

# Hot Topics on the Horizon in Human Resources Law

Presented by:



**Robert Brooks**

[rbrooks@verrill-law.com](mailto:rbrooks@verrill-law.com)



**Scott Connolly**

[sconnolly@verrill-law.com](mailto:sconnolly@verrill-law.com)

## Agenda

- The gig economy and independent contractors
- Gender pronouns
- Supreme Court cases in 2020
- Mandatory vaccination
- Accommodating mental health issues
- Drug legalization

## States Continue Efforts to Restrict/Prevent Use of Independent Contractors Despite “Gig Economy”

- Different Tests and Standards for Different Purposes
  - IRS and State Tax Agencies
  - Wage Payment Laws
  - Unemployment Insurance
- States Claim:
  - Workers abused, victimized by wage theft, and need employee protections
  - Hundreds of Millions of Dollars in lost payroll withholdings
- Federal assault abated; states, local politicians, and labor unions waging war

## States Continue Efforts to Restrict/Prevent Use of Independent Contractors Despite “Gig Economy”

- **January 2020:** California Assembly Bill 5 took effect, which codified Supreme Court of California case, *Dynamex Operations West, Inc. v. The Superior Court of Los Angeles County*
  - Most workers are employees, ought to be classified as such, and the burden of proof for classifying individuals as independent contractors belongs to the hiring entity.
  - AB5 entitles workers classified as employees to greater labor protections, such as minimum wage laws, sick leave, and unemployment and workers' compensation benefits, which do not apply to independent contractors. Concerns over employee misclassification, especially in the gig economy, drove support for the bill.
- **November 12, 2019:** New Jersey sent payment demand to Uber Technologies for \$459 million and another to its subsidiary for \$642 million seeking unpaid contributions, penalties, and interest.
  - The payment demands cover 2014 through 2018 and allege a failure to make required payments under the New Jersey Unemployment and Temporary Disability Insurance Laws.

## States Continue Efforts to Restrict/Prevent Use of Independent Contractors Despite “Gig Economy”

- Ridesharing worker misclassification legal precedents important to other businesses, e.g. spillover to logistics and the “Uberization” of freight
- The “ABC Test” – Must meet all three prongs:
  - A)** the worker is free from control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;  
**AND**
  - B)** the worker performs work that is outside the usual course of the hiring entity’s business;  
**AND**
  - C)** the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.
- “B” prong: a worker whose job responsibilities fall within the “usual course of business” of the employer may be deemed misclassified
  - If re-classified, companies may have to account for workers' compensation, unemployment insurance, and social security taxes, and for some employees a host of wage-related issues, including overtime, meal, and rest periods

## States Continue Efforts to Restrict/Prevent Use of Independent Contractors Despite “Gig Economy”

- Sources of Risk and What Can Be Done?
  - Disgruntled terminated consultants and contractors and class-action lawsuits
    - Manage the termination
    - Address and resolve payment and reimbursement disputes
  - Agency audits and investigations
    - ABC Test must be met under written agreement
    - Be prepared for the knock at the door
      - What’s your argument that the service performed is “outside the usual course” of the Company’s business?
      - Documentation:
        - Independently established business
        - Free from direction and control in the performance of work

## Using Employees' Preferred Gender Pronouns & Gender Pronoun Legislation

- Common courtesy and actionable workplace right
- Manager, supervisor, and co-worker confusion, inexperience, or ignorance
  - transgender, cisgender, gender non-conforming, non-binary, intersex, androgynous, gender diverse, gender expansive, gender fluid, agender, bigender, genderqueer, pangender, MTF (male to female), and FTM (female to male)
  - he/him/his; she/her/hers; they/them/theirs; ze/hir
- Equal Employment Opportunity Commission (EEOC) - What You Should Know About EEOC and Enforcement Protections for LGBT Workers:
  - prohibited acts under Title VII include “intentionally and persistently failing to use the name and gender pronoun that correspond to the gender identity with which the employee identifies, and which the employee has communicated to management and employees.”
  - supervisors and co-workers should use the employee’s chosen name and pronoun “in employee records and in communications with and about the employee.”

