EMPLOYMENT LAWSCENE ALERT: WHAT DOES THE CDC'S NEW MASK GUIDANCE MEAN FOR EMPLOYERS?

O'NEILCANNON
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On May 13, 2021, the CDC announced that it had updated its guidance for individuals who have been fully vaccinated against the COVID-19 virus (i.e., individuals who received their final shot more than two weeks ago). The updated guidance states that individuals who have been fully vaccinated against COVID-19 are not required to wear masks or follow social distancing guidelines in most settings. Masks are still required for those who have not reached full vaccination. Masks are also still required for all individuals in certain places, including on public transportation, in transportation hubs, and at high-risk workplaces, such as healthcare, correctional facilities, and homeless shelters. Although this guidance was issued for individuals, the CDC has promised updated guidance for businesses and employers shortly, and some companies have already lifted their mask mandates for customers.

So, while this means that employers may soon be able to relax their mask rules for employees, there are a number of important considerations for employers.

Can an employer ask its employees if they have been vaccinated?

Yes. According to the EEOC, requesting proof of COVID-19 vaccination is not likely to elicit information about a disability, and therefore is not a disability-related inquiry under the ADA, which would otherwise need to be job-related and consistent with business necessity, and does not elicit genetic information protected by the Genetic Information Nondiscrimination Act. Additionally, HIPAA does not apply to employee health information collected or maintained by an employer in its role as an employee's employer. However, medical information regarding employees should be kept confidential and separate from an employee's general personnel file.

Does my company still have to comply with local mask ordinances?

Yes. The CDC guidance specifically says that individuals are still required to wear masks when required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance. Therefore, companies located in areas where there are currently mask ordinances in place must continue to follow such local or state laws.

What about OSHA and other safety concerns?

On January 29, 2021, OSHA published guidance that required all individuals to wear masks when in public and around other people and provided that employers should not distinguish between workers who are vaccinated and those who are not. However, OSHA has now stated that it is reviewing the CDC guidance, will update its guidance in the near future, and to "refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers." Therefore, employers should be able to rely on the CDC guidance related to mask mandates and social distancing for fully vaccinated employees. However, employers must remember that, consistent with the obligations under the OSH Act's general duty clause, they will need to continue to provide a safe workplace. Therefore, an employer that abandons all COVID-related safety protocols or permits all employees, regardless of vaccination status, to stop wearing masks may still be at risk of an OSHA complaint.

In summary, employers must continue to comply with local mask ordinances and should monitor OSHA and other guidelines to make sure that they are ensuring the safety of their employees. If an employer decides to allow fully vaccinated individuals to stop wearing masks, it should clearly communicate its policy, including how it will verify vaccination status, to its employees. As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.

EMPLOYMENT LAWSCENE ALERT: AMERICAN RESCUE PLAN EXTENDS TAX CREDITS FOR COVID-RELATED LEAVE

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On March 11, 2021, President Biden signed the American Rescue Plan into law. Among a wide variety of other aims, the $1.9 trillion bill extended tax incentives for certain employers that chose to provide their employees with qualifying paid leave related to the COVID-19 pandemic.

In March 2020, the Families First Coronavirus Response Act ("FFCRA") was signed into law.

The FFCRA contained two leave components: the Emergency Paid Sick Leave Act ("EPSLA") and the Emergency and Family and Medical Leave Act ("EFMLA"). Under the EPSLA, employers with fewer than 500 employees were required to provide employees with up two weeks of leave sick leave for six COVID-related reasons; and under the EFMLA, employers with fewer than 500 employees were required to provide employees with up to 12 weeks of leave if their children's school or child care facilities were closed due to COVID. Those employers could then offset the expense of such paid leave through tax credits. Mandated leave under the FFCRA ended on December 31, 2020, but in December 2020, the tax credits were extended through March 31, 2021 for employers with fewer than 500 employees that opted to continue to provide qualifying EPSLA and EFMLA leave.

