Foster Garvey

2024 Legal Update

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43rd Civil Service Conference

Opening Thoughts

- This presentation provides **an overview** of legal updates from over the past year.
- If you have specific questions about the application of these legal changes to your situation, please consult with your attorney.

Administrative Law

Administrative Law

***Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce* (SCOTUS)**

- A divided court struck down 40-year old *Chevron* deference, finding that the case improperly prioritized the executive branch over the judicial branch.
  - *Chevon* stood for principle that if the statute at issue was ambiguous and the agency's interpretation was "reasonable," courts would defer to agency
  - Now Courts will only defer to an agency's interpretation if they are persuaded that it is the best interpretation of the law
- Court was clear that ruling did not call into question prior cases relying on the *Chevron* framework, under statutory stare decisis.
- But decision means that courts may now conduct much more searching analysis of agency interpretations of statutes
- **Bottom Line: may weaken federal/executive power, less predictability**

Administrative Law cont.

Securities and Exchange Commission v. Jarkesy (SCOTUS)

- A divided court narrowed the range of penalties that agencies can impose through their own adjudicative processes.
  - At issue were SEC ALJs who impose, among other things, civil penalties in a quasi-court setting, without juries.
  - Court found that civil penalties are “legal” in nature (rather than found in equity), because they seek to punish the wrongdoer rather than enforcing a common right to restore the status quo.
  - And because the seventh amendment to the Constitution guarantees that “suits at common law” can be tried to a jury, the ALJ process was unconstitutional because there was no jury.
- Ruling only applies to SEC, but the implication is that if any federal agency wants to impose civil penalties, they should bring the action in federal court with a jury.

2024 Washington State Legislation

Employee Free Choice Act (SB 5778)

- Prohibits employers from disciplining (or threatening to discipline) or otherwise penalizing an employee for refusing to attend/participate or listen to speech the primary purpose of which is to communicate the employer's opinion concerning religious or political matters.

- "Political matters" means relating to elections, political parties, proposals to change legislation or regulations, and the decision to join or support any political party or political, civic, community, fraternal, or labor association or organization.
  - No "Captive Audience" meetings

- "Religious matters" means relating to religious affiliation and practice, and the decision to join or support any religious organization.

- Aggrieved employees must bring their civil action within 90 days of the alleged violation.

Equal Pay Amendments (SHB 1905)

- All protected classes, not just gender, are now included in the Washington Equal Pay and Opportunities Act.
  - Pay differentials between similarly employed people in all protected classes must now also be fully explainable by bona fide factors such as education, experience, seniority system, merit system, regional compensation, and local minimum wage laws.

Paid Sick Leave Amendments (SB 5793)

- Effective January 1, 2025:
  - The definition of family is amended to include “any individual who regularly resides in the employee’s home or where the relationship creates an expectation that the employee care for the person, and that individual depends on the employee for care.”
  - The definition of “child” was also amended to encompass “a child’s spouse.”
  - The legislature added additional proper uses of WPSL to include when a child’s school or place of care has been closed “after the declaration of an emergency by a local or state government or agency, or by the federal government.”

Flexible Work for Peace Officers (SB 5424)

- Provides general and limited authority law enforcement agencies the option to have flexible work policies and to hire on a less than full-time basis when feasible.
  - E.g., supplementing work during peak hours with part-time employees
  - May not cause layoff or otherwise displace full-time employees
  - Employees would be in the same bargaining unit and the agency would need to bargain

Civil Service Amendments (SSB 6157)

- In July, Washington joined four other states in opening police jobs to DACA recipients.
- DACA recipients were previously excluded from being able to apply. The new program aims to address law enforcement shortages and help make officer ranks better reflect the communities they serve.

Civil Service Amendments (SSB 6157), cont'd

- Discretion to create additional preference points:
  - 10% for full professional proficiency or complete fluency in 2 or more languages other than English
  - 5% for full professional proficiency or complete fluency in 1 language other than English
  - 5% for 2 or more years of professional experience or volunteer experience in the AmeriCorps, DV counseling, mental or behavioral health care, homelessness programs, or other social services professions
  - 5% for AA degree or higher

- These preference points may not be aggregated to exceed more than 15% of the applicant's examination score. Preference points may be added until the applicant's first appointment. No preference points under this subsection may be used in promotional examination.

- Permits applicants to civil service to be a deferred action for childhood arrivals (DACA) recipient. Will need a written firearms policy authorizing the possession and carry of firearms. A firearms policy must comply with laws and regulations of DOJ, Bureau of Alcohol, Tobacco, Firearms, and explosives, etc.

