

HRAGC LEGAL UPDATE

SEPTEMBER 24, 2020

FEDERAL

United States Supreme Court

In *Bostock v. Clayton County, Ga.*, the U.S. Supreme Court held that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964, in a 6-3 decision issued June 15, 2020. Relying on the plain language of the statute prohibiting discrimination on account of sex, the Court determined that because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently on account of sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII. Many states do not include protections from discrimination for LGBTQ employees and this decision applies federal law to each of those states. New Hampshire's anti-discrimination law (RSA 354-A) specifically prohibits discrimination on account of gender identity and sexual orientation. The case number is No. 17-1618.

United States District Court

On September 8 the Southern District of New York issued an order striking down major parts of the DOL's Joint Employer rule, in a case filed by seventeen states and the District of Columbia. Earlier this year the DOL revised the rule to utilize a four-part balancing test to determine whether an entity could be deemed the "employer" of another company's employees and thus jointly liable for wage and hour obligations under the FLSA. The Court found the DOL rule was too narrow and conflicted with the FLSA and that the DOL had failed to comply with the rulemaking process. A key aspect of the DOL's rule was the requirement the employer have exercised actual control over certain employment decisions and the Court found it was improper to exclude situations where the employer had merely reserved the right to exercise control. An appeal is expected.

United States Department of Labor

FFCRA. The DOL revised, affirmed and clarified portions of its Families First Coronavirus Relief Act rules to respond to a federal court decision invalidating certain aspects of the DOL rules issued in April. The revised rules took effect September 16 and clarify:

- Employees are entitled to FFCRA leave only when work is available.
- Employer approval is required before an employee may take intermittent FFCRA leave.
- The definition of "health care provider" is now identical to the definition under FMLA regulations and the definition has been clarified to also include those who are employed to provide certain health care services.
- Employees must provide required documentation supporting the FFCRA leave "as soon as practicable."
- The notice an employee must provide for expanded family leave under the FFCRA must be given "as soon as practicable" which may be in advance of the leave or shortly thereafter.

Independent Contractors. On September 22 the DOL issued a proposed rule to clarify who is an employee or an independent contractor under the FLSA. Adopting an "economic reality" test, the rule focuses on the worker's control over the work and the opportunity for profit or loss. Other factors include the amount of skill involved, the permanence of the relationship and whether the work is an integrated unit of production. Comments are due within 30 days after the rule is published in the Federal Register, which is a shortened period.

Internal Revenue Service

The IRS issued a guidance on August 28 to explain how the payroll tax suspension will work. Employers may suspend the withdrawal and payment of payroll taxes for employees earning less than \$4,000 biweekly between September 1 and December 31 but must collect and pay the deferred taxes in the first quarter of 2021. Employers are subject to interest and penalties for unpaid amounts beginning May 1, 2021. Employers may suspend payment of the taxes but are not required to do so, even if requested.

NEW HAMPSHIRE

New Hampshire Governor

Governor Sununu issued Universal Guidelines that must be followed by all businesses. These were last updated August 27, 2020. In addition, there are industry specific guidelines that must also be followed. They can be found at:

<https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/files/inline-documents/guidance-universal.pdf>

Key aspects of the Universal Guidelines that apply to all employees and volunteers for all businesses and organizations include:

- Wear a face covering/mask as set forth in the guidelines
- Practice social distancing
- A person who meets any of the following is prohibited from entering the workplace for specific periods (generally a 14-day quarantine):
 - Has new or unexplained symptoms of Covid-19
 - Is diagnosed with Covid-19
 - Has had close contact with someone known or suspected to have Covid-19
 - Engages in travel outside NH, ME, VT, MA, RI, CT
- All persons entering the business must undergo a screening process before entering the workplace, including:
 - Answer the Illness and Risk Screening questions
 - Take the person's temperature and confirm it is below 100.4 degrees
- A person must report new or unexplained symptoms to a supervisor
- Covid-19 testing and referral to a health care provider is required in certain circumstances
- Maintain the privacy of all medical information
- Follow cleaning and disinfecting guidelines
- Consider workplace modifications (work stations, schedules, use of barriers, meetings, restrooms, common areas)
- Increase hygiene practices
- Educate and communicate on policies and procedures and post signage
- Update the Illness Policy
- Follow the FFCRA
- Follow OSHA regulations and recommendations (including conducting a workplace assessment)
- Follow CDC and NH DHHS recommendations

New Hampshire Legislature

The legislature considered several employment-related bills, several were passed but were vetoed by the Governor, and one was signed. One bill was pulled from committee and tabled, essentially killing the bill, as it could not be taken up before the session ended. The key bills are:

- HB 731 (increasing the minimum wage). Vetoed
- HB 1166 (addressing unemployment, FMLA, and testing costs due to Covid-19). Vetoed.
- HB 253 (regulating the use of criminal record checks by public employers). Signed. Eff. 9/22/20
- HB 532 (requiring payment of earned but unused vacation time and PTO). Removed from committee and tabled.
- HB 712 (implementing a Family and Medical Leave insurance program). Vetoed.

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