keep training record
- Post Notices

EEO-1

EEO-1 Reporting

- EEO-1 Form Due September 30, 2019.
- Employers with 100 employees and certain federal contractors.

EEOC Files Pay Discrimination Suit Against University of Miami

- July 29, 2019: EEOC filed wage discrimination suit claiming University of Miami violated federal law by paying a female professor at the school less than a male counterpart for performing equal or similar work.
- Lawsuit claims University of Miami paid a male political science professor more money than a female political science professor even though the two professors were both awarded promotion to full professor on their first attempt at promotion, at the same time, and with similar reviews by faculty.
- The female professor at the College of Arts and Sciences was able to confirm that the university was paying her less than her male counterpart through an inadvertently sent email.

EEOC to Employers

- “Employers often get away with wage discrimination because of the secrecy around employee compensation. In this case, an email confirmed what the professor had already suspected – that she was not being treated equally to her male colleagues. The EEOC will fight vigorously to enforce her rights.”

U.S. DOL Sues Oracle for Wage Discrimination

- August 22, 2019: Department of Labor lawsuit accuses software company Oracle of paying minorities and women less than white male employees.
- DOL alleges Oracle paid minorities and women less in primarily two ways: by basing starting salaries on previous salaries and by steering these employees into lower paying jobs upon hire.
- Suit claims more than 4,000 Oracle female, black and Asian employees at the Redwood City, CA location were underpaid.
- The suit also claims that Oracle had a strong preference for hiring Asian students with visas, as these employees were dependent upon Oracle for sponsorship to stay in the United States and therefore extremely vulnerable to wage discrimination.
- 90 percent of the 500 engineers hired at Oracle headquarters through student recruiting programs from 2013-2016 were Asian. Of those 500 engineers, only six were black.
- Oracle has been threatened with the cancellation of its existing government contracts, worth more than $100 million, and a ban on any new contracts until it corrects the discriminatory practices and pays affected employees lost wages.

School District Pays $11K to Settle EEOC Pay Discrimination Suit

- May 16, 2019-, Kansas school district agreed to pay $11,250 to settle an equal pay discrimination lawsuit filed by EEOC.
- Per EEOC, Julie Rosenquist was hired as the principal of Gridley Elementary and Southern Coffey County Middle School in 2015 and was paid $5,000 less than her male predecessor.
- In 2017, when Rosenquist left the position, District paid her male replacement the same salary as Rosenquist's male predecessor.

EEOC to Employers

- “Ensuring equal pay protections for all workers remains one of the agency’s top priorities. We urge all employers to look closely at their pay practices and ensure that they are paying women and men equally for doing jobs that require the same skill, effort, responsibility, and working conditions”

Vice Media to Pay $1.8 Million to Settle Wage Discrimination Suit

- March 27, 2019-Settlement part of class action lawsuit in which women employees alleged they were systematically underpaid.
- Initial suit filed by female project manager from 2014-2016. Alleged Vice relied on past salary data to pay current employees which resulted in women being systematically underpaid.
- Alleged she had hired a male subordinate who was paid $25,000 more than she was, and later was promoted and became her supervisor.
- Other men were being paid more for the same roles as women in the company, according to the lawsuit.
- Company agreed in mediation to a payout to 675 past women employees.

EEO-1: Who Must Report?

- Employer with 100 or more employees; ***or***
- Employer who has fewer than 100 employees but is owned, affiliated with, or controlled by a company with more than 100 employees overall; or
- Federal contractors who:
  - (1) are not exempt as provided for by 41 CFR 60-1.5;
  - (2) have 100 or more employees;
  - (3) are prime contractors or first-tier subcontractors; **and**
  - (4) have a contract, subcontract, or purchase order amounting to $50,000 or more; **or** serve as depositories of Government funds in any amount; **or** are financial institutions which are issuing and paying agents for U.S. Savings Bonds and or savings notes.

EEO 1 Component 2 Reporting Due September 30, 2019

- Applicable employers must file compensation data for calendar years 2017 and 2018 by September 30, 2019.
- Data filed electronically at https://eeoccomp2.norc.org/login.

When Do Employers Count Their Employees?

- Employers count employees during “workforce snapshot period”.
- Workforce snapshot period is self-selected pay period between October 1 and December 31 of the reporting year.
  - For 2017 reporting period, the snapshot period will be a pay period between October 1, 2017 and December 31, 2017.
  - For 2018 reporting period, the snapshot period will be a pay period between October 1, 2018 and December 31, 2018.
- Only full and part-time employees who were on the employer’s payroll during the workforce snapshot period are counted.
- Employers are permitted to choose different workforce snapshot periods for the two reporting years if they so choose.

EEO 1 Reporting Content Overview

- Employers will report in 2 areas
  1. Total number of full-time and part-time employees by demographic categories (ethnicity, race, gender) in each of 12 pay bands listed for each EEO-1 job category based on W-2 earnings.
  2. Total number of hours worked by employees by demographic categories in each pay band.

Component 2: Pay Data

- To identify compensation band in which to count an employee, employers use “Box 1-Wages, tips, other compensation” as measure of pay.
- Employers then tally total number of employees who fall into each compensation band by job category.
- If there is no employee in a compensation band, employers leave the cell blank.

Example: Pay Data Reporting

Job Categories	Salary Compensation Band	Number of Employees (Report employees in only one category)														
		Race/Ethnicity														Total Col. A-N
		Hispanic or Latino		Non/Hispanic or Latino												
				Male						Female						
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or more races	
		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1 Executive/ Senior Level Officials and Managers	1. $19,239 and under															
	2. $19,240 - $24,439															
	3. $24,440 - $30,679															
	4. $30,680 - $38,999		1	1	1		1	1		1	1		1	1		9
	5. $39,000 - $49,919	1				1										2
	6. $49,920 - $62,919															
	7. $62,920 - $80,079															
	8. $80,080 - $101,919															
	9. $101,920 - $128,959															
	10. $128,960 - $163,799															
	11. $163,800 - $207,999															
	12. $208,000 and over															

Component 2: Hours Worked

- Component 2 has a second matrix to report hours-worked data that corresponds to the matrix to report hours-worked.