Workers Comp Amendments (SHB 2127 & HB 1927)

- Increases incentives to return to work
  - Increases maximum benefits reimbursed by the state for workplaces utilizing light duty or transitional work for eligible workers. Now, maximum wage reimbursement is 50% of wage up to $25,000 (previously 10K)
  - Almost doubles the length of time a worker may be in such a position for each claim
  - Provides greater flexibility for vocational training to return people to the workforce.
- Reduces the number of days that a worker's temporary total disability must continue to receive workers comp for the day of the injury and the three-day period following the injury
  - A disability now must continue for 7 consecutive calendar days to receive workers' comp for the day of the injury and the three days following the injury. This is a reduction from the previous 14-day requirement

Interest Arbitration (SB 5808)

- Adds to the definition of “uniformed personnel” “public safety telecommunicators, as defined in RCW 38.60.020, employed by a public employer”
    - This does not apply to WSP dispatchers or other state agency dispatchers.

Developments in Federal and State Noncompete Law

Developments in Noncompete Law – Federal

- On April 23, the Federal Trade Commission issued its final rule banning most noncompetition agreements.
- Employers would have been required to notify workers (other than senior executives) who are bound by an existing non-compete that they will not enforce any noncompetes against them.
- The final rule was set to become effective on September 4, 2024 (120 days after publication in the Federal Register).
- On August 20, 2024, a federal district court in Texas issued a nationwide injunction against the Federal Trade Commission's (FTC) Non-Compete Rule. The court ruled that the FTC exceeded its authority and that the rule was arbitrary and capricious. The rule is now blocked from enforcement.

Developments in Noncompete Law – Washington

- Current law
  - Compensation Thresholds
    - $120,559.99 for employees
    - $301,399.98 for independent contractors
  - Any employee can be bound to non-solicitation agreements or agreements that prohibit poaching of customers or clients.
- 2024 legislative changes – effective June 6, 2024
  - Non-solicit covenants cover only current customers or clients.
  - Barring employees from doing business with customers or clients is a noncompete.

Developments in Noncompete Law – Washington

Other Changes

- Construe exceptions and ambiguities in favor of employees.
- Existing exclusion from coverage of noncompetes as part of sale or purchase of business – now limited to 1% or more of equity.
- If noncompete part of hire, must be presented before or with oral or written offer.
- Washington law must apply.
- Since 2020, damages and attorney fees could be awarded against employers, with the possibility of class actions; now others (like new employer) can sue if “aggrieved.”

Pre-Employment Testing for Cannabis

New WA Cannabis Statute

New Law, beginning January 1, 2024

- Employer can't refuse to hire based on off-duty use of cannabis or positive pre-employment drug test results that find ***nonpsychoactive*** cannabis metabolites in hair, blood, urine, or other bodily fluids
- Still can use "scientifically valid" test that doesn't screen for presence of nonpsychoactive cannabis metabolites; or can use drug tests that detect cannabis, if findings of past cannabis use are not provided to the employer.

New WA Cannabis Statute

- Does not preempt state or federal law requiring the applicant to be tested for controlled substances
- Does not apply to applicants for
  - Positions requiring a federal government background investigation or security clearance
  - Certain law enforcement, fire department, corrections officers and first responder positions
  - Positions in airline or aerospace
  - Safety-sensitive positions if impairment presents a substantial risk of death; must be identified by employer before application
- Does not prohibit post-accident or reasonable suspicion testing
- Employer still can have a drug and alcohol-free workplace

Religious Accommodation

Groff v. DeJoy

Religious Accommodation / *Groff v. DeJoy*

- U.S. Postal worker denied a religious accommodation to not work on Sunday.
- Accommodation denied because USPS was forced to redistribute deliveries to other employees, deemed an “undue hardship” under established “more than a de minimis cost” standard.
- U.S. Supreme Court held that undue hardship on the employer’s business occurs when “granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.”
- Must assess specific accommodations, impact based on the nature, size and operating costs of the business, must not rely on impacts on other employees, and the costs must be substantial.

Religious Accommodation

Suarez v. State of Washington

Religious Accommodation / *Suarez v. Washington*

- Plaintiff worked at a nursing facility in Selah.
- The nursing facility requires certain employees, including employees in Plaintiff's position to do mandatory OT. The Plaintiff's employment was governed by a CBA.
- Plaintiff is a "nondenominational Christian" and regularly attends church on Tuesdays and Saturdays.
- Plaintiff was terminated for her attendance, refusal to work mandatory overtime, and not showing up on 9/29 when she knew the facility would be short-staffed.
- "The correct analysis of an "undue hardship" defense against a claim for failure to provide reasonable accommodation for an employee's religious practices under the WLAD is within Hardison, adopted by this court in Kumar, and clarified by the United States Supreme Court in Groff, not WAC 82-56-020."

