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UP-TO-THE-MINUTE EMPLOYMENT LAW UPDATES

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Meet the Speaker

- **Thomas L. McCally** is an Equity Partner and has over 25 years of experience as a litigator, business advisor, and outside general counsel across a variety of industry groups for nearly every issue in business law and commercial litigation, employment and labor law, complex litigation, class actions, multidistrict litigation (MDL), civil rights, non profit, and religious institutions practice. As the lead Partner for Carr Maloney's Employment and Labor Law Practice Group, Tom regularly represents clients in Federal and State courts as well as before the EEOC and state/local EEO agencies across the Mid-Atlantic region.

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Independent Contractor Standard under the DOL: 29 CFR Parts 780, 788, and 795

On January 6, 2021, the Department of Labor (Department) announced a final rule clarifying the standard for determining whether an individual is an employee versus independent contractor under the Fair Labor Standards Act (FLSA). The effective date of the final rule is March 8, 2021. The Department has proposed to delay the rule's effective date to May 7, 2021. See Federal Register 2021-02484.

Changes to the Final Rule are Likely to Occur Under the Biden Administration

- It is unlikely that the Final Rule will go into effect.
- President Biden announced recently that he favors implementing a three-part standard similar to the so-called ABC test laid out in the California state law known as A.B. 5, which focuses on whether workers are free from the hiring entity's control, work outside its "usual business," and "customarily" do the work they do for an employer as part of an "independent business."
- It is also possible that the Biden administration will revert to administrative guidance issued under former President Barack Obama under which most workers are classified as employees under the FLSA.

In the Final Rule, the Department:

- Reaffirms an “economic reality” test to determine whether an individual is in business for him or herself (independent contractor) or is economically dependent on a potential employer for work (FLSA employee).

In the Final Rule, the Department:

- Identifies and explains two “core factors” that are most probative to the question of whether a worker is economically dependent on someone else’s business or is in business for him or herself:
  - The nature and degree of control over the work.
  - The worker’s opportunity for profit or loss based on initiative and/or investment.

In the Final Rule, the Department:

- Identifies three other factors that may serve as additional guideposts in the analysis, particularly when the two core factors do not point to the same classification. The factors are:
  - The amount of skill required for the work.
  - The degree of permanence of the working relationship between the worker and the potential employer.
  - Whether the work is part of an integrated unit of production.

In the Final Rule, the Department:

- The actual practice of the worker and the potential employer is more relevant than what may be contractually or theoretically possible.
- Provides six fact-specific examples applying the factors.
- The Final Rule makes clear that the standard adopted does not alter state law or apply to other federal laws beyond the FLSA.

Employer Take Away

- As indicated above, it is highly unlikely that the Final Rule will ever take effect.
- Employers should keep apprised of developments under the Biden administration, and be prepared for a broad definition of employment to be applied.
- The DOL also recently submitted a proposed rule titled "Joint Employer Status Under the Fair Labor Standards Act" to the Office of Management and Budget, signaling efforts to significantly expand the joint employment test.

Enforceability of Non-Compete Agreements in the D.C. Metropolitan Region

Ethical Considerations for Lawyers:
Rule 5.6: ABA Model Rules Professional Conduct

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, ***except an agreement concerning benefits upon retirement***; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Note: Law Firms cannot penalize departing attorneys who leave and take clients with them by making reductions to compensation or other non-retirement related benefits. *See Jacobson Holman PLLC v. Gentner, No. 19-CV-830, __ A.3d __ (D.C. Feb. 4, 2021).*

General Rule in Virginia:

Effective July 1, 2020, employers may not "enter into, enforce, or threaten to enforce" a non-compete agreement with any "low-wage employee." *Virginia Code Section 40.1-28.7.8.*

- The definition of who qualifies as a "low wage employee" is subject to change and is defined as an employee making "less than the average weekly wage of the Commonwealth as determined [by] . . . subsection B of § 65.2-500." Accordingly, at present, the determinative rate is $1,204.00 per week, which equates to $62,608.00 annually. This figure will fluctuate yearly.

General Rule in Virginia:

The new law creates a private cause of action which allows any eligible employee to sue his or her employer in order to prevent the enforcement of certain restrictive covenants.