The American Rescue Plan similarly gives employers with fewer than 500 employees the option, but not the obligation, to continue to provide EFMLA and EPSLA to employees through September 30, 2021 and provide employers with a 100% tax credit to offset the cost of such leave. The American Rescue Plan has also expanded the list of qualifying reasons for EPSLA leave to include time off to receive the COVID-19 vaccination and time off to recover from side effects of receiving the vaccination. Employers should be mindful to update their existing FFCRA leave forms to reflect these additional uses for leave. Finally, on April 1, 2021, for employers who opt to provide continued leave pursuant to EPSLA and EFMLA, employees are entitled to a renewed two-week bank of EPSLA leave, and if an employee's bank of FMLA has not otherwise renewed pursuant to the employer's FMLA policy, the 12-week EFMLA leave bank would also be replenished.

Therefore, while the American Rescue Plan does not add any new obligations for employers, it does continue to provide incentives in the event that employers with fewer than 500 employees choose to provide COVID-related paid time off. As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID and related issues.

EMPLOYMENT LAWSCENE ALERT: BIDEN ADMINISTRATION SUPPORTS NEW LAWS PROTECTING EMPLOYEES FROM DISCRIMINATION

In this, the latest installment in our series discussing the Biden Administration's workplace initiatives, we will now consider the potential impact on employment discrimination laws. At the moment, there are two main legislative actions underway in Congress, and President Biden has lent his support to both these initiatives, as well as other proposals that would affect employment discrimination laws.

Equality Act

In February 2020, the House of Representatives passed the Equality Act, which was originally passed in 2019 but never received a vote in the Senate. The Equality Act would write protections for LGBTQ individuals into Title VII and other federal civil rights statutes and would explicitly prohibit discrimination based on sexual orientation and gender identity. The U.S. Supreme Court's 2020 *Bostock v. Clayton County* decision held that Title VII protects employees against discrimination due to sexual orientation and gender identity, but the Equality Act would codify that decision for employment purposes and also expand the protections to housing, public accommodations, and other contexts. During debate on the bill, Republican lawmakers in the House voiced concerns about how the Equality Act will affect religious freedom for religious organizations. The bill that passed the House specifically states that the Religious Freedom Restoration Act, which provides that the government cannot infringe on a person's religious rights unless it has a good reason to do so and does so in the least restrictive way, cannot be used as a defense against a claim of LGBTQ discrimination under the Equality Act.

The Equality Act now heads to the Senate, where it will need 60 votes to overcome the filibuster. To do so, it may require the addition of religious freedom protections. If the Senate passes the Equality Act, President Biden, who has stated that it is necessary to "lock[] in critical safeguards," is likely to sign the bill into law. Whether or not the Equality Act becomes law, given the recency of the *Bostock* decision, the EEOC is likely to prioritize the protection of LGBTQ employees under Title VII.

Pregnant Workers Fairness Act

In February 2020, the House reintroduced the Pregnant Workers Fairness Act ("PWFA"). The PWFA would require private employers with 15 or more employees and public sector employers to make reasonable accommodations for pregnant employees unless such accommodations would impose an undue hardship on the employer. This will codify and expand upon the U.S. Supreme Court's decision in *Young v. UPS*, which held that employers

are required to treat pregnant employees no less favorably than they treat non-pregnant workers with similar inabilities to work. Given the *Young* decision, many employers are likely already providing a least some accommodations to pregnant workers. The PWFA, however, would eliminate the comparison to "non-pregnant workers with similar inabilities to work" and simply require reasonable accommodations, absent an undue hardship.

Under the PWFA, employers would also be prohibited from retaliating against pregnant employees for requesting a reasonable accommodation, and a pregnant employee could not be forced to take paid or unpaid leave if another reasonable accommodation is available. The PWFA has bipartisan support and will likely pass the House when it comes up for a vote. Like other legislation, the PWFA would need 60 votes in the Senate to over come the filibuster. Given the PWFA's broad bipartisan support, it is likely that it will get a vote in the Senate, pass, and be signed into law by President Biden.