Counting Hours Worked

- For non-exempt employees, employers must report the actual hours worked.
- For FLSA-exempt employees, employers have the option to either:
  - Report actual hours worked by the exempt employee if the employer already maintains accurate records of this information; or
  - Report a proxy of 40 hours per week for full-time exempt employees and 20 hours per week for part-time employees, multiplied by the number of weeks the employees were employed during the EEO-1 reporting year.

Example: Hours Worked Reporting

Job Categories	Salary Compensation Band	For each cell provide the TOTAL Number of Hours worked in last year														
		Race/Ethnicity														Total Col. A-N
		Hispanic or Latino		Non/Hispanic or Latino												
				Male						Female						
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or more races	
		A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
1 Executive/ Senior Level Officials and Managers	1. $19,239 and under															
	2. $19,240 - $24,439															
	3. $24,440 - $30,679															
	4. $30,680 - $38,999		2030	2030	2080		2080	2080								10,300
	5. $39,000 - $49,919	2080				2080				2080	2080		2080	2080		12,480
	6. $49,920 - $62,919															
	7. $62,920 - $80,079															
	8. $80,080 - $101,919															
	9. $101,920 - $128,959															
	10. $128,960 - $163,799															
	11. $163,800 - $207,999															
	12. $208,000 and over															

To Do’s

- Download instructions
- Select pay period for counting employees
- Identify problems
  - Be mindful of same job/same length of service

Connecticut FMLA

Timetable of Paid/Unpaid Leave Law

- January 1, 2020:
  - The FMLA Insurance Authority begins conducting a public education campaign for individuals and employers regarding the Family and Medical Leave Insurance Program.
- January 1, 2021:
  - Employers begin withholding employee payroll contributions.
- January 1, 2022:
  - Deadline for DOL commissioner to adopt regulations concerning FMLA
  - Changes to state's existing unpaid FMLA law go into effect (employer with 1 employee rather than 75 employees covered, expanded definition of family, etc.)
  - FMLI program begins paying FMLI benefits to covered employees.
  - Employer non-charge goes into effect.
- July 1, 2022
  - At time of hiring, and annually thereafter, employers must provide written notice to each of the employer's employees.

New State Laws: CT Paid FMLA / Changes to Unpaid FMLA Law

- P.A. 19-25- An Act Concerning Paid and Family Medical Leave.
  - Establishes a Paid Family and Medical Leave Program
  - Enacts sweeping changes to the existing state Family and Medical Leave Law
  - Affects your handbook, FMLA forms, will require new forms, employee communication, and communication with your payroll service.

The Paid FMLA Program

- Overview:
  - Applies to all private sector employees (except private elementary and secondary school employees)
  - Funded by a maximum contribution of 0.5% of each employee's wages
  - Administered by the Paid Family and Medical Leave Insurance Authority (Authority)
  - Allows employee to take 12 weeks of paid leave over a 12-month period (14 in case of serious health condition that results in incapacitation from pregnancy).

Part 1: The Leave in Paid Family and Medical Leave

Eligibility for Leave

1. Individual must have earned at least $2,325 during his/her highest earning quarter within their base period; and
    - Base period= First four of the five most recently completed quarters.
2. Individual must:
    - Be presently employed by an employer with at least 1 employee; or
    - Have been employed by an employer in the previous 12 weeks; or
    - Be a sole proprietor or self employed individual who lives in Connecticut and enrolled in the program.
3. Individual must be:
    - Private sector employee, enrolled sole proprietor or self-employed individual, or covered public sector employee.

Eligibility: Reasons for Leave

- Allowable reasons for leave:
  - Those under current state FMLA leave law.
  - Those that amend current state FMLA leave law effective January 1, 2022.
    - Reasons for leave that amend state FMLA law apply to both paid and unpaid leave.

Current FMLA Qualifying Reasons for Leave

- Current state FMLA leave allowed for:
  1. Birth of employee's child
  2. Placement of a child with employee for adoption or foster care.
  3. Spouse, son, daughter, or parent's serious health condition.
  4. Employee's own serious health condition
  5. To serve as organ or bone marrow donor.
  6. For certain family members who are in armed forces undergoing treatment for injury incurred in line of duty.
  7. Under certain circumstances when family members are on active duty in military or notified of impending call to active duty
  8. Family violence victims

New FMLA Qualifying Reasons for Leave

- Effective January 1, 2022, Act allows leave:
  - "In order to care for a family member of the employee, if such family member has a serious health condition."

Definition of “Family Member”

- Spouse
- Sibling
- Son or daughter
- Grandparent
- Grandchild
- Parent
- Individual related to the employee by blood or affinity whose close association the employee shows to be equivalent of those family relationships.

Family Definitional Changes

- “Grandchild” means a grandchild related to employee by:
  - Blood
  - Marriage
  - Adoption by a child of the grandparent
  - Foster care by a child of the grandparent.
- “Grandparent” means grandparent related to employee by:
  - Blood
  - Marriage
  - Adoption of a minor child by a child of the grandparent
  - Foster care by a child of the grandparent.

Family Definitional Changes

- Definition of “parent” to include:
  - Parent-in-law
  - Individual who stood in loco parentis to the eligible employee when the employee was a child.
- Definition of “son or daughter” to include
  - Individual to whom the employee stood in loco parentis when individual was a child.
- Definition of spouse:
  - Removes “a husband or wife” and replaces with “person to whom one is legally married”
- Definition of sibling:
  - Brother or sister related by blood, marriage, adoption by a parent of the person, foster care placement.

