2023 Legal Update

Katy Rand, Dan Strader & Katie Porter

PIERCE ATWOOD LLP

New England and Federal

Katy Rand and Katie Porter

PIERCE ATWOOD LLP

Pregnancy Accommodation

- Old standard:
  - Pregnancy is not a disability, so no obligation to reasonably accommodate pregnancy related restrictions unless employer accommodates similar restrictions of non-pregnant employees
- Enter:
  - 2019 Amendments to MHRA, "An Act to Protect Pregnant Workers"
  - Pregnant Workers Fairness Act

MHRA - Pregnancy

- Provides an explicit right to accommodations for pregnancy-related conditions.
- Requires reasonable accommodation unless employer can prove undue hardship.
- Bill originally included language to the effect that employees with pg-related conditions were entitled to same rights as a qualified individual with a disability.
- This language was stricken and employer therefore must consider accommodations that include the elimination of essential function.

PWFA – effective June 27, 2023

- Applies to employers with at least 15 employees
- Similarly requires provision of reasonable accommodation to known limitations related to pregnancy, childbirth, or related medical conditions
- Similarly allows denial upon proof of undue hardship

Pregnancy-Related Conditions

High blood pressure	Anxiety	Carpal tunnel
Gestational diabetes	Post partum depression	Pregnancy loss
Severe morning sickness	Mastitis	Abortion care

Potential Accommodations

- Rest time
- Opportunity to sit
- Relaxed uniform requirements
- Time off
- Remote work
- Lifting restrictions
- Light duty
- Temporary reassignment

Religious Accommodation

- *Groff v. DeJoy* (SCOTUS, 6/9/23)
  - › USPS employee claimed could not work Sundays.
  - › Employer continued to schedule him, seeking volunteers to cover his shifts. Not always successful.
  - › Other employees required to work more Sundays.
  - › Groff received discipline for Sunday absences and eventually resigned.
- Prior to *Groff*, SCOTUS said an undue hardship means anything more than a "de minimis" burden.
  - › Cases expressly referenced burden on others as an undue hardship.

Groff Decision

- Court rejected Groff's argument that undue hardship requires showing of "significant difficulty or expense."
- Instead, undue hardship is a fact-specific inquiry that focuses on whether "a burden is substantial in the overall context of an employer's business."
  - › Consider practical impact of accommodation in light of the nature, size, and operating cost of the employer.
  - › Impact on coworkers only relevant to the extent it impacts the conduct of the business.

Groff Takeaways

- Can no longer deny requests for religious accommodation based solely upon the fact that they burden other employees
- Think creatively:
  - › If employee can't work every other weekend as required, can they work every Saturday?
- Employer should be prepared to engage in an ADA-style dialogue, considering all available accommodations, even if not proposed by employee.
- Document options considered and thought process behind trying / rejecting alternatives.

Workers' Compensation Bar

- WCA is the exclusive remedy for workplace injuries
- An employee cannot sue employer or any employee in tort for harm caused in the course of / because of employment
  - Torts: negligence, intentional infliction of emotional distress, defamation, assault.
- Historically, this has applied regardless of whether the injury was caused by negligence or an intentional act

Recent Amendment to WCA

- In cases involving intentional sexual harassment or assault, the workers' comp bar will not prevent a tort action against an individual employee, supervisor, officer or director.
- Workers' comp bar will still preclude an action in tort against the employer, however.

Relation to Title VII / MHRA

- Federal and state anti-discrimination laws have their own remedies for sexual harassment (and assault, which will generally be viewed as sufficiently severe to constitute harassment).
- Maine's Law Court has ruled that, when there's a statutory right and remedy, the employee cannot seek common law relief, aka a tort claim.
- But neither Title VII nor the MHRA support individual liability for sexual harassment.

WCA Change Takeaway

- In Maine, sexual harassers / assaulters can now be individually liable in tort for damages caused by their actions.
  - Damages for physical harm
  - Potentially emotional distress
- Unlike Title VII and MHRA claims, tort claims don't involve attorney fee shifting.
- Open question: will injured employees be able to afford representation?

Maine Equal Pay Law

- 26 M.R.S.A. § 628
- "An employer may not discriminate between employees in the same establishment **on the basis of sex** by paying wages to any employee in any occupation in this State at a rate less than the rate at which the employer pays any employee of the opposite sex for **comparable work** on jobs that have comparable requirements relating to skill, effort and responsibility."
- Expanded to cover **race** (L.D. 1703)

Maine Equal Pay Law (*cont.*)

- Affirmative defenses under ME law:
  - Seniority systems
  - Merit increase systems
  - Differences in shift or time of day worked
- Note: unlike federal law there is not a "factors other than sex" defense
- Recall:
  - Intent does not matter (*see Mundell v. Acadia Hospital Corp*., 585 F. Supp. 3d 86 (D. Me. 2022))
  - Focus on "comparable work"
  - Pay transparency laws – not in ME yet but could be coming…

MHRA Damages Cap Increases

- 5 M.R.S.A. § 4613
- Compensatory and punitive damages caps increased for alleged MHRA violations significantly:

Employer Size	Prior Damages Cap	New Damages Cap
15-100 employees	$50,000	$100,000
101-200 employees	$100,000	$300,000
201-500 employees	$300,000	$500,000
501+ employees	$500,000	$1,000,000

- Updated caps follow *Bell v. O'Reilly Auto Enterprises, LLC*, 626 F. Supp. 3d 141 (D. Me. 2022) decision, which confirms that employees may stack federal and state damages.
- Increases effective as of September 19, 2023 (L.D. 1423)
- Concerns: increased settlements, EPLI and litigation

