

The Year in Review

An overview of critical legal decisions and legislative updates impacting public employers.

Presented by
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Today's Presenter



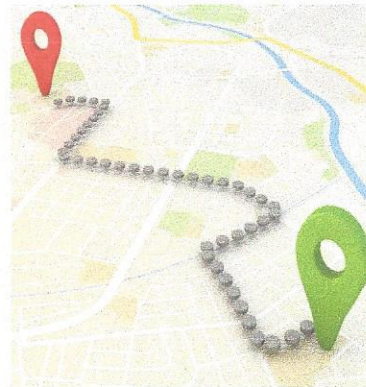
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Outline of Discussion

- Supreme Court decisions
- Sixth Circuit decisions
- Michigan decisions
- Legislative update
- What to watch for: employment law trends
- Questions

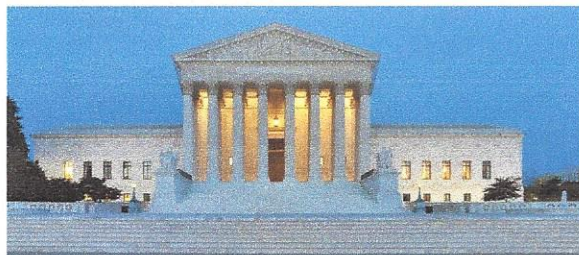


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SCOTUS

- Most recent term (ended July 2021) – light on employment law cases
- Still some important takeaways
- We should also look to 2020 decisions and keep an eye on pending cases/writs of certiorari



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Van Buren v. United States

- Police officer used valid credentials to access information in a law-enforcement database
 - Had authorization to access, but used information for an unauthorized person
- Claim brought under Computer Fraud and Abuse Act
- SCOTUS ruled that the CFAA does not cover claims that properly-obtained material was *misused*
- Key: ensure no inappropriate access to ESI

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Cedar Point Nursery v. Hassid

- 6-3 decision: a California regulation granting union organizers access to agriculture employers' property to speak with workers about the benefits of collective bargaining was unconstitutional
 - Specific to agricultural businesses
- May be a message as to how SCOTUS may rule in other cases about union access to worksites
 - Note: Congress is currently reviewing the "Protecting the Right to Organize" Act – would make significant changes to U.S. Labor Law

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Mahoney Area School District v. B.L.

- 8-1 decision: school unconstitutionally suspended a high-school cheerleader
 - Cheerleader was unhappy about not making the varsity squad and posted a photo to a social media account showing her and a friend raising their middle fingers with the caption: “f*ck school f*ck softball f*ck cheer f*ck everything.”
 - Decision to suspend the student based on specific off-campus conduct violated the First Amendment

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Bostock v. Clayton County, GA

- Decided in June 2020
- Employers cannot terminate employees based on their lesbian, gay, bisexual, transgender or queer (LGBTBQ) status
- “Sex” discrimination under Title VII of the Civil Rights Act of 1964 includes sexual orientation and gender identity discrimination
- Employers should review policies/impact on bathroom and locker-room access, dress codes and grooming standards, and pronoun use

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SCOTUS: On the Horizon

- First Amendment religious rights case involving a high school football coach (insisted on post-game, midfield prayers – subsequently fired)
- Whether a religiously affiliated college can assert the ministerial exception to avoid a discrimination suit
- Causation standard for age discrimination claims
 - “But-for causation”
 - Multiple causes can exist – *Bostock*: threshold met so long as one cause was discriminatory
 - Different than sole cause

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Sixth Circuit Updates

- Slowdown during pandemic
 - On average – took 9.7 months from the notice of appeal to a decision (slowdown of approximately one month)
- Still issued a number of employment-related decisions
- One decision (*Pelcha* – ADEA standard) could see Supreme Court review

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United States ex rel. Felten v. William Beaumont Hosp.

- Sixth Circuit reversed the district court's dismissal of realtor, David Felten's, complaint alleging that he was "blacklisted" by Beaumont post-employment when seeking other employment
- False Claims Act anti-retaliation provisions cover actions taken after the course of employment concludes
- Takeaways: potential domino effect – beware: post-employment references, comments, etc.

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Bennett v. Metropolitan Gov't of Nashville

- The city terminated the plaintiff's employment after she allegedly made racially derogatory social media posts on the night of the 2016 presidential election
- Reversed decision in favor of the employee after analysis of balancing test
 - *Does the employee's interest in commenting upon matters of public concern outweigh the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees?*

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Threat v. City of Cleveland

- Sixth Circuit held that employees' work shifts are "terms of employment" under Title VII
 - Changing those shifts on the basis of race can constitute discrimination
- Rejected the idea that demonstrating a "materially adverse employment action" as a threshold matter to sustain a Title VII discrimination claim was a "categorical rule"
- May be read as allowing any employment action that is *more than de minimis* to support a claim

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Michigan Legal Developments

- Generally, speaking – significantly fewer new laws took effect in 2021
- December 2020 – Michigan legislature passed laws re: COVID-19 leave
- Summer, 2021 - Rescission of *most* MIOSHA rules regarding COVID-19 workplace safety.
- July 2021 – Michigan Supreme Court agreed to hear Elliott-Larsen Civil Rights Case regarding protection for sexual orientation discrimination.