Discrimination

Muldrow v. City of St. Louis, Missouri

Muldrow v. City of St. Louis, Missouri

- Petitioner was involuntarily transferred out of her department. Her rank and pay remained the same in the new position, while her responsibilities, job perks and schedule did not.
- The federal district court dismissed Muldrow's discrimination claim, reasoning that she did not suffer a "significant" employment disadvantage. The Eighth Circuit affirmed.
- Title VII requires a plaintiff to show only that the transfer brought about some "disadvantageous" change in an employment term or condition based on sex.
- This decision eases the pathway for more workplace-bias lawsuits based on transfers or other actions that caused at least "some harm."

Related from PERC: City of Seattle, Decision 13735-A (PECB, 2024)

- Allegation that use of paid administrative leave was discrimination for prior filing of unfair labor practice charge.
- PERC concluded that paid administrative leave, while resulting in no financial harm, was a deprivation of a right, benefit or status and could be the basis for a discrimination ULP charge.
- Employee did not win but set low bar for the employer action that could support a claim.

EEOC New Enforcement Guidance on Workplace Harassment

EEOC Guidance on Harassment in the Workplace

- Issued in April
- The EEOC has not updated its harassment guidance since 1999.
- Examples of harassing conduct include:
  - Epithets regarding sexual orientation or gender identity;
  - Physical assault due to sexual orientation or gender identity;
  - Outing (disclosure of an individual's sexual orientation or gender identity without permission);
  - Repeated and intentional use of a name or pronoun inconsistent with the individual's known identity; and
  - Denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

Pregnant Workers Fairness Act Rules

EEOC Pregnant Workers Fairness Act Rules

- Reasonable accommodations to employee or applicant for “physical or mental condition related to, affected by or arising out of pregnancy, childbirth or related medical conditions - unless undue hardship.
- “Pregnancy” is broad, including current pregnancy, past pregnancy or potential and intended pregnancy, e.g., infertility, fertility treatment and contraception use.
- “Related medical conditions” also broad, including complications related to termination such as miscarriage, stillbirth, abortion and post-partum complications like anxiety, depression, incontinence, menstruation and lactation.
- Requires accommodation of employees who “temporarily” cannot perform essential functions – some adjustment of essential functions may be required.
- Categories of accommodations that presumptively do not impose undue hardship, including carrying water, restroom breaks, sitting/standing, eating breaks.
- Verbal communication to supervisor of limitation and need for adjustment at work is sufficient notice.
- Does not supersede WA law re pregnancy-related accommodations - RCW 43.10.005
  - Including no-question accommodations of restroom breaks, modifying food and drink policies and lifting restrictions over 17 pounds.

Court Tosses Reverse Discrimination Lawsuit *Massey v. Borough of Bergenfield* (D.N.J. 2024)

- A Caucasian police officer alleged that Defendants discriminated against him when they selected a Palestinian and Muslim individual to be Chief of Police, instead of him.
- The plaintiff alleged that all the individuals who made the employment decision were racial minorities, and some of their statements were evidence of racial bias.
- The Court disagreed, finding that the Defendants' statements about the employee's minority status, the American Dream, and the value of diversity did not form an adequate basis to establish background circumstances suggesting Defendants engaged in racial discrimination.

LA Sees Retired Police Lt.'s Military Leave Suit Trimmed *David Craig v. City of Los Angeles* (C.D. Cal. 2024)

- A retired police lieutenant alleged workers who take military leave for more than one year receive fewer sick time benefits than workers taking other types of leave for more than a year.
- The Court dismissed claims alleging the city of Los Angeles unlawfully required him to complete paperwork before approving his leave, imposed stringent reemployment requirements on him and denied him a promotion to captain. However, the plaintiff will have the opportunity to amend these claims.
- The Court did not provide the plaintiff with an opportunity to amend his claim that the city provides "enhanced military leave benefits" — such as differential pay and continued medical insurance — only for employees performing military service for specific operations.
- The Court noted that the Uniformed Services Employment and Reemployment Rights Act is “not meant to ensure that employees who take military leave for one reason receive the same rights and benefits provided to employees who also take military leave but for a different reason."
- The Court allowed the plaintiff’s claim alleging he was docked vacation time because he took military leave.

Covering for Mayor Is Not Fire Chief's Job. *Barton v. Neeley* (6th Cir. 2024)

- A Sixth Circuit panel concluded that covering up alleged misconduct to help a Michigan mayor pursue reelection was not part of an ex-fire chief's official job duties. The Sixth Circuit found that the fire chief's refusal to lie was protected speech and denied the mayor immunity.
- A fire chief refused to publicly change his recommendation to terminate firefighters who allegedly lied about their search efforts in a fire that killed two black children. The fire chief alleged that the former mayor requested the changes to secure political favor with the firefighters' union.
- The Sixth Circuit concluded that the refusal was not part of the fire chief’s job duties and is therefore protected by the First Amendment. As a public employee, the fire chief could not be compelled to make false statements about public issues in response to the mayor's retaliation threats.

Questions?

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