Notice

- Employee seeking leave must:
  1. Provide notice to the Authority and employer about need for benefits in a form and manner to be determined by the Authority.
  2. Provide certification upon the Authority's request, to the Authority and the employer about their need for leave.
     - Certifications must be provided in same manner state FMLA requires for medical certifications.

Part 2: The Paid in Paid Family and Medical Leave

Contributions: Who Must Contribute

- Who must contribute to the program:
  1. All private-sector employees except private elementary or secondary school employees.
  2. “Covered public sector employees”:
     - State employees who are not in a collective bargaining agreement
     - State, municipal, or local or regional board of education employees whose collective bargaining agent negotiates inclusion in the program. Once the municipal employer or board of education negotiates inclusion in program for members of one of its bargaining units, any employees of the municipality or BOE who are not part of collective bargaining unit also become covered employees.
  3. Sole proprietors who elect to opt-in to the program.

Contributions: When

- Contributions begin January 1, 2021, and not later than February 1, 2021.
- Employers required to deduct and withhold the contribution amount from employee wages each payroll period and make payments on behalf of the employee to the fund.

Contributions: How Much

- Paid FMLA Insurance Authority will determine employee contribution rate each year.
- Maximum contribution rate Authority can establish is .05% of employee wages.
  - Wages=all remuneration for employment and dismissal payments.
- Date for establishing the first contribution rate November 1, 2021.
- Authority can revise contribution rate annually each November 1, beginning November 1, 2022.
  - New contribution rate would become effective that January.

Contributions: How Much

- Employee wages subject to the contribution rate are capped at the amount of earnings subject to Social Security taxes.
- Social Security cap is set by Commissioner of Social Security annually.
- In 2019, income subject to Social Security tax capped at $132,900.

Benefit

- Provides 12 weeks paid leave during any 12-month period
  - Provides 14 weeks for a serious health condition resulting in incapacitation during pregnancy.
- Beginning January 1, 2022 weekly benefit for employees will be:
  - 95% of 40 times the minimum wage and 60% on earnings above the minimum wage.

Benefit

- Maximum weekly benefit can not exceed 60 times the minimum wage which is the equivalent of:
  - $ 780 on a $13 minimum wage (August, 2021)
  - $ 840 on a $14 minimum wage (July, 2022)
  - $ 900 on a $15 minimum wage (June, 2023)
- Authority can reduce benefits in order to ensure the program's solvency.

Benefit

- Act allows employees to receive FMLI benefits concurrent with employer-provided employment benefits, provided total compensation during benefit period does not exceed employee's regular rate of pay.
- Employee can not collect FMLI benefits and unemployment compensation or workers' compensation benefits at the same time.

Other Provisions of CT Paid FMLA Law

- **Effective July 1, 2022**. Each employer must, upon hiring, and annually thereafter, provide written notice to each of the employer's employees:
  - (1) of the entitlement to family and medical leave and the terms under which such leave may be used,
  - (2) of the opportunity to file a claim for compensation under the program,
  - (3) that retaliation by the employer against the employee for requesting, applying for or using family and medical leave for which the employee is eligible is prohibited, and
  - (4) that the employee has a right to file a complaint with the Labor Commissioner for any violation of said sections.

Other Provisions: Private Plans

- Allows an employer to apply to the Authority for approval to meet its obligations under the program through a private plan. Among the requirements:
  - Authority must evaluate private plan in coordination with the Insurance Department, as appropriate.
  - Private plan must at a minimum confer same rights, benefits, and protections as FMLI plan.
  - Must not cost employees more that the premium charged to employees under the state program
  - Be approved by a majority vote of employer's employees
- If plan is self-insured, employer must provide surety bond to state.

Part 3: Changes to Existing State FMLA Law (Unpaid)

Changes to CT's Existing Leave Law (Unpaid)

- Changes effective **January 1, 2022**.
  1. Extends FMLA to cover private-sector employees with at least 1 employee, rather than 75 employees.
  2. Lowers employee work threshold to qualify for leave from (a) 12 months of employment and 1000 work-hours with the employer to (b) 3 months of employment with the employer, with no minimum requirement for hours work.
  3. Changes maximum FMLA leave allowed from 16 weeks over a 24-month period to 12 weeks over a 12 month period. Allows 2 additional weeks due to a serious health condition that results in incapacitation due to pregnancy.

Changes to CT's Existing Leave Law (Unpaid)

- Changes effective **January 1, 2022.**
    4. Limits extent to which employer can require employee taking FMLA to use vacation, personal, or medical or sick leave—employee must retain not less than two weeks of such leave.
    5. Adds to list of "family members" for whom leave can be taken.
    6. Expands the family members for which employers must allow their employees to use up to two weeks of any employer-provided sick leave.
    7. Act creates a "non-charge" against an employer's unemployment tax experience rate when an employee's separation is due to the return of someone who was on bona fide FMLA leave.
        - Allows employer to lay off an employee who was temporarily filling the job of an employee on FMLA leave without increasing employer's unemployment taxes.

To Do’s

- July 2020-Begin compliance program
- Talk with payroll service
- Look for deduction form-we’ll advise
- Prepare employee communication
- Train supervisors
- Train HR
- Change your forms

Other FMLA Developments

Changes to Federal FMLA Forms Coming

- U.S. DOL seeking comments until October 4, 2019 on revised FMLA forms.
- Changes include:
  - Fewer questions requiring written responses. Instead, forms would have statements with check boxes.
  - Reorganization of medical certification forms to more quickly determine if an impairment is a serious health condition covered by the FMLA.
  - Clarifications to reduce the demand on health care providers for follow-up information.
- Employers continue to use current FMLA form until further notice from DOL.