Other Potential Changes

Currently, in order to prevail on a claim of age discrimination under the Age Discrimination in Employment Act ("ADEA"), an employee must show that age was the "but-for" reason for the adverse employment action. This is a more stringent standard than the "motivating factor" or "mixed motive" standards, which are required to prove other types of employment discrimination, including under Title VII. President Biden has indicated his support for legislation that would eliminate the "but-for" standard and bring the ADEA in line with other anti-discrimination laws that protect employees.

Finally, during his presidential campaign, President Biden expressed support for the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act ("BE HEARD Act"). This proposed legislation would expand Title VII to cover all employers, not just those with 15 or more employees; would expand the definition of employee to include independent contractors, volunteers, interns, and trainees; and would require anti-harassment policies and training. The BE HEARD Act was introduced in the House in 2019, but never received a vote. Given the other pending employment discrimination legislation, it may not be reintroduced, but its underpinnings of expanded rights are an important barometer for where employment discrimination legislation and policy through the EEOC is likely headed over the next four years.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding employment discrimination.

EMPLOYMENT LAWSCENE ALERT: THE BIDEN ADMINISTRATION TACKLES WAGE AND HOUR ISSUES

O'NEILCANNON
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In this installment of our series discussing the new workplace initiatives under the Biden Administration, we will discuss wage and hour issues that employers should prepare for, including an increased federal minimum wage, updated enforcement priorities, and the proposed Paycheck Fairness Act.

Minimum Wage

The federal minimum wage was last increased in 2009. Since then, multiple states and municipalities have increased their minimum wages. However, the federal minimum wage, as well as the minimum wage in Wisconsin, has remained at $7.25. Organizers and activists have supported the "Fight for $15," particularly in industries like fast food, and the Democratic Party has included support for a $15 minimum wage in its party platform since 2016. President Biden made his support of a $15 minimum wage even more clear when he signed a January 22, 2021, Executive Order directing the Office of Personnel Management to develop recommendations to pay federal employees at least $15 per hour and directing his administration to start the work that would allow him to issue an Executive Order within the first 100 days that requires federal contractors to pay a $15 minimum wage.

The Raise the Wage Act proposes a gradual increase, such that the federal minimum wage would increase in increments on a yearly basis between now and 2025 until it reaches $15 per hour. Thereafter, the minimum wage would index to median wages. The first increase, in 2021, would be to $9.50 per hour. Additionally, the Raise the Wage Act would, by 2027, eliminate the "tipped wage," the "youth wage," and the 14(c) wage, which can be paid to disabled individuals in certain positions. These changes would affect approximately 27 million workers, and the Congressional Budget Office has projected that it would increase the federal deficit and cost 1.4 million jobs as a result of employers scaling back due to increased costs.

However, increasing the federal minimum wage is no simple task. President Biden included a $15 minimum wage in his stimulus proposal, and the House of Representatives has included a $15 minimum wage in its most recent version of the coronavirus-relief package. However, once the bill reaches the Senate, passing an increased minimum wage will become

significantly more challenging. Typically, a bill needs the votes of 60 Senators to make it to the floor, and the increase of the federal minimum wage does not currently have that support.

The coronavirus-relief package, including the increased minimum wage, could, however, be passed through a process known as budget reconciliation, which requires only a simple majority of Senators, with ties broken by the Vice President. In order to be considered part of the budget reconciliation process, the Senate Parliamentarian would have to agree that raising the minimum wage has a direct impact on the federal budget. If she does not, Vice President Harris could overrule her. If it gets past these steps, at least 50 Senators would need to vote in favor of it. At this point, it's not clear that 50 Senators would vote "yes" to increasing the federal minimum wage to $15 per hour, even if gradually. Additionally, President Biden has admitted that passing an increased minimum wage as part of the coronavirus-relief package is unlikely at this point.

