

Fall 2021: Employment Laws & Policy Updates to Know & Consider

by CHRIS MORGAN — Barran Liebman LLP

As employers head towards the fall and many welcome an increased number of employees back to the office, now is a great time to review and update internal policies and to ensure compliance with new laws.

Here are four main legal and policy updates to be aware of and consider heading into fall of 2021:

Vaccination Policies & Procedures

Many employers are considering, or have already implemented, mandatory vaccination policies for employees. Prior to doing so, and based upon the specific industry that an organization is in, employers are encouraged to consult with employment counsel to ensure the legality of any mandatory policy, as well as any applicable exemptions which might apply.

To the extent that an organization does choose to promulgate and implement a policy requiring vaccinations, a written notice should go out to employees that clearly outlines the policy, the timing associated with the policy (such as a timeline for required vaccination), any exceptions (such as required accommodations for disabilities and sincerely held religious beliefs) and consequences for non-compliance (such as termination).

In addition to ensuring legality, employers should also consider the potential human resource consequences associated with a mandatory vaccination policy, including the possibility that employees may choose to leave the organization as a result. These are decisions that should be made carefully and with the advice of counsel.

Presumption of Retaliation

Following Workplace Safety Complaints

SB 483, a new law just passed by the Oregon State Legislature and signed into law by Governor Brown, will presume as a matter of law that an employer is guilty of whistleblower retaliation if the employer discharges or otherwise takes adverse action against



that individual within 60 days of them raising health or safety workplace complaints.

Employers should be extremely careful, and consult employment counsel prior to taking disciplinary action against an employee who has raised concerns about health and safety in the workplace. This includes a wide range of potential issues, ranging from minor inquiries related to mask wearing and compliance with state

and local requirements, to larger concerns related to OSHA's general duty clause.

This is a great time for employers to review and update their reporting procedures to ensure that complaints are adequately addressed. Employers should also be sure to create and preserve documentation related to the non-discriminatory, non-pre-textual reasons for taking action against an employee after they have raised a complaint. This documentation will be the best defense an employer has to rebut an inference of whistleblower retaliation created under the new law.

Non-COVID-19-Related Leave Considerations

For now, voluntary paid medical leave under the American Rescue Plan Act is set to expire on September 30, 2021. Under the current program, employers may (but are not required) to provide paid leave for COVID-19-related reasons in exchange for refundable tax credits. It remains to be seen what, if any, extension there will be at the federal level — or whether the federal government may reinstitute additional mandatory paid leave for employees as they did through the original Families First Coronavirus Response Act (FFCRA).

However, employers should remember that COVID-19 potentially implicated a number of federal and state laws — including the Americans with Disabilities Act (ADA), the federal Family Medical Leave Act (FMLA) and the Oregon Family Leave Act (OFLA). Even if an employer is not offering paid leave

to an employee who is dealing with a situation related to COVID-19, employers should be careful to explore what, if any, other laws may entitle that employee to paid leave under the circumstances. This is typically an individualized inquiry that will involve providing the employee with an opportunity to show that their condition qualifies them for leave under the ADA, FMLA or OFLA. If it does, the employee could be entitled up to 12 weeks of unpaid leave.

Telework Considerations

Even with many companies welcoming employees back to work, odds are that at least *some* employees will continue to work remotely. Remember, although employers can require employees to return to the office, accommodations (including potential remote work) still need to be made where an employee requires reasonable accommodations under the ADA, OFLA or FMLA. For the time being, allowing remote work as an accommodation is highly recommended unless the employer has very strong evidence that allowing such an accommodation would present an undue hardship under the circumstances.

When it comes to telework, there are a number of more detailed, nuanced considerations to take into account. Your telework policies should be thorough, specific and detailed. For example, if your company has individuals who are working remotely in another state, there may be tax and workers' compensation considerations that must be addressed and accounted for. Employers should also implement best practices to ensure that non-exempt employees who are working remotely are still taking required rest and meal breaks.

Taking affirmative steps to develop comprehensive telework policies can help avoid potential legal pitfalls for employers moving forward.

Chris Morgan is an attorney at Barran Liebman LLP, where he specializes in the defense of complex and high-profile employment matters. Contact him at 503-276-2144 or cmorgan@barran.com.

barran.com