Mass. Issues Final Paid FMLA Regs; Contributions Begin October 1

- Final Regs issued by Massachusetts Department of Family and Medical Leave on June 18, 2019.
- Substantive changes made to final regs. Most notably:
  - 24 categories of employees are now exempt from PFMLA, including fully commission-based real estate brokers and salespeople and insurance agents and solicitors classified as W-2 employees.
  - Definition of "child" changed. Employees can now take leave to care for an adult child.
  - Definition of "intermittent leave" changed. Employer may now require that employees take intermittent leave in increments no smaller than a minimum amount designated by the employer (up to four consecutive hours).

- Notice- Due September 30, 2019
  - Deadline for employers to send written notice to workforce of PFML benefits, contribution rates, and other provisions as outlined in M.G.L. c. 175M sec. 4 extended from June 30th to September 30, 2019.
  - Must include the opportunity for an employee or self-employed individual to acknowledge receipt or decline to acknowledge receipt of the information.

- Contributions- Begin October 1, 2019
  - Employers with 25 or more covered individuals required to pay a share of the required contributions.
  - Employers with fewer than 25 covered individuals not required to pay the employer's share of contributions but must still remit payment on behalf of their covered individuals.
- Quarterly Report and Contributions- Due January 31, 2020
  - Employer must complete quarterly report and submit contributions for the previous calendar quarter (October - December) through MassTaxConnect.

Other New Laws

Minimum Wage Increases October 1, 2019

- P.A. 19-4: An Act Increasing the Minimum Wage. **Effective October 1, 2019.**
- Bill increases the minimum wage from the current level of $10.10 per hour as follows:
  - $11.00 on October 1, 2019
  - $12.00 on September 1, 2020
  - $13.00 on August 1, 2021
  - $14.00 on July 1, 2022
  - $15.00 on June 1, 2023

- **Increases after 2023**
  - Beginning January 1, 2024, it indexes future annual minimum wage changes to the federal employment cost index for “wages and salaries for all civilian workers”.
- **Potential for freezes**
  - Allows the Labor Commissioner to recommend that minimum wage increases be suspended after two consecutive quarters of negative growth to the state’s gross domestic product.

- **Tip Credit**
  - Freezes the employer's share of the minimum wage requirement for hotel and restaurant staff who customarily receive tips.
  - Current levels will remain the same — $6.38 for hotel and restaurant staff, and $8.23 for bartenders.
  - So long as the employees' tips make up the difference between the increasing minimum wage and the tip credit, employers can still rely on those tips to "pay" the employees.

- **Training Wages**
  - Act eliminates the “training wage” exceptions for “learners and beginners” and limits the training wage to only those under age 18 (excluding emancipated minors).
  - Training wage has to be the greater of $10.10 per hour **or** 85% of the minimum wage.
  - Only allows for the training wage to be paid in the first 90 days of employment, rather than the first 200 hours.
  - In the following year (October 1, 2020), the bill bars employers from taking any action to displace an employee over 18 to hire people at the training wage.

Non-Competes

- Bill No. 7424. An Act Concerning The State Budget For The Biennium Ending June Thirtieth, 2021, And Making Appropriations Therefor, And Implementing Provisions Of The Budget. **Effective July 1, 2019.**
- **Bans Non-Competes for Home Healthcare Workers.**
  - Prohibits non-compete agreements that restrict the rights of an individual to provide homemaker, companion, or home healthcare services:
    1. In any geographic region of the state for any period of time; or
    2. To any individual

Non-Competes

- Prohibition appears on p. 416 of 567-page budget bill.
- Budget bill passed both houses on June 4, 2019.
- Prohibition effective upon governor’s signing the bill.
- Governor is expected to sign.

Topic: DOL Opinion Letters

DOL Resumes Issuing Opinion Letters

- DOL stopped issuing opinion letters in 2010 in favor of more general guidance.
- Began issuing opinion letters again this year.

April 2019 Agricultural Employment

- This letter responds to your request for an opinion concerning whether a farm's "light processing" activities—cutting or freezing its own agricultural products—and additional activities of packing, storing, and delivering those products, are primary or secondary agriculture for purposes of the Fair Labor Standards Act's (FLSA) section 13(b)(12) exemption from overtime pay.

- You represent that the employees of this farm work in field crop production; washing, packing, and storing products grown on the farm; and transporting these products to market.
- The farm engages in “light processing” of the farm’s own products without adding other ingredients. These “light processing” activities include cutting or freezing the farm’s own fruit, vegetable, and meat products on and off the farm. The farm also packs, stores, and transports these cut or frozen products to market.

- We cannot determine from the facts whether the farm's activities of cutting or freezing its own fruit, vegetables, or meat are subordinate to its farming operations or amount to an independent business.
- If they are subordinate to farming operations and do not amount to an independent business, these activities are secondary agriculture, and the employees employed in those activities will be exempt from overtime pay under section 13(b)(12).

U.S. DOL Issues FMLA Opinion Letter: March, 2019.

- Issue: Can an employer permit an employee to exhaust paid sick or other leave before designating the leave as FMLA-qualifying?

Court Ag Exemption

- In July, a U.S. District Court judge in the Southern District of Georgia recently found that Bland Farms Production and Packing LLC (Bland Farms), one of the largest producers of Vidalia onions in the country, failed to pay overtime to 460 workers during spring harvest seasons from 2012-2016.
- During this time, Bland Farms grew approximately 1,500-2,100 acres of Vidalia onions on land it either owned or leased. Bland Farms then packed those onions in its packing shed. In the same packing shed, Bland Farms workers also packed onions grown on land owned or leased by other onion growers who grew onions for Bland Farms (contract growers). Bland Farms did not pay the workers in the packing shed overtime for the 2012-2017 harvest seasons.

- To determine whether farm employees are eligible for the agricultural labor exemption, an employer must compare the work performed by the employee to the FLSA's definition of agriculture, broken down into either primary or secondary agriculture.

- **Primary agriculture** includes cultivation and tilling of soil; production, cultivation, growing, and harvesting agricultural and horticultural commodities; and raising livestock, bees, fur-bearing animals, or poultry.