## Using Employees' Preferred Gender Pronouns & Gender Pronoun Legislation

- New York City's Human Rights Law & Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression:
  - Employers must use the name, pronouns, and title with which a person self-identifies, regardless of the person's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person's identification
  - "refusal to use a transgender employee's name, pronouns, or title may constitute unlawful gender-based harassment"
    - Intentional or repeated refusal to use a person's name, pronouns, or title, e.g. repeatedly calling a transgender woman "him" or "Mr." after she has made clear that she uses she/her and Ms.
    - Refusal to use a person's name, pronouns, or title because they do not conform to gender stereotypes, e.g., insisting on calling a non-binary person "Mr." after they have requested to be called "Mx."
    - Conditioning a person's use of their name on obtaining a court-ordered name change or providing identification in that name
    - Requiring a person to provide information about their medical history or proof of having undergone particular medical procedures in order to use their preferred name, pronouns, or title



## 2020 U.S. Supreme Court Employment Cases

- Whether Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sexual orientation and transgender status
  - Federal appellate courts have disagreed on the issue
  - Two consolidated cases, *Altitude Express Inc. v. Zarda* and *Bostock v. Clayton County, Georgia*, address workplace protections based on sexual orientation
  - *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC* will consider employment rights based on gender identity
  - The Equal Employment Opportunity Commission maintains that LGBT workers are covered under Title VII's protection from sex-based discrimination in the workplace
  - The U.S. Department of Justice submitted arguments that take the opposite position, arguing that Title VII does not protect workers based on gender identity or sexual orientation

## 2020 U.S. Supreme Court Employment Cases

- Age Discrimination
  - *Babb v. Wilkie*, the Supreme Court will consider a provision in the Age Discrimination in Employment Act of 1967 regarding federal-sector coverage
  - The provision at issue requires employers taking personnel actions affecting agency employees aged 40 years or older to be free from “discrimination based on age”
  - The issue is whether the federal-sector provision requires a plaintiff to prove that age was a but-for cause of a challenged personnel action
- Employee Benefits
  - *Intel Corp. Investment Policy Committee v. Sulyma*, the Supreme Court will settle an issue concerning the statute of limitation in Section 413(2) of the Employee Retirement Income Security Act
  - The three-year limitations period runs from “the earliest date on which the plaintiff had actual knowledge of the breach or violation”
  - The question for the Court is whether this limitations period bars suit when the defendants in a case had disclosed all relevant information to the plaintiff more than three years before the plaintiff filed a complaint, but the plaintiff chose not to read or could not recall having read the information

## Mandatory Vaccinations vs. Employee Rights

- Global trend for governments to mandate vaccination of some or all of the population as part of public health initiatives
  - Argentina
  - Australia
  - California
  - Maine
- Legislative trend in U.S. to limit the ability of citizens to decline vaccination for themselves and their children
- Growing popular opposition to this trend
- Some employers, especially in healthcare, require vaccination as a condition of employment even in the absence of a state law

## An Act to Protect Maine Children and Students from Preventable Diseases by Repealing Certain Exemptions from the Laws Governing Immunization Requirements

- Passed Maine Senate by 1 vote, signed by Gov. Mills on 5/24/19
- The new law will eliminate exemptions from immunization based on philosophical and religious reasons for students and **covered employees**; some medical exemptions are retained
- Law will be effective 9/1/21 unless overturned by People's Veto Referendum on 3/3/20

## Current Maine Law Mandates Vaccination for These Employees:

- Employees of nursery schools who provide care for children
- Employees working for healthcare providers:
  - nursing homes
  - residential care facilities
  - intermediate care facilities for persons with intellectual disabilities
  - multi-level health care facilities
  - hospitals
  - home health agencies
- "Employee" means any person who performs a service for wages or other remuneration for a designated health care facility (i.e., not just direct care providers)
- Required vaccinations: measles, mumps, rubella, varicella (chicken pox), Hepatitis B (unless opt out in writing)
- N.b., Maine law does not require teachers to be vaccinated

## Public Health vs. Individual Liberties

- Both federal and state law protect employees from discrimination based on religion and disability
- U.S. courts have generally upheld a state's exercise of its "police powers" to protect public health to justify mandatory vaccination programs that override parental rights and individual liberties.  
*Jacobson v. Massachusetts* (1905)
- But a state's police powers are not unlimited
- Employers with policies mandating vaccination may need to make "reasonable accommodations" for employees objecting to vaccines based on religious or medical grounds

## Do Mandatory Vaccination Laws and Policies Conflict with Federal and State Human Rights Laws?

- EEOC has filed several discrimination lawsuits claiming the employer violated federal law when it refused to accommodate an employee's religious beliefs regarding a mandatory flu vaccine. See, e.g., *EEOC v. Baystate Medical Center*.

