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ATTORNEYS AT LAW



General Counsel Employment Law Report

Prepared By:
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Program Overview
CCHRA Meeting
February 27, 2020

The CCHRA General Counsel, Attorney Michael Foley, will provide a highly interactive explanation of a holistic approach to Employment Law compliance and HR-related risk management within the entire life cycle of the employment relationship:

- Mike will test our understanding of both Massachusetts and Federal employment laws. For example, do you know the answer to these true or false questions:
 - Job descriptions are not required by law and are overrated.
 - If an employee has a "Manager" title and is paid on a salary basis he or she can be considered exempt from overtime.
 - If a worker is free from the employer's control and can use his/her discretion in performing services both under a contract and in fact, then he/she can be retained as an independent contractor and not an employee.
 - In Massachusetts, employers satisfy their obligation to prohibit sexual harassment by posting their sexual harassment policy for all to see.
 - The Commonwealth's Criminal Offender Record Information Law prohibits employers from inquiring about criminal records during the applicant screening process.
- He will outline best practices for developing a strategic approach to effective risk management.
- Mike will also provide compliance tools and resource information. Here is a link to the [2020 Synopsis of Massachusetts and Federal Employment Law and Workplace Regulations](#). This is a very valuable and popular resource that will help your team meet your organization's compliance obligations and will prepare you for Mike's interactive presentation.

This is a presentation you do not want to miss.

#10YearChallenge: Employment Law Version

Here at Foley & Foley we are nothing if not on point. Social media is our life and we follow celebrities closely.

NOT! But the end of a decade and a trendy hash tag could be a good way to review the past 10 years of major employment law developments. This is an overview of federal changes—your state may have seen big changes in the last decade not specifically mentioned here. Drum roll please:

#1 Family and Medical Leave Act (FMLA) expansions: Day in day out the FMLA- related questions are the most common ones for employers we represent. Intermittent leave, return to work, and the interplay with other leaves and laws are just a few of the many issues the FMLA raises. The U.S. Department of Labor implemented regulations that expanded the FMLA in 2009, including an increase in employer and employee notice obligations. While unpaid, FMLA continues to be used (and sometimes abused) with increased frequency. FMLA is not headline grabbing but has a major impact on the workplace.

#2 The Americans with Disabilities Act Amendments Act of 2008 (ADAAA): On its own, the ADA can be **problematic**. The common dance between FMLA leave and ADA accommodation can add tricky moves. The ADA amendments expanded both the scope of the ADA's definition of a disability and the definition of "regarded as" disabled. ADA obligations and case law have enormous repercussions on employers with no end in sight.

#3 Lilly Ledbetter Fair Pay Act: The signing of the Lilly Ledbetter Act in February 2009 is arguably the springboard for state and local pay equity actions nationwide. The Lilly Ledbetter Act reversed the Supreme Court ruling and allowed workers the right to file suit 180 days after the last pay violation, not just 180 days after the initial pay disparity. Ten years after Ledbetter, pay equity cases and statutory law are common in most states. Plus the EEOC has made equal pay protection a priority.

#4 Paid Family Medical Leave: Now available for most federal employees and in several states. Paid leave will only grow as employers seek to attract workers. How statutory paid leave is administered and funded are yet to be seen. This is an area of the law that will continue to develop into the next decade and beyond.

#5 Pregnancy Discrimination: On the federal books since 1978 and now more likely to be further developed in state and even local laws. Millennials are not standing for pregnancy and pregnancy-related discrimination. The federal law is older than 10 years but the past decade has seen an increase in discrimination claims, case law and state laws. Legislation carving out parental leave, lactation rights and strengthening the right of pregnant workers has ballooned, no pun intended, in the last 10 years.

#6 #Metoo: Two hashtags in one post—very modern. In October 2017 a tweet went out, requesting the response #metoo to anyone who had been sexually harassed or assaulted in the wake of claims against movie producer Harvey Weinstein. The Metoo phrase had been coined a decade before but the overnight response on twitter was in the thousands and grew to tens of thousands. Social media was the format the movement needed and Harvey Weinstein was the over the top Hollywood personality to give voice to victim outrage. While there have been reports about #metoo backlash, sexual harassment prohibition—from mandatory training to women required on public company boards (CA)—show otherwise. Victims rallied and courts and the EEOC have responded, as well as state legislators. This genie cannot be put back in the bottle—#metoo is not a twitter trend but a fundamental change in the workplace.