- An employee may be entitled to injunctive relief along with liquidated damages, lost compensation, and attorneys' fees and costs.
- The law also permits the Virginia Department of Labor & Industry ("DOLI") to impose a civil penalty of $10,000 (per violation) for employers who enter into, enforce, or threaten to enforce, an offending restrictive covenant agreement.

General Rule in Virginia:

- Exemptions: The statute exempts employees whose income is derived in whole or predominantly in part from sales commissions and the like. Thus, the new law may not prohibit non-competes for employees in some sales positions.
- Virginia's statute does not prohibit confidentiality or non-disclosure agreements, or restrictive covenants entered into before the effective date of the code section, i.e., July 1, 2020.

Maryland: Non-Compete Law

- Effective October 1, 2019, Maryland law (the Noncompete and Conflict of Interest Clause Act) prohibits the use of non-competition agreements for employees with wages equal to or less than $15 per hour or $31,200 annually. See Maryland's NCICA.
- The Maryland statute provides that any "noncompete or conflict of interest provision in an employment contract or a similar document or agreement that restricts the ability of an employee to enter into employment with a new employer or to become self-employed in the same or similar business or trade null and void as being against public policy of the State."

Maryland: Non-Compete Law

- The law specifically provides that its prohibition on non-competition agreements does not extend to "employment contract[s] or similar document[s] or agreement[s] with respect to the taking or use of a client list or other proprietary client-related information."
- The law is silent with respect to agreements not to solicit customers or employees.

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Maryland: Non-Compete Law

- The new law does not address penalties for violating the law.
- It creates no framework for employees to object to prohibited non-compete clauses in employment contracts, nor does it create a way to enforce the law.
- Therefore, it is assumed that the enforceability of the law will be left to the courts, which will likely determine that such clauses are (under the conditions set forth in the statute) void for public policy reasons.

District of Columbia: Non-Compete Law

- D.C.'s Ban on Non-Compete Agreements Amendment Act of 2020 ("the Act"), will become effective on or about March 19, 2021 (if it passes the 30-day Congressional review period).
- The Act applies to all D.C. private employers and applies broadly to most employees who perform work in D.C. or whom a prospective employer reasonably anticipates will perform work in D.C.
- Under the Act, employers are prohibited from requiring or requesting that D.C. employees execute a non-compete agreement, with a few exceptions for unpaid volunteers, babysitters, and certain licensed physicians.

District of Columbia: Non-Compete Law

- Unlike the statutory prohibitions against non-compete agreements in Maryland and Virginia, the D.C. law does not have a minimum salary threshold.
- The Act not only prohibits employers from restricting an employee from working for a competitor **after** employment ends, but also prohibits restrictions on an employee's competitive activities **while** employed by the employer.
- Consequently, the Act appears to allow an employee to hold another job during their employment, even a job with a direct competitor.
- *This poses unique concerns for law firms: The law does not contain any exception for situations in which simultaneous employment could potentially create conflicts of interest.*

District of Columbia: Non-Compete Law

- The Act excludes from its prohibitions confidentiality agreements that protect an employer's trade secrets, customer lists, or other proprietary or confidential information. The Act also excludes restrictive covenants contained in sale or purchase agreements.
- The Act does not specifically address any other type of restrictive covenants, such as non-solicitation provisions. Arguably, such non-solicitation provisions do not fall within the Act's definition of a prohibited "non-compete provision" and may still be permissible.

District of Columbia: Non-Compete Law

NOTICE:

- The Act requires all D.C. employers (including employers not using non-compete agreements) to provide written notice of the Act to employees, using the following specific language: "No employer operating in the District of Columbia may request or require any employee working in the District of Columbia to agree to a non-compete policy or agreement, in accordance with the Ban on Non-Compete Agreements Amendment Act of 2020."

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District of Columbia: Non-Compete Law

Employers must provide this notice on three separate occasions:

(1) ninety calendar days after the Act becomes effective; (2) seven calendar days after an individual becomes an employee; and, (3) fourteen calendar days after the employer receives a written request for notice from the employee.

- There is no additional notice or posting requirement.
- The Act prohibits retaliation, provides a private right of action, and provides for penalties for violations.