- **Secondary agriculture** includes any practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. For the agriculture exemption to apply to secondary practices, "the practices in question must relate to the farmer's own farming operations and not to the farming operations of others . . . ." *Mitchell v. Huntsville Wholesale Nurseries, Inc*., 267 F. 2d 286, 290 (5th Cir. 1959).

- Court ruled: Farm Bland Farms failed to pay overtime. Ag Exemption did not apply.
- Bland Farms, therefore, hads to repay all of the overtime wages due from 2012-2016 and the overtime plus an amount equal in liquidated damages for the part of 2014 after the lawsuit was filed and all of 2015 and 2016.
- Cost: $1.4 Million

Answer:

- Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee *nor the employer* may decline FMLA protection for that leave. . . . Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation."
- "[I]f an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement."

U.S. DOL Opinion Letter: August 8, 2019

- Issue: Can parents of students with special education needs may take leave under the Family Medical Leave Act (FMLA) to attend a meeting related to addressing those needs.

- Facts:
- Employee has two children in school with serious health conditions under the FMLA.
- Federal law requires public schools to develop an Individualized Education Plan (IEP) for a child who receives special education and related services with input from the child's parents, teachers, school administrators, and related services personnel.
- Such "related services" include services such as audiology services, medical services, physical therapy, psychological services, speech-language pathology services, and rehabilitation counseling services, among others.
- The requestor's children were receiving physician-prescribed support services, such as occupational, speech, and physical therapy.
- Four times a year, the school holds meetings to review the children's educational and medical needs, well-being, and progress.

- Answer:
- The employee qualifies for intermittent FMLA leave for the meetings:
  - The meetings were to care for a family member with a serious health condition;
  - Caring for a family member with a serious health condition includes making arrangements for changes in care; and
  - An employee may make arrangements for changes in care, even if the care is not provided by a facility that provides medical treatment.
  - DOL analysis and conclusion apply to "*any meetings held pursuant to the [Individuals with Disabilities Education Act], and any applicable state or local law, regardless of the term used for such meetings*."

DOL Issues FLSA Opinion Letter: March, 2019

- DOL addresses whether and to what extent the Fair Labor Standard Act applies when it conflicts with state and local wage and hour laws.
- Issue: New York law excludes live-in janitor from minimum wage and overtime requirement, FLSA does not. Which law applies?

Answer:

- When a federal, state, or local minimum wage or overtime law differs from the FLSA, the employer must comply with *both* laws and meet the standard of whichever law gives the employee the greatest protection.
- Although New York requirements do not cover residential janitors, the FLSA does.
- Employer, therefore, must adhere to FLSA's minimum wage and overtime requirements or face possibility of liquidated damages for FLSA noncompliance.
- Compliance with state law no longer excuses noncompliance with the FLSA.

Topic: Healthcare

Status of the ACA

- Individual mandate effectively repealed under Tax Cut and Jobs Act, signed into law on December 22, 2017.
- Federal judge in Texas ruled the Affordable Care Act unconstitutional on December 14, 2018.
- Judge Reed O'Connor held law cannot stand after Congress rolled back the individual mandate.
- Appeal pending in 5th U.S. Circuit Court of Appeals.
- Tuesday (Jan. 21. 2019) US Supreme Court refused to Fast Track Appeal-there will be no further action this year.

Status of ACA

- ACA remains in effect while appeal pending.
- Employer mandate remains in effect.

Topic: FLSA and Wages

Overtime Rule

- March 7, 2019- U.S. DOL proposed rule increasing salary threshold for exempt employees from $23,660 ($455/wk.) to $35,308 per year ($679/wk.).
- No changes to the duties tests were proposed.
- Comment period ended May 21, 2019.
- Final FLSA rule will now in effect:
  - $684 per week ($35,568 per year)

Topic-#Metoo

EEOC Sexual Harassment Claims Up

- Even as number of overall complaints filed with the EEOC have decreased, number of sexual harassment claims have gone up.
  - In 2018, the EEOC received 7,609 sexual harassment charges — a 13.6% increase from 2017.
- The amount the EEOC has recovered from sexual harassment claims has also gone up.
  - The EEOC received $56.6 million in monetary benefits from sexual harassment claims in 2018 — up from $46.3M the prior year.
- Retaliation claims continue to climb.
  - 20 years ago, retaliation claims of all types represented just 21.7% of all charges filed.
  - In 2018, they represented 51.6% of all claims filed. That means over half of all claims filed contain a retaliation charge.

EEOC Settles with IHOP for $700k

- IHOP owners, supervisors, managers and co-workers subjected female employees to ongoing sexual harassment Nevada and New York locations.
- Included groping; sending pictures of male genitalia; propositions for sex; viewing of pornography; vulgar comments; and unwanted touching and kissing.
- Company failed to take corrective action when the victims complained, instead reducing their work hours or firing them.
- Since 2005, company's sexual harassment policy required complaints be made to corporate office in writing within 72 hours of the harassing incident.
- EEOC contends policy deterred victims of harassment from reporting, removed the responsibility of local managers and supervisors to correct harassment that they were aware of, and emboldened the abusers.

- IHOP required to:
  - Eliminate the 72-hour policy for reporting harassment;
  - Establish and maintain a human resources department;
  - Hire an outside monitor;
  - Create performance review standards for compliance with Title VII;
  - Provide extensive training to management to prevent and correct harassment and retaliation, along with civility training.
- EEOC: "Employers should remember that they are responsible for creating an environment free of harassment. This includes empowering managers to address such conduct when they become aware of it."