Acknowledging the challenge of getting a minimum wage hike included in the coronavirus-relief package, President Biden has said that he is prepared to engage in separate negotiations on the matter, and other politicians have discussed their potential support of a lower amount, such as $12 per hour. So, while a $15 minimum wage may not be right on employers' doorsteps, this is not an issue that is likely to go away. Employers should begin evaluating the effect that a minimum wage increase would have not only on the wages of their workers who fall between the current minimum wage and a potential new minimum wage, but also on their ability to retain workers who, while now comfortably over the minimum wage, may end up below, at, or only slightly above it if there is a mandated increase.

Wage and Hour Enforcement Priorities

One of President Biden's campaign promises was to "ensure workers are paid fairly for the long hours they work and get the overtime they have earned." This will assuredly lead to an enforcement push at the Department of Labor ("DOL"). Moreover, the DOL is likely to strictly enforce penalties for non-payment of overtime wages. This new stance can already be seen by the fact that the Biden Administration eliminated the Payroll Audit Independent Determination ("PAID") program. The PAID program was a 2018 initiative that allowed employers to self-report FLSA wage and hour violations, including unpaid or miscalculated overtime. While the PAID program required employers to pay workers 100% of the wages owed, it did not assess the 100% liquidated damages penalty. However, on Friday, January 29, 2021, the DOL announced the immediate end of the PAID program, stating that the program "deprived workers of their rights and put employers that play by the rules at a disadvantage." The DOL added that it "will rigorously enforce the law, and . . . use all the enforcement tools we have available." Employers must make sure that their wage and hour policies and practices comply with the law and should consider performing audits to ensure

there are no potential violations. Failure to take these proactive measures could land employers on the wrong side of a time-consuming and costly DOL investigation.

Paycheck Fairness Act

Finally, President Biden supports the Paycheck Fairness Act, which was originally passed in the House of Representatives in 2019 and was recently reintroduced in February 2021. If passed, the Paycheck Fairness Act would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be based on "a bona fide factor other than sex, such as education, training, or experience." Currently, federal law requires that any pay disparity between employees of different sexes performing the same job be based on a "factor other than sex." The use of a **bona fide** factor would significantly narrow employers' flexibility in justifying any pay differences. The Paycheck Fairness Act also prohibits employers from restricting employees' discussions of wage information, requires additional employer reporting regarding compensation, and makes it easier for employees to pursue individual and class and collective actions alleging wage discrimination.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have regarding wage and hour concerns or new policies or legislation under the Biden Administration.

EMPLOYMENT LAWSCENE ALERT: WHAT'S A BIDEN PRESIDENCY GOING TO MEAN FOR EMPLOYERS? AN OVERVIEW

O'NEILCANNON
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The labor and employment law policies and enforcement goals of the federal government rely largely on which party's administration occupies the White House. When inaugurated in January, President Joseph R. Biden made some immediate and significant changes that will affect employers. Also, based on President Biden's statements made during his campaign and the stated goals of others in the Democratic Party, decidedly pro-employee policies, enforcement goals, and legislation are very likely on the way. These changes are all but certain, now, with a Democratically controlled Congress. Over the next five weeks, the

OCHDL employment law team will examine five labor and employment areas that employers should know and understand in order to navigate through the new and significant changes that the Biden Administration will likely make in the coming months and years. In the following weeks, we will cover:

- **OSHA**: On January 21, 2021, President Biden signed an Executive Order requiring OSHA to provide guidance to employers on workplace safety during the COVID-19 pandemic. In response, on January 29, 2021, OSHA issued guidance related to COVID-19. This guidance, as well as OSHA's enforcement policies regarding COVID-19, will likely continue to evolve under the new administration.
- **Wage & Hour**: This blog series will also cover potential wage and hour changes such as an updated federal minimum wage and the proposed Paycheck Fairness Act, which would expand the equal pay provisions contained in the FLSA and require that any pay differential between sexes be passed on "a bona fide factor other than sex, such as education, training, or experience."
- **Labor Law**: We'll discuss the future of the NLRB and labor law under a Biden Administration. Significant changes, including the roll back of certain enforcement guidance and the ousting of the General Counsel, have already occurred, and if campaign promises are to be believed, we could have significant additional changes, including the passing of the Protecting the Right to Organize (PRO) Act, which would be a sweeping overhaul of federal labor law including prohibiting the use of class action waivers in arbitration agreements, making it easier for workers to form unions, limiting the impact of right-to-work laws, and codifying an expanded definition of what constitutes a joint employer.
- **Discrimination**: Then, we'll cover the Biden Administration's potential impact on issues of discrimination, including the Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD) Act, which would require most businesses to provide anti-harassment policies and training and would codify the prohibition of discrimination on the basis of sexual orientation, gender identity, pregnancy, childbirth, a medical condition related to pregnancy or childbirth, and a sex stereotype under Title VII.
- **DOL**: Finally, this blog series will wrap up with potential changes that could come through the Department of Labor, including changes to the independent contractor test, changes to the joint employer test, and expansions of the FMLA.