Compliance With State and Federal Posting Requirements

- The U.S. Department of Labor (DOL) has an elaws Poster Advisor and a compliance assistance webpage. https://webapps.dol.gov/elaws/posters.html;
- The poster advisor assists employers in determining which federal employment law posters apply to their organization.
- For state poster requirements, most state departments of labor websites provide a list of state employment poster requirements.
- Employers are required to have posters conspicuously posted at each organizational facility.

Compliance With State and Federal Posting Requirements

- Due to the increase in employees working remotely in 2020, the DOL issued Field Assistance Bulletin 2020-7, addressing when the DOL will consider electronic posting by employers via email or an internet or intranet website to satisfy the employer's requirement to provide employees with required notices under a variety of federal labor laws.
- Generally speaking, where there is no physical establishment where employees are employed or where interviewing or hiring takes place and employees and applicants can access the electronic posting at all times, the DOL will consider such electronic posting to meet the regulatory requirements that the notice be posted.
- See: https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_7.pdf

Compliance With State and Federal Posting Requirements

- It is recommended that Employers use both traditional hard copy postings and postings via electronic means (such as email or electronic bulletin boards) to ensure compliance with all posting requirements.
- Consider utilization of online payroll portals to post required notices, particularly with respect to wage issues.
- It is recommended that the Employer somehow confirm receipt of postings sent electronically.

The Impact of COVID- Returning Employees To The Workplace

Workplace Safety: Compliance with EEOC/CDC/OSHA Guidance

- Can employers require employees to be vaccinated?
- On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued guidance indicating that employers are, in fact, lawfully permitted to require employees to be vaccinated before returning to the office, subject to certain important limitations and exceptions.
- ADA Implications
- Title VII- Religious Beliefs
- Reasonable Accommodations/ Individualized Assessment

How the Americans with Disabilities Act May Be Triggered

- Regarding the COVID vaccine, the EEOC's revised guidance makes it clear that neither the administration of a vaccination, nor the requirement that an employee show proof of vaccination, is a "medical examination" or "disability-related inquiry."
- Therefore, simply requiring a vaccine does not implicate the ADA.
- Information obtained during the vaccination process, however, may put the employer on notice that the employee has a disability.
- Notice of a disability may trigger the ADA and potentially require the employer to engage in the interactive process to determine if any reasonable accommodations are necessary.

How the Americans with Disabilities Act May Be Triggered

- Under current U.S. Centers for Disease Control and Prevention (CDC) guidance, health care providers who administer vaccinations are advised to ask certain questions before administering a vaccination.
- The information is gathered to ensure that there are no medical reasons for which the individual must be denied a vaccine.
- An employer, or third party contracted by the employer, asking an employee for pre-vaccination information that discloses a disability might constitute a "disability-related inquiry."
- Under the ADA, therefore, such inquiry must be job-related and consistent with business necessity. The EEOC cautions that pre-vaccination questions should also be careful to avoid questions about an individual's family medical or genetic history that implicate the Genetic Information Nondiscrimination Act (GINA).

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What Can Employers Due to Minimize Risks

- The exposure related to employer mandated vaccines is minimized, although not completely eliminated, when the employer simply requires proof of vaccination.
- The employer will not have direct access to the medical information elicited as part of the pre-vaccine screening.
- However, subsequent employer questions (such as asking why an individual did not receive a vaccination) may elicit information about a disability.
- Employers may also consider looking at each type of position individually to determine if there is a business reason to require vaccination. (Back-office staff vs employees with direct contact with clients).

What if an Employee Refuses to Take the Vaccine

- The EEOC has made it clear that the employer may not automatically exclude an employee from the workplace for refusing or being ineligible for vaccination.
- The EEOC states that "the employer must show that an unvaccinated employee would pose a direct threat due to 'a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.'"
- Employers are further advised that they should conduct an "individualized assessment" of four factors: the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.
- A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite and that also takes into account the number of other employees in the workforce that are fully vaccinated.

What if an Employee Refuses to Take the Vaccine

REASONABLE ACCOMODATION:

- If an employer determines that an unvaccinated worker poses a direct threat, the EEOC cautions that it cannot then exclude that employee from the workplace "unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat."
- Even when considering whether there is an "undue hardship," the revised EEOC guidance notes that the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, also factor in.