Alorica Settles EEOC Sexual Harassment Lawsuit For $3.5 Million

- Alorica Inc., one of nation's largest call center firms, based in Irvine, CA.
- Male and female customer service employees subjected to harassment, including a sexually hostile work environment, by managers and coworkers.
- Women subjected to unwanted touching of their breasts and buttocks.
- Those who complained were terminated or felt compelled to resign.
- Several male workers were also subjected to harassment, with female co-workers talking about sex.
- Onsite human resources staff failed to properly address the harassment despite repeated complaints by employees.

Flash Market Settles with EEOC for $100k

- Flash Market, Inc., owner/operator of 90 convenience store gas stations in the Mid-South under the Citgo, Phillips, Conoco and Shell brands.
- Female cashier alleged area manager propositioned her for sex, frequently made sexually explicit comments, and subjected her to inappropriate touching on several occasions.
- Cashier complained to store manager about the conduct. Store manager said she could not help because she was being sexually harassed by area manager as well.
- Area manager fired the cashier after she filed a discrimination charge with the EEOC.

- Flash Market entered into an 18-month consent decree requiring company to train employees and managers on sexual harassment and conduct exit interviews with departing employees to determine if they were subjected to sex discrimination or retaliation during their employment.

More Sexual Harassment Charges Against McDonald's

- May 25, 2019: 25 lawsuits and regulatory charges filed against McDonald's alleging condoning sexual harassment and retaliation.
- Suits allege "groping, indecent exposure, propositions for sex and lewd comments by supervisors against workers as young as 16 years old."
- Complaints of sexual harassment allegedly ignored and sometimes mocked;
- Many complainants had hours reduced or received unwarranted discipline or termination.
- Last September, McDonald's workers in 10 cities staged one-day strike to protest sexual harassment.
- More than 50 complaints filed against McDonald's in last 3 years.

Topic: Drugs

NYC Bans Pre-Employment Marijuana Testing

- April 9, 2019: New York City Council passed law prohibiting employers from conducting pre-employment drug testing for marijuana.
- Law amends New York City Human Rights Law and takes effect May 10, 2020.
- "It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to require a prospective employee to submit to testing for the presence of any tetrahydrocannabinols or marijuana in such prospective employee's system as a condition of employment."

Exceptions to Ban

- Certain types of jobs, including:
  - Law enforcement;
  - Certain types of construction and maintenance jobs;
  - Positions requiring a commercial driver's license;
  - Positions requiring the supervision or care of children, medical patients or vulnerable persons;
  - Positions with the potential to significantly impact the health or safety of employees or members of the public.

Exceptions to Ban

- The law specifically does not apply to drug testing required by:
  - Any regulations promulgated by the U.S. DOT requiring pre-employment drug testing, and any state or city regulations that adopt the DOT rules;
  - Contracts or grants entered into between the federal government and an employer that requires drug testing;
  - Any federal or state law that requires drug testing of prospective employees for purposes of safety or security; or
  - Any applicants whose prospective employer is a party to a valid collective bargaining agreement that specifically addresses the pre-employment drug testing of such applicants.

Connecticut Marijuana Testing

- Connecticut permits pre-employment testing for marijuana.
- On September 5, 2018, Connecticut federal district court held employer discriminated against prospective employee by rescinding a job offer based on a positive preemployment drug test in violation of Connecticut's Palliative Use of Marijuana Act (PUMA) -*Noffsinger v. SCC Niantic Operating Company (Noffsinger II)*

Connecticut Marijuana Testing

- Decision emphasized PUMA does nothing to limit an employer's ability to prohibit the use of intoxicating substances during work hours.
- In the first decision in the case (*Noffsinger I, 2017)*, the court considered and rejected employer's argument that federal law, which prohibits the use of marijuana for any purpose, trumped PUMA's antidiscrimination provision.

Connecticut Recreational Marijuana Bill Fails

- Three separate marijuana bills passed out of committees this year:
  - One would lay the foundation for a marijuana industry in Connecticut;
  - One would erase the criminal records of people who have committed low-level drug offenses;
  - Third deals with taxation and distribution of the revenue.
- Bills were to be combined into a single omnibus bill, prior to vote.
- Died after Democratic Caucus meeting where lawmakers realized they did not have enough votes favoring the measure.
- Proponents of effort to legalize recreational marijuana exploring placing issue on ballot next year as a constitutional amendment.

Massachusetts Went Retail in 2018

- First recreational marijuana dispensaries opened on November 20, 2018.
- Massachusetts currently has 18 retail dispensaries open.
- On May 16, 2019, Cannabis Control Commission approved policy establishing the framework for a social consumption pilot program, allowing for eventual opening of marijuana cafes.
- Public consumption of marijuana in any form is currently illegal in the state. Law would need to be amended before program could take effect.

Topic: Immigration

- No Match
- Enforcement

Another Round of No-Match Letters to be Issued to Employers this Fall

- So far this year the Social Security Administration sent 577,000 no-match letters (officially called Employer Correction Request notices) to employers.
- The SSA recently announced in a letter to Rep. Jim Costa, D-Calif., that it plans to mail a second set of no match letters this fall.
- Notifications are sent to employers identified as having at least one name and Social Security Number (SSN) combination submitted on wage and tax statement (Form W-2) that does not match SSA records.

No Match Pitfalls

- Failure to address a No-Match Letter and/or failure to follow-up with an employee and their progress towards resolving the no-match could lead to a finding by ICE of constructive knowledge of employing unauthorized workers.
- Employers receiving no-match letters must not only make an effort to resolve the issues identified by the SSA, but must also exercise care when doing so in order to avoid violating the antidiscrimination provisions of the Immigration and Nationality Act.

Employer Response to No-Match Letter

- Verify employer information matches the name and SSN on employee's Social Security card.
- If it does not match, ask employee to provide the exact information as it is shown on the employee's card.
- If it matches the employee's card, ask employee to check with any local Social Security office to resolve the issue.
- If resolved at that stage, employee must notify the employer of any corrections, and the employer must update its records, including possibly filing a Form W-2c to correct the original W-2, and Form 941-x to update wage reports on the original Form 941.
- If the mismatch cannot be reconciled within a 30-90 day "reasonable period of time," the employer may have to terminate the worker until suitable documentation can be provided for both I-9 and payroll tax purposes.