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PA 339 of 2020

- Outlines COVID-19 **isolation/quarantine** periods
 - Incorporates changing federal, state and local health guidelines
 - Typically requires review of county health department requirements
- Prohibits employers from taking certain actions against employees who do not report to work during those periods, as well as those who oppose violations of the Act or report health violations related to COVID-19.

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MIOSHA COVID-19 Rules

- June 22, 2021 – rescinded COVID-19 Emergency Workplace Rules
 - Adopted Federal OSHA Emergency Temporary Standards for healthcare employers
- MIOSHA encourages employers to follow CDC guidance for vaccinated and unvaccinated individuals
 - No need for COVID-19 Preparedness and Response Plan, daily screening records, training, etc.
 - Do need to comply with general requirement to maintain a safe workplace (i.e., don't throw "caution to the wind").

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Federal Vaccine Mandate

- Sept. 9, 2021 - Pres. Biden announced that the U.S. Department of Labor is developing an emergency rule to require all employers with 100 or more employees to ensure their workforces are fully vaccinated or show a negative test at least once per week.
- OSHA is expected to issue an emergency temporary standard (“ETS”) to carry out the requirement.
- The ETS is expected to affect more than 80 million workers.
- Private employers are also expected to be required to give workers PTO to get vaccinated or recover from vaccine side effects.

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ETS Process

- Provisions for an ETS are outlined in Section 6 of the OSH Act.
- OSHA does not have to go through the full rulemaking process – can skip requirement for notice, public comment, and public hearing.
- Once issued, ETS is effective and OSHA begins rulemaking for a permanent standard. ETS is valid until permanent standard is promulgated (must be within six months of publication of ETS in the Federal Register).
- State Plans
 - MI-OSHA –has 30 days from issuance of ETS to draft/issue its own (equally protective) standard.

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Does OSHA/DOL have authority to require mandatory vaccination/testing?

- Numerous legal challenges are expected regarding scope of authority and legality of the mandate/anticipated ETS.
 - Several governors have already promised to try to block the ETS from taking effect in their states (MI is not one).
- OSHA already imposes one vaccination requirement on employers: must offer the hepatitis B virus vaccination to all workers who have occupational exposure (but, notably, employees can decline without losing their job).
- ETS authority in place if: (1) American workers are in grave danger due to an exposure to COVID-19; and (2) an emergency standard is needed to protect them.

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Expected ETS Provisions

- Basic requirement: must demonstrate all employees are vaccinated OR test weekly for COVID-19 to stop the spread of the disease in the workplace.
- 100 employees will be counted on a company-wide basis, not by location, thereby covering more people.
- Unknown whether vaccine-or-test requirement will apply to all employees (including those working remotely) or only those working in offices/with other employees.

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Expected ETS Provisions

- ETS expected to mirror healthcare ETS and require employers to provide reasonable paid time off for vaccination and possible side effects.
- ETS will allow employers to require use of PTO to cover this time off.
- Testing option viewed as a relatively straightforward way to respond to requests for disability/religious accommodations.
 - Also may help gov't with response to constitutional/legal challenges.

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Expected ETS Provisions

- ETS will specify who pays for testing.
- Administration has taken steps to cut costs with private testing companies and Medicaid recipients test for free.
- Unlikely that the ETS will require employers to systematically report vaccination and testing data.
- Will likely have record-keeping requirements, such as the form in which employers must collect vaccination and testing information.

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ETS Penalties

- Serious violations of the ETS – likely fine \$13,653 per violation
- Willful violations of the ETS – likely fine \$136,532 per violation

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What do we do *now*?

- Actions to consider now (if covered employer):
 - Encourage vaccination *now*
 - Get informed about employees' vaccination status
 - To whom/how reported?
 - Ensure measures are in place for keeping vaccination and testing information confidential and secure.
 - Separate from personnel file
 - HIPAA does not prohibit employees from providing proof of vaccination (i.e., picture of vaccine card)

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What do we do *now*?

- Begin considering testing protocols and audit processes to ensure accurate record-keeping and compliance.
- Consider all CBA obligations – begin discussions with applicable representatives.
- Map out what happens when tests results come back positive.

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EEOC Update

- April 2021 – EEOC issued new guidance on religious discrimination and accommodation of religious beliefs
- **Reasonable Accommodation**
 - May include: flexible scheduling, voluntary swaps of shifts, or lateral transfers to enable religious observance.
 - Modification of workplace practices, policies, or procedures. Ex: employer could accommodate a pharmacist who has a religious objection to dispensing contraceptives by allowing a coworker to assist customers who seek to make those purchases.
- **Undue Hardship**
 - Factors to be considered include the “identifiable cost in relation to the size and operating costs of the employer and the number of individuals who will in fact need a particular accommodation.”
 - Ex: if an employee does not want to wear a uniform supporting LGBTQ rights on religious grounds, the employer can reasonably accommodate the employee without undue hardship by permitting the employee to wear something else. However, the employer can require the employee to attend diversity training that fosters respect for others.

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What to Expect from EEOC

- Religious/disability accommodation issues
 - Outside boundary of rights to exercise religious beliefs in the workplace for – *including when employed by public employers.*
- Interactive process analysis
 - *Must remember: failure to engage in the interactive process is a standalone claim.*
- Religious/disability issues expected to overlap with COVID-19 litigation – particularly related to vaccination requirements.

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