As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We look forward to expounding on these topics over the next five weeks and providing you with timely and relevant information over the years to come. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding the anticipated labor and employment law changes under the new Biden Administration.

EMPLOYMENT LAWSCENE ALERT: THE ELECTION IS ALMOST HERE—VOTING LEAVE IN WISCONSIN

O'NEILCANNON
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Tuesday, November 3, 2020 is Election Day. Although early voting is underway and many individuals have already returned their absentee ballots, many people will want to vote in-person on Election Day. All Wisconsin employers are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 AM until 8 PM), and employees must request the time off prior to the election. Voting leave cannot be denied on the basis that employees would have time outside of their scheduled work hours to vote while the polls are open, but employers can specify which three hours an employee is permitted to utilize. Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are also required to grant an employee who is appointed to serve as an election official 24 hours of unpaid leave for the election day in which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with at least seven days' notice of their need for this leave.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong & Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: DOL UPDATES FFCRA LEAVE REGULATIONS

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On September 11, 2020, the Department of Labor issued updated regulations regarding the Families First Coronavirus Response Act and leave available under that law. These updates were issued in response to a recent federal district court ruling out of the Southern District of New York that invalidated portions of DOL's original rules under the FFCRA because the agency exceeded its authority in issuing certain portions of its rules. These updated regulations are effective on September 16, 2020.

Most notably, the new DOL regulations update the definition of "health care providers" that are excluded from the FFCRA. The original definition included anyone employed at a hospital, medical school, and a variety of other places where medical services are provided, as well as individuals employed by a business that produced medical equipment. This definition was criticized as being overbroad and including many more workers than the traditional FMLA definition of health care provider. DOL has revised the definition to include both those who meet the traditional FMLA definition of health care provider who can issue an FMLA certification, as well as individuals capable of providing health care services such as diagnostic services, preventative services, treatment services, or other services that are integrated with and necessary to the provision of patient care. Non-medical personnel such as IT professionals, building maintenance staff, human resources personnel, food services workers, records managers, consultants, and billers are no longer considered health care providers, even if they work at a hospital or other medical service provider.

Employers should take notice that the DOL clarified its stance on intermittent leave under the FFCRA. While intermittent leave is still available only with the agreement of the employer, the DOL clarified that if a child is going to school under a school-mandated hybrid model (e.g., in person two days per week and remote learning three days per week), an employee's need for leave only on those days that their child is home engaged in remote learning would not be considered intermittent leave, and, therefore, the employer's agreement for such a leave schedule would not be necessary. On the other hand, the DOL explained that if it is the parent's choice to have the child attend remote learning instead of in person classes, rather than the change being imposed by the school, then the parent would not be eligible for any FFCRA leave because the school is not "closed" due to a COVID-19 related reason. Under those circumstances, the employer could lawfully deny the employee's request for FFCRA leave.

O’Neil, Cannon, Hollman, DeJong & Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN FACE COVERING ORDER ISSUED – EFFECTIVE AUGUST 1, 2020

O'NEILCANNON
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Today, Wisconsin Governor Tony Evers declared a Public Health Emergency and issued an Emergency Order requiring individuals to wear face coverings. This Emergency Order goes into effect at 12:01 a.m. on Saturday, August 1, 2020 and will expire on September 28, 2020, unless there is a subsequent superseding emergency order.