Mistakes to Avoid

- Requesting that the employee provide specific documents, such as his or her Social Security card, to verify the information;
- Requesting the employee complete a new Form I-9 to reverify the employee's work authorization based solely on receipt of the no-match letter;
- Making assumptions about the employee's work authorization or immigration status and taking adverse action, such as terminating employment, solely based on receipt of a no-match letter;
- Not implementing or following the same procedures for all employees regardless of immigration status or citizenship.

Employers Face Surge in Immigration Enforcement Actions

- Criminal investigations and I-9 audits surged in FY2018 following ICE's announcement of its intent to increase its worksite enforcement efforts.
- According to ICE, in FY2018:
  - 6,848 worksite investigations were opened (compared to 1,691 in FY2017);
  - 5,981 I-9 audits were initiated (compared to 1,360 in FY 2017);
  - 779 criminal and 1,525 administrative worksite-related arrests occurred (compared to 139 and 172, respectively, in FY2017).

High-Profile Enforcement Actions

- April 2018: Search warrant was executed at a slaughterhouse in Tennessee. 104 employees arrested. Owner of the company pleaded guilty to tax fraud, wire fraud, and employing illegal aliens, and agreed to pay $1.4 million in restitution even before his scheduled May 2019 sentencing.
- August 2018: 17 individuals at agricultural firms in Nebraska, Minnesota, and Nevada arrested connected to an alleged conspiracy to exploit illegal alien laborers for profit, as well as fraud, wire fraud and money laundering.

High Profile Enforcement Actions

- February 2019: 26 individuals working at a California market arrested after a worksite enforcement operation.
- April 2019: Several search warrants executed at a Texas telecommunications equipment repair company and several related staffing companies resulting in the arrest of over 280 employees.
  - Criminal investigation stemmed from an I-9 audit that was initiated after multiple tips indicated that the company had hired illegal aliens and that individuals employed there were using fraudulent identification documents.

ICE Conducting Workforce Visits for STEM OPT

- ICE has begun conducting workplace site visits for F-1 students employed pursuant to optional practical training (OPT) in the science, technology, engineering, and math (STEM) fields.
- While ICE has had the authority to conduct on-site inspections since 2016, it has not exercised that authority until recently.
- Companies that employ STEM OPT workers are encouraged to be prepared in case ICE visits their workplaces.
- Any employer that hires an F-1 student pursuant to STEM OPT is subject to a site inspection.
- The purpose of such a visit is to verify that the employer is complying with the STEM OPT regulations and to ensure adherence to the obligations contained in the employee's Form I-983 training plan.

New Form I-9's Proposed

- In June, the U.S. Citizenship and Immigration Services ("USCIS") posted a new version of Form I-9 for employment eligibility verification in the Federal Register for public comment.
- The current Form I-9 was due to expire on August 31, 2019.
- USCIS has advised employers to continue using the current Form I-9 until further notice.

2018-2019 Court Cases

SCOTUS to Decide Sex Discrimination Cases

- The U.S. Supreme Court will hear trio of cases that could decide whether Title VII covers discrimination because of sexual orientation, status as transgender, or gender stereotyping:
  - *Altitude Express v. Zarda*
  - *Bostock v. Clayton County, Georgia* (Consolidated with *Zarda*)
  - *R.G. and G.R. Harris Funeral Homes v. EEOC*

Altitude Express v. Zarda

- Donald Zarda employed as skydiving instructor for Altitude Express.
- In effort to reassure female customer's concerns about being tightly strapped to Zarda during a tandem dive, Zarda told her that he was "100 percent gay."
- Female customer's boyfriend complained about comment to employer and Zarda was fired.
- Zarda claimed he was fired for being gay and sued under Title VII.
- He lost the initial case. He died in a 2014 wingsuit accident, and his estate appealed his case.

Bostock v. Clayton County Georgia

- Gerald Bostock, a gay man, worked for ten years as a child welfare services coordinator for Clayton County, Georgia.
- In 2013, Bostock began participating in a gay recreational softball league.
- Shortly thereafter, he was criticized for his participation in the league and for his sexual orientation and identity generally.
- During meeting in which Bostock's supervisor was present, at least one individual openly made disparaging remarks about Bostock's sexual orientation and his participation in the gay softball league.
- Around the same time, Clayton County informed Bostock that it would be conducting an internal audit of the program funds he managed.
- Shortly afterwards, Clayton County terminated Bostock allegedly for "conduct unbecoming of its employees."

ADA Contemplates Hostile Work Environment Claims

- 2nd Circuit Court of Appeals ruled for first time that hostile work environment claim can be made under the Americans with Disabilities Act (ADA).
- Christopher Fox, employee with Tourette's syndrome and obsessive-compulsive disorder, sued employer Costco.
- Alleged he was mocked by co-workers and that managers knew about the harassment and sometimes participated.
- Lower court dismissed his claims.

- On appeal, Second Circuit said Fox produced enough evidence to send case to jury to determine "whether the frequency and severity of the mockery rose to the level of an objectively hostile work environment.“
- Second Circuit joined several other circuits in holding that the ADA contemplates hostile work environment claims.
- Court held "because the ADA echoes and expressly refers to Title VII, and because the two statutes have the same purpose — the prohibition of illegal discrimination in employment — it follows that disabled Americans should be able to assert hostile work environment claims under the ADA, as can those protected by Title VII.“

-Fox v. Costco Wholesale Club

Regular, Reliable Attendance Can Be An Essential Function, Connecticut Appellate Court Holds

- Plaintiff was a full-time, one-on-one paraprofessional for schoolchildren.
- While Plaintiff's performance reviews confirmed that she met expectations when she was present at work, 10 of her 13 performance reviews noted that her tardiness and excessive absenteeism interfered with her performance.
- Plaintiff was not eligible for leave under the Family and Medical Leave Act, but was granted a leave of absence coextensive with her banked sick time.
- Plaintiff then requested intermittent leave prospectively.