What if an Employee Refuses to Take the Vaccine

- If there is no reasonable accommodation, absent undue hardship, that would eliminate or reduce the risk posed by an unvaccinated employee, the employer can exclude the employee from entering the workplace.
- However, the EEOC guidance also states that this does not mean the employer may automatically terminate the worker.
- Employers will need to determine if any other accommodation can be made and/or if other rights apply under federal, state and local law.
- For example, employees may be entitled to work remotely or take leave under other laws and/or the employer's existing policies.

Religious Accommodation Requirements

- Title VII of the federal Civil Rights Act requires employers to provide reasonable accommodations to employees who indicate they cannot receive the vaccine because of their sincerely held religious beliefs, practice or observance, unless accommodation would pose an "undue hardship."
- The EEOC provides that an employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief.

Religious Accommodation Requirements

- However, employers may be justified in requesting additional supporting information if they have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice or observance.
- As with the ADA, employers must engage in an individualized, fact based and interactive process to determine if any reasonable accommodation can be made and must also assess whether the employee has additional rights under federal, state or local law.
- If there is no reasonable accommodation absent undue hardship, the employer can exclude the employee from entering the workplace.

The Impact of COVID- Returning Employees To The Workplace

- Focus should always be on business needs and goals, and accommodations should always be considered
  - Consideration should also be given to standard industry practices
  - Consideration should also be given to impact on recruitment/ retention

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The Impact of COVID- Returning Employees To The Workplace

- Employers should also establish policies regarding use of/provision of PPE and other sanitizing efforts.
- Physical distancing and physical changes such as the use of plexiglass.
- Consideration of rotating in office shifts and remote working.
- Consideration of accommodations should always be made.
- Note that with the prevalence of remote work during the pandemic it will be more difficult to establish that allowing employees to work remotely will cause undue hardship.

The Impact of COVID- Returning Employees To The Workplace

- Implementation of procedure for contact tracing to include co-workers and client contacts
- Employers should also review policies to ensure compliance with newly enacted federal, state and local leave policies.

The Impact COVID – Returning Employees to the Workplace

- Notably, as more information becomes known about available vaccines and their efficacy, longevity, and plan for distribution, it is likely that the EEOC and other agencies will issue updated guidance to address new information as it becomes available.
- Employers must keep up to date on EEOC, CDC and OSHA guidance as well as state/ local COVID-19 restrictions on businesses (i.e. office occupancy restrictions).

The Impact COVID – Returning Employees to the Workplace

NEW CDC GUIDANCE:

- For example, the CDC recently revised its guidance on requiring employees that have been vaccinated for Covid-19 to quarantine after having been in contact with an individual who has tested positive for or shown symptoms. New York has also adopted similar guidelines. The new guidelines now state that an individual who has been in close contact with someone with COVID-19 or who was experiencing COVID-19 symptoms no longer needs to quarantine if:
  - the individual has received both doses of the vaccine,
  - at least two (2) weeks have passed since the second dose,
  - less than three (3) months have passed since the individual was fully vaccinated, and
  - the individual remains asymptomatic after the close contact.
- Employers who are considering implementing mandatory or voluntary vaccination policies should keep apprised of developments as they occur and are encouraged to consult with counsel.

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Questions?

If your question does not get addressed within the time allotted for the webinar, please reach out to our presenters with any additional questions.

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Carr Maloney's Upcoming Events and Resources

Carr Maloney's COVID-19 Resource Hub

With the rapid growth of COVID-19, the laws and rules of employment matters are constantly evolving and changing. Carr Maloney's Employment and Labor Practice Group is here to provide useful resources for employers on how COVID-19 is affecting various aspects of employment law and how different jurisdictions are addressing the outbreak.

There will be new governmental measures each day. Employers should consult with counsel for the latest developments and updated guidance on this topic. Carr Maloney P.C. is open for business and our attorneys are available to consult by client's preference of communication whether it be email, phone, or video chat. Please feel free to reach out to our Employment and Labor Practice Group partners with any questions during this time.

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