The Emergency Order applies to all individuals over the age of five when they are indoors or in an enclosed space with anyone outside of their household, other than when inside a private residence. “Enclosed space” is defined in the Emergency Order as “a confined space open to the public where individuals congregate, including but not limited to outdoor bars, outdoor restaurants, taxis, public transit, ride-share vehicles, and outdoor park structures.” Additional guidance included in the Face Covering FAQs states that, even if individuals can socially distance indoors, unless that person is the only person in the room, a face covering must be worn and that the Emergency Order requires face coverings inside businesses and office spaces, unless an exception applies. Exceptions to the face covering requirement include, among other things, the following:

- when an individual is eating, drinking, or swimming;
- when an individual is obtaining a service that requires temporary removal of the face covering, such as dental services; and
- individuals with health conditions or disabilities that would preclude safely wearing a face mask.

Therefore, the Emergency Order will require employees to wear face coverings in most workspaces, unless the employee is in a room and is the only person in that room.

The Emergency Order supersedes local orders that are less restrictive, but those that are

more restrictive than the Emergency Order, like that issued by the City of Milwaukee, are not superseded and remain in force. Therefore, it is important to check local guidelines to ensure that all requirements are complied with. The Emergency Order will be enforced by local and state officials, and the penalty for violation of the Emergency Order is a fine of not more than $200.

O'Neil, Cannon, Hollman, DeJong & Laing remains open during this time. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to COVID-19.

EMPLOYMENT LAWSCENE ALERT: SUPREME COURT RULES THAT TITLE VII PROHIBITION ON SEX DISCRIMINATION PROTECTS GAY AND TRANSGENDER EMPLOYEES

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

Today, June 15, 2020, the United States Supreme Court issued a landmark ruling holding that an employer who fires an individual based on his or her sexual orientation or transgender status violates Title VII's prohibition against discrimination "because of . . . sex." In a 6-3 decision, the majority found that "[s]ex plays a necessary and undisguisable role" in a decision to terminate an individual for being homosexual or transgender, which is "exactly what Title VII forbids." Although the Court recognized that "homosexuality and transgender status are distinct concepts from sex . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."

Title VII requires the Court to apply a but-for test, under which an employer violates the law if the employment decision is based in part on sex. Therefore, the Court concluded that if you change *only* the individual's sex and it results in a different outcome, that is a violation of Title VII. So, the fact that a man who is attracted to men is treated differently from a woman who is attracted to men means that sex is the but-for cause of the decision. Justice Gorsuch, who wrote the majority opinion, analogized this to an employer firing female employees who were Yankees fans but not male employees who were Yankees fans. Sex does not have to be

the sole or even the primary cause of the adverse action. There may be two or more reasons for the termination, but if a different outcome would have been reached if the individual's sex was changed, sex is the but-for cause of the decision. Therefore, because "homosexuality and transgender status are inextricably bound up with sex," a decision based on homosexuality or transgender status takes sex into account in a way that is impermissible under Title VII. Additionally, the Supreme Court did not find it persuasive that homosexual men and homosexual women would be treated the same. Instead, the Court stated that the focus of Title VII is on the individual and how the individual is treated.

The Court found that this decision is in line with prior precedent finding that the following instances violated Title VII where, if the plaintiff had been a different sex, they would have been treated differently: a policy where women with young children were not hired when men with young children were; a policy where women were required to make larger pension fund contributions than men because of longer overall life expectancies; and an instance where a male employee was sexually harassed by male coworkers. In each of these situations, the Court found that there was a violation of Title VII because the result would have been different if the individual was a different sex.

Finally, the Court dismissed arguments that this interpretation was not what Congress intended. First, the Court reasoned that the term "sex" was broad and that, where there are no statutory exceptions to a broad rule, it is not the Court's role to write in such exceptions. Additionally, the Court stated that, while this *result* may not have been what the drafters of Title VII anticipated in 1964, the *meaning* of sex has not changed, and the Court is bound to the plain meaning of the words contained in the statute.