Connecticut Appellate Court:

- Regular attendance was an essential job function, and
- Where Plaintiff's requests for intermittent extended leave would eliminate that essential function, such leave was not a reasonable accommodation as a matter of law.

- “we fail to see how it is possible to perform the essential function of attending work through an accommodation that provides for even more absences from work . . . the plaintiff’s request to permit her to take intermittent leave, above and beyond that for which she was eligible or already approved, would only exacerbate her existing attendance issues and would further undermine her ability to perform an essential function of her employment, namely, maintaining regular attendance. It is, thus, not a reasonable accommodation.”

-Barbabosa v. City of Manchester

Takeaways from *Barbabosa*

- Each employee's request for an accommodation should be handled through an individualized, interactive process in light of the particular circumstances.
  - Continuous leave of absence or leave extension may constitute a reasonable accommodation depending on the circumstances.
- Employers should be prepared to demonstrate that regular and reliable attendance is an essential function of a position.
  - Court noted the employer's repeated documentation of the negative impact that Plaintiff's absences had on the students she supported.
- State or federal FMLA may protect intermittent absences for eligible employees with a serious health condition, irrespective of whether leave would be a reasonable accommodation.
  - In *Barbabosa*, plaintiff was ineligible for FMLA and the employer considered whether leave was a reasonable accommodation after Plaintiff exhausted time-off to which she was entitled under the employer's policies.

Prorating Bonus Did not Interfere with FMLA Rights

- Do employees who do not meet certain bonus goals due to FMLA leave qualify for such bonuses?
- Moody's Analytics, Inc. employee Gregory Clemens brought suit alleging retaliation for and interference with the exercise of his rights under the FMLA.
- Clemens argued that Moody's unlawfully prorated bonus payments owed to him under the company's incentive program.

- Under incentive program, Clemens was eligible to receive incentive payments for completing certain enumerated tasks throughout the year.
- Employer policy prorated payments under incentive bonus program based on the length of an employee's leave, regardless of the reason for the leave.
- **Held**: "Because employer neutrally applied its policy of prorating bonus payments under the program to *all* types of leave, court determined that Moody's did not violate the FMLA."

-*Clemens* v. *Moody's Analytics, Inc.*

Clemens Takeaways

FMLA Regulations:

- "If a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave."

Clemens Takeaways

- Employers seeking to prorate bonus payments to employees on FMLA leave, or other leave, may want to consider the following:
  - Making bonus structures goal or production based and tied to specific goals, (*e.g.* sales, hours worked, or production);
  - Clearly identifying requirements for obtaining bonuses;
  - Ensuring bonuses distributed to employees on leave are prorated and calculated in same fashion as those on other types of leave
  - Accurately prorating bonus payment so employee is paid for the work he/she put toward the goal; and
  - Paying company-wide bonuses to employees on FMLA leave when bonuses are tied to company results, rather than individual results, or neutrally distributed to all employees.

Second Circuit Says HR Rep Violated NLRA by Calling Police

- A manager at Meyer's Tools announced company was creating a new night-shift supervisor position because employees on night shift were underperforming and took excessive breaks.
- Three employees questioned need for night supervisor and the qualifications for the position.
- One of the questioning employees, Cannon-El, also raised question about poor air quality in the plant, seemingly justifying frequent breaks of night shift employees.
- Manager running the meeting summoned a company vice-president who "began to yell at Cannon-El while standing over him", 'their faces inches apart.'"
- Next day, Cannon-El and other two employees went to HR to complain about the vice-president's conduct the night before.

- Cannon-El then got into “heated verbal exchange” with HR Rep.
- HR Rep gave Cannon-El “to the count of three” to leave the premises or police would be called.
- HR Rep said “one”, and Cannon-El finished by saying “two, three,” and “I have done nothing wrong.”
- Police were called and company suspended and later terminated Cannon-El for refusing to immediately leave the premises when asked.
- Cannon-El sued for interference with rights under NLRA.

- Company argued it was able to fire Cannon-El because he refused to leave HR office and thus trespassed on company property.
- NLRB ruled Cannon-El was terminated because he engaged in protected, concerned activity, and ordered him to be reinstated, with back pay.
- On appeal to the Second Circuit, employer argued Cannon-El lost his legal protection by acting in an intimidating and abusive way to the HR Rep.

- **Held**: Second Circuit held that there are circumstances in which an abusive employee forfeits protection for what is otherwise concerted activity
- In this case, Cannon-El was not sufficiently abusive.
- His conversation with the HR representative, "while heated, did not disrupt any other employee's work or even cause those nearby to close their office doors."
- The argument involved raised voices, but Cannon-El did not use obscenities, engage in physically intimidating conduct, make threats, or disturb customers.

-Cannon-El v. Meyer Tools

Meyer Tools Takeaways

- National Labor Relations Act (NLRA) protects even nonunionized employees who engage in "concerted activity”.
- This can include anything from joint efforts to improve working conditions to complaints to HR, if they are made by more than one individual or undertaken as a call to action.
- Attempts to stifle employee conversations about pay is a particular hot-button issue that often attracts NLRB's attention.
- In general, any time an employee engages in group activity or discussions related to working conditions and is threatened with reprisals, an employer is heading down a risky path.

Conclusion

- Wage Issues/EEO-1: Most immediate priority for employer
- No Match Letters
- FMLA changes need to begin as a project plan in 2019.
  - Handbook, forms, employee communication (Q&A), coordination with payroll, impact on federal FMLA, CT Paid Sick Days
- Sexual Harassment Training