Maine Paid Family Leave

- *Covered employees:* all employees who have earned at least six times the state average weekly wage in the first four calendar quarters immediately preceding the first day of an individual's benefit year are covered by the law (i.e., currently $6,216).
- *Family leave:* provides *12 weeks* of job-protected, paid family leave for:
  - To care for the employee's serious health condition.
  - To care for a family member (with a serious health condition.
  - The birth of the employee's child or the employee's domestic partner's child.
  - To bond with the employee's child during the first 12 months after the child's birth, adoption or foster care placement.
  - To attend to a qualifying exigency or need arising out of a family member's active-duty military service.
  - Safe leave, otherwise known as sexual assault victim leave.
  - Any reason set forth in Maine's Family Medical Leave Requirements.
  - For the death or serious health conditions of certain family members in the military who died or incurred a serious health condition while on active duty.
  - For the donation of an organ of the employee for a human organ transplant.

Maine Paid Family Leave (*cont.*)

- *"Family Member"* includes individuals with significant personal bonds like a family relationship regardless of biological or legal relationship.
- *Medical leave*: provides *12 weeks* of job-protected, paid medical leave for employee's own serious health condition (7-day waiting period).
- *Intermittent leave* permitted in increments of not less than *8 hours* or on a reduced leave schedule agreed to by the employee and employer.

Maine Paid Family Leave (*cont.*)

- *Benefit Amount*:
  - Maximum weekly benefit capped at 100% of the state average weekly wage.
  - Wage replacement calculated at: (a) a rate of 90% for portion of employee's average weekly wage equal to or less than 50% of the state average weekly wage and (b) a rate of 66% for the employee's average weekly wage that is more than 50% of the state average weekly wage up to cap.
    - Funded by Maine employers and employees – up to 1% payroll tax.
    - Exempts employers with 15 or fewer employees from paying into program.
- *Notice of Leave:*
  - Must give "reasonable notice" of leave absent an emergency, illness or sudden necessity and must be schedule to prevent undue hardship on the employer.
  - May take MPFL immediately after they start employment.
- *No retaliation.*
- *Effective dates:* If enacted, benefits available May 1, 2026 with employer/employee contributions beginning on January 1, 2025.

Maine Paid Family Leave (*cont.*)

- *Employer private plans*: can be substituted for participation in the state plan provided (a) the plan meets or exceeds the requirements of MPFL and (b) employer obtains Maine DOL approval of the private plan.
- *Poster and notice*: employers will be required to (a) post an MPFL poster once available and (b) provide employees notice of their rights under MPFL within 30 days of their start date.
- *Additional Guidance*: the Maine DOL is expected to provide additional guidance on the PMFL no later than January 1, 2025.

Other Notable Developments

- L.D. 688: prohibits employers from requiring licensed veterinarians from entering into noncompete agreements unless they are owners of the business.
  - › Law applies retroactively
  - › Effective September 19, 2023
- Proposed new EEOC Enforcement Guidance on Harassment in the Workplace
- Proposed Expansion of Worker's OT Eligibility:
  - › Would increase exempt salary threshold from $35,568 to $55,068 per year

PIERCE ATWOOD LLP

Presenters

Katharine I. Rand

krand@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

PH / 207.791.1267

Katherine L. Porter

kporter@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

PH / 207.791.1212

Labor Law Update: Mischief Afoot at the NLRB

Daniel Strader

PIERCE ATWOOD LLP

Employment Contracts

Non-disparagement and Confidentiality provisions

- *McLaren Macomb*, 372 NLRB No. 58 (Feb. 2023) – Board reversed two earlier decisions and held that severance agreements with broad non-disparagement and confidentiality provisions violated the Act.
  - › Simply offering such a provision is unlawful, even if not enforced
  - › Does not apply to management personnel

Non-compete agreements

- May 30, 2023 GC Memo stated that "except in limited circumstances," most non-competes interfere with Section 7 rights.
  - › Non-competes limit and/or deter employees from seeking or threatening to seek alternative employment
  - › Does not apply to management personnel

Expanding "Concerted" Activity

Miller Plastic Products (Aug. 2023)

- Board will look at "totality of the circumstances" to determine whether activity was concerted, i.e. taken on behalf or for the benefit of other employees.
- Even single employee complaint in a private meeting may qualify if there is some link to actual or contemplated group action

American Federation for Children (Aug. 2023)

- Applied protection to employees advocating for non-employees (e.g. interns, contractors), because of potential impact on employees' own work conditions

Work Rules / Policies

Stericycle Inc. (Aug. 2023)

- Work rules are presumptively unlawful if they have "reasonable tendency" to chill protected activity, unless employer proves rule is narrowly tailored to advance legitimate and substantial business interest
- Evaluate rules from standpoint of "the reasonable employee who is economically dependent on her employer and thus inclined to interpret an ambiguous rule to prohibit protected activity"

Lion Elastomers LLC (May 2023)

- Adopted "setting specific" test for whether employer may discipline employee for abusive / profane conduct in context of protected activity in workplace
- Consider: (1) location of discussion, (2) subject matter, (3) nature of outburst, and (4) whether provoked by ULP

Union Elections

Cemex Constructions Materials (Aug. 2023)

- Board overturned 52-year-old precedent that granted employers absolute right to a union election to determine majority support
- Under new rule, if union presents authorization cards signed by 50% of employees, employer must either immediately bargain with union or promptly file for an election itself
- Any ULPs committed during election will result in immediate bargaining order

PIERCE ATWOOD LLP

Presenter

Daniel R. Strader

dstrader@pierceatwood.com

Merrill's Wharf
254 Commercial Street
Portland, ME 04101

PH / 207.791.1202