The Supreme Court's decision does not change business-as-usual for Wisconsin employers. In 2017, the Seventh Circuit ruled that sex discrimination under Title VII includes discrimination based on sexual orientation. In addition, the Wisconsin Fair Employment Act prohibits discrimination on the basis of both sex and sexual orientation, and since at least 2015, the EEOC has taken the policy stance that sexual orientation and transgender status were protected categories under Title VII. The U.S. Supreme Court's ruling serves as a reminder for employers to stay vigilant about enforcing their anti-discrimination and anti-harassment policies and practices for all individuals.

EMPLOYMENT LAWSCENE ALERT: WHEN ARE MY EMPLOYEES ENTITLED TO LEAVE UNDER

THE FFCRA BECAUSE THEIR CHILDREN ARE HOME FROM SCHOOL OR DAYCARE?

O'NEILCANNON
HOLLMAN DEJONG & LAING S.C.

As we previously covered here, the Families First Coronavirus Response Act ("FFCRA") requires that, with certain exceptions, employers with 500 or fewer employees must provide employees with leave in certain circumstances pursuant to the Emergency Paid Sick Leave Act ("EPSLA") and Emergency Family and Medical Leave Expansion Act ("EFMLA"). Both the EPSLA and the EFMLA require leave if an individual is unable to work or telework because they need to care for their son or daughter under the age of 18 if the child's school or place of care has been closed or if the childcare provider of such child is unavailable due to reasons related to COVID-19.

The Department of Labor ("DOL") has issued some additional guidance regarding leave under the FFCRA. Included is guidance specific to the need for leave to care for a child whose school or place of care has been closed or whose childcare provider is unavailable, further clarifying that (i) such leave is not available if another suitable person is available who can care for a child; (ii) such leave is not available to the extent that an employee can telework while caring for the child; (iii) such leave may be taken intermittently if the employee and employer agree to do so; and (iv) such leave may be taken for a child over the age of 18 if he or she has a disability and cannot care for him or herself due to that disability. The DOL also stated that employers should keep the following records for leave to care for a child whose school or place of care is closed: (i) the employee's name; (ii) the date(s) for which leave is requested; (iii) the reason for leave; (iv) a statement from the employee that he is she is unable to work or telework because of this reason; (v) the name of the child being cared for; (vi) the name of the school, place of care, or childcare provider that has closed or become unavailable; and (vii) a statement from the employee that no other suitable person is available to care for the child. This documentation will be necessary for employers who provide FFCRA leave to receive reimbursement of the costs of that leave through tax credits from the Internal Revenue Service ("IRS"). The DOL also stated that employers should consult IRS forms, instructions, and information for the procedures that must be followed to claim a tax credit, including any needed substantiation to support the credit.

The guidance published by the IRS for a leave requested based on a school closing or childcare provider unavailability includes all of the DOL information and also requires that the employee provide the **age** of the child. Additionally, if an employee claims that they are unable to work or telework because of a need to provide care for a child older than 14 during

daylight hours, the employee must also provide a statement that special circumstances exist requiring the employee to provide care. Although there is no specific guidance regarding what is considered a “special circumstance,” a reasonable interpretation would be that it requires some specific reason outside of typical circumstances, such as a disability or medical condition, that the child is not able to care for him or herself. If additional guidance becomes available, we will provide updates.

Employers must request accurate and complete documentation from employees requesting leave under the FFCRA. If that leave is to care for a child over the age of 14 because his or her school or place of childcare is closed, special circumstances must exist in order for the employer to grant such leave. If such leave is granted without proper documentation and appropriate special circumstances, the IRS will deny the employer tax credit for the amount paid for such leave.

O’Neil, Cannon, Hollman, DeJong & Laing S.C. remains open during this time and is here to help. We encourage you to reach out with any questions, concerns, or legal issues you may have, including those related to leave under the FFCRA.