## Hypotheticals

#1: Hospital hires billing clerk who discloses she is 3 months pregnant and refuses to get any of required vaccines including the annual flu shot because of safety concerns related to her baby.

#2: Nursing home discovers a nurse employed for the last ten years lacks the MMR and chicken pox vaccines. Nurse refuses to get either, citing religious reasons that vaccines contains material derived from aborted fetal tissue.

#3: School requires that all employees receive the same schedule of vaccines that state law requires for its students. A math teacher refuses to get vaccinated based on past history of adverse medical reaction to the DTaP vaccine.



## Employee Mental Health Issues

- 30% to 50% of adults in the U.S. experience mental health issues at some point during their lifetime
- Anxiety, depression, and substance abuse are the most common
- Mental health disorders among the most costly illnesses in the U.S.

## Employee Mental Health Issues

- Workers with mental health disorders are significantly less productive
- Workers with mental health disorders often suffer from other health conditions, which compound the cost of treatment and loss of productivity
- Physical health problems tend to affect attendance while mental health problems tend to affect performance

## Increasing Rates of Mental Health Issues Among Younger Workers

- A recent study found 50% of millennials and 75% of Gen Zers have left a job for mental health reasons
- The percentage of young Americans experiencing certain types of mental health disorders, such as suicidal thoughts, has risen significantly over the past decade, with no corresponding increase in older adults

## Addressing Mental Health Issues

- Build and sustain workplace cultures that enhance health and well-being
- Focus on the protection of workers from safety and health hazards
- Give workers a role in deciding how their work is to be done
- Have resources in place to address employees with mental health issues, including methods for early detection and intervention

## Impact of Marijuana Legalization in the Workplace

- Changed attitudes towards marijuana use
  - 2018 Pew Research Survey: 62% of respondents said should be legal
  - 2000: 31%
- The law has followed changed attitudes
  - As of 2019, 33 states & D.C. have legalized medical use
  - 11 states have legalized recreational use
- Workplace impact and employer confusion
  - Deny employment or discipline for testing positive?
  - Modify policies?
  - Duty to accommodate?

## Impact of Marijuana Legalization in the Workplace

- Federal Law – cannabis still illegal Schedule I drug
  - 2013 DOJ: “still illegal, but we will defer to states”
  - 2018 DOJ reverses: previous guidance rescinded; prosecutors will continue to enforce prohibition on marijuana
- State Medical Use Laws vary considerably
- State Recreational Use
  - Washington, Colorado, Alaska, California, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, and DC

## Impact of Marijuana Legalization in the Workplace

- Employers free to adopt drug-free workplace policies
  - Discipline okay where legal or illegal drug impairs an employee's job performance or creates safety hazard
  - Example: California Recreational Use Law
    - “Not intended to affect the rights and obligations of public and private employers to maintain a drug and alcohol free workplace or to require an employer to permit or accommodate marijuana use in the workplace”
  - Colorado: *Coats v. Dish Network*
    - Although employee's recreational marijuana use lawful under state law, Colo. Supreme Court found that federal prohibition rendered employee's conduct unlawful and not protected “lawful out-of-work activity”

## Impact of Marijuana Legalization in the Workplace

- Reasonable Accommodation of Medical Marijuana Use
  - State law may require reasonable accommodation of employees who use medical marijuana outside of work hours due to a disability
  - Arizona, Connecticut, Delaware, Illinois, Minnesota, Nevada, New York, and Rhode Island statutes expressly prohibit employers from discriminating against employees based on status as medical marijuana patients
  - Some state courts may impose obligation even without statute - MA SJC in *Barbuto v. Advantage Sales & Marketing* says interactive process and undue burden analysis required
  - But others may not – Oregon Supreme Court in *Emerald Street Fabricators v. Bureau of Labor* says federal law preempts state medical use and no accommodation required
  - Federal law controls industries subject to federal safety regulation and recipients of federal grants