This list is just a snapshot. For example, the Supreme Court is expected to rule on Title VII protection for sexual preference, an area that has seen growth at the state level and in the courts. The NLRB is marching towards weakening a decade of union and employer rights; the independent contractor status shrinks; so does the use of non-compete agreements. The beat goes on.

Did your favorite law not make the list? Contact us.

**Hope the next decade brings prosperity to your workplace and peace to your life.
Happy New Year**

DOL New Year's Resolution: Calculating Regular Rate of Pay

Regular Rate of Pay—A Legal Term of Art

The US Department of Labor (DOL) has promulgated new regulations on what constitutes a regular rate of pay to “provide clarity and to better reflect the 21st-century workplace.” The effective date is January 15, 2020 and they are arguably more employer friendly. Employers must soon reconsider their calculations in determining a non-exempt employee’s regular rate of pay for overtime wages.

As you all know, non-exempt employees must be paid at least one-and-one half times their regular rate of pay for all hours worked over 40 in a workweek. The regular rate, the rate at which overtime is calculated, can include more than just the employee’s normal salary or hourly rate. The FLSA defines the regular rate as “all remuneration for employment paid to, or on behalf of, the employee” with 8 exclusions in section 7(e) of the FLSA.

This part is simple math: The regular hourly rate of pay is determined by dividing the employee’s total remuneration in any workweek, *except for the statutory exclusions*, by the total number of hours actually worked in that workweek.

There are 8 statutory exclusions in section 7(e) of the FLSA. Payments which are not part of the regular rate include pay for expenses incurred on the employer’s behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness. <https://www.dol.gov/whd/regs/compliance/whdfs23.pdf>.

The final rule clarifies which benefits are included under the statutory exceptions, including when payments for forgoing unused paid leave, payments for bona fide meal periods, reimbursements, benefit plan contributions, and certain ancillary benefits may be excluded from the regular rate. See 29 C.F.R. 778: <https://www.federalregister.gov/documents/2019/12/16/2019-26447/regular-rate-under-the-fair-labor-standards-act>.

Employers may now exclude the following benefits when calculating an employee’s regular rate of pay:

- The cost of providing certain:
 - Parking benefits;
 - Wellness programs;
 - Onsite specialist treatment;
 - Gym access and fitness classes;
 - Employee discounts on retail goods and services;

- Certain tuition benefits; and
 - Adoption assistance.
- Payments for unused paid leave, including paid sick leave or paid time off;
- Payments of certain penalties required under state and local predictive scheduling laws;
- Reimbursed expenses including:
 - Cellphone plans;
 - Credentialing exam fees;
 - Organization membership dues; and
 - Travel.
- Certain sign-on bonuses and longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses; and
- Contributions to benefit plans for accident, unemployment, legal services or other events that could cause future financial hardship or expense.

Questions? We can help.

Smoking Ain't Allowed in School—or Anywhere if You Want to Work for U-Haul

U-Haul made a big New Year's resolution: it will screen out applicants who smoke, vape or chew tobacco in the 21 states without smoker protection laws.

Where is this allowed? Alabama, Alaska, Arizona (U-Haul headquarters), Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Nebraska, Pennsylvania, Texas, Utah, Vermont, Virginia and Washington.

What? The move applies to new employees only. U-Haul does have initiatives to promote nicotine cessation and a wellness fee for employees who use nicotine.

When will it start? February 1, 2020.

Why? Well, because they can. Nicotine addiction is not recognized as a disability under the ADA and without state law protections, nicotine users can be excluded. U-Haul claims they want to promote a healthy workplace and minimize serious employee health risks.

How will they do this? The nicotine-free hiring policy will be on all job applications and applicants will be questioned on their nicotine use. In 17 or the 21 states where this exclusion is allowed, applicants must consent to nicotine screening in the future to be considered for a job.

What else? Off duty conduct laws—even where allowed—get people excited; not in a good way. There may be challenges to the law based on privacy or other grounds but U-Haul is on good footing. Beyond the law, this screening may create a morale problem if U-Haul has a lot of smokers employed already—plus they cannot exclude smokers in 29 states and DC.

A trend? The compelling health information from the Centers for disease Control (CDC) helps this cause. More people in the US are addicted to nicotine than any other substance and cigarette smoking is the #1 cause of preventable deaths. Screening nicotine users is still relatively rare—some hospitals and Alaska Airlines have done it. For employers committed to workplace wellness and cutting healthcare costs, a policy like this is a big step toward those goals.

Questions about implementing a policy like this at your workplace? We can help.



General Counsel's Office Hours Special Member Benefit



All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

[Click here](#) for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. [Click here](#) for Mike's bio.