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2021: We Thought You Would Never Get Here, and Now that You Are, What Can Employers Expect

Related Professionals

Cherie W. Blackburn
843.720.1728
cblackburn@nexsenpruet.com

Practices

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Never before have we welcomed a year with quite the hope and exuberance as we welcome 2021. While some good things did happen in 2020, for most employers, 2020 added layers of complexity to the role of human resources that could not have been anticipated this time last year. So what should we expect in 2021?

Employer Monitoring vs. Employee Privacy in the Remote Workspace

During 2020, the pandemic changed the way we lived and worked – and opened the door to a new era of remote working. While many employers will require employees to permanently return to the workplace once the threat of the virus is removed, many will not, and employees will seek out jobs that allow them to live in any location and work from home. This new landscape has required employers to adjust policies and practices to allow for meetings, conferences and business to take place via on-line platforms with participants in different locations. It has also resulted in a new challenge: tracking the work and productivity of employees in a remote setting.

In a traditional workplace, showing up to work each day is often a measure of performance. During the past year, employers have turned to software and other digital tools to monitor employees' activities in real-time. These monitoring tools can take screenshots of workers' computers at regular intervals, track every keystroke, monitor instant messaging, send alerts when the keyboard is idle for a period of time, and allow remote control takeover of the computer. Certain programs operate in a stealth fashion, unseen by the user, who cannot detect the presence of the program.

Employers using monitoring programs for employees working remotely need to make sure that they do not cross the line into monitoring an employee's private activities, which could give rise to an invasion of privacy

claim by the employee. In addition to federal law, state common law and, in some states statutory law, governs employee privacy. The Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. Section 2511 et seq., is a federal law that allows an employer to monitor oral and electronic communications provided the employer can show a legitimate business purpose for doing so.[1] Courts addressing privacy claims in a workplace setting generally consider whether the employee has a reasonable expectation of privacy and whether the employer has a legitimate business interest for conducting certain surveillance. In most cases, the legitimate business purpose for using a monitoring tool is tied to tracking an employee's productivity related to work activities.

Employers should have policies in place that clearly explain their right to monitor company-owned computers and other devices and the limitations on an employee's use of such devices, including whether an employee may use the device for any non-work-related activities. To the extent employees are allowed personal use of company-owned devices, safeguards should be in place to avoid monitoring personal use, such as limiting monitoring to designated working hours and limiting personal use to non-working hours. With more employees using company-owned devices in a remote setting, now is a good time to review and update policies related to the use of such devices, regardless of whether an employer is monitoring the work activities of its employees.

In addition, being transparent with the employee may help to avoid privacy-related claims. Employers should consider disclosing in writing to the employee the type of monitoring that is being conducted and the business reason for implementing it and having the employee sign a consent form acknowledging and agreeing to the monitoring program. Putting monitoring systems in place without disclosure and consent from the employees can result in an environment of distrust when employees later learn they were being monitored.

Workplace Safety Under the New Administration

President-Elect Biden has announced that OSHA will be directed to adopt a temporary safety standard on COVID-19, to aggressively enforce compliance by all employers, and to issue fines for those who fail to comply. President-Elect Biden is expected to move quickly to appoint and have confirmed an undersecretary of OSHA, a position that has been vacant for the past four years, to promulgate the temporary safety standards. We can anticipate that OSHA will strictly enforce its regulations, particularly those related to COVID-19, under the new administration.

Changes to Wage and Hour Rules and Enforcement Initiatives

Employers need to prepare for a shift in wage and hour laws, regulations and enforcement proceedings during the Biden administration. We can anticipate that the DOL will become more aggressive in its enforcement of the wage and hour laws and increase communications and cooperation with state DOLs in connection with investigations of employer violations.

Issues such as the joint employer rule and independent-contractor/employee rule will be high up on the DOL's agenda. Under the Trump administration, the DOL proposed a new rule that will make it easier for employers to classify workers as independent contractors. The proposed rule may be dead in the water under the new administration. Another rule that may meet its demise is the joint-employer rule, which was finalized last year and revised the DOL's test for when two or more employers bear liability for wage and hour violations, making it more favorable for employers. The rule was blocked in September by a New York federal judge and the case is now on

appeal to the Second Circuit. The Biden administration may choose not to defend the rule on appeal.

The Biden administration is also expected to take action to raise the federal minimum wage from the current wage of $7.25 per hour to $15 per hour. There is speculation that it will be difficult to pass such legislation amid resistance from Republicans without the elimination of the legislative filibuster. In addition to possible federal legislation, twenty-four states have increased the minimum wage for 2021.[2]

In anticipation of greater enforcement initiatives by the DOL and changes in favor of employees, employers should review their policies and practices related to payment of wages, including overtime, to ensure compliance with the Fair Labor Standards Act (FLSA).

Labor Relations Under the Biden Administration

During his campaign, President-Elect Biden made clear that he intends to reinvigorate union organizing and implement measures to support union campaigns. His pre-election campaign statement on labor issues included a pledge that he would ensure that federal contracts would only go to employers who sign neutrality agreements committing not to run any anti-union campaigns. He also intends to support pro-union legislation that was approved by the House of Representatives in February of last year, but stalled in the Republican-controlled Senate. The Protecting the Right to Organize (PRO) Act proposes significant changes in favor of unions, including reducing the time between a union petition for an election and the date the election is held and banning mandatory meetings in which employers speak to employees about the effects of unionization in the workplace. It would also subject employers to monetary fines for unfair labor practices and create individual liability for corporate officers and directors.

In addition to proposing new laws supporting employees and unions, President-Elect Biden will have the opportunity to appoint members to the National Labor Relations Board. The five-person Board currently has three Republican members, one Democrat member and one vacant position. Traditionally, the Board consists of a majority in the same party as the President. During 2021, President-Elect Biden will have the opportunity to fill the vacant seat, as well as the seat of a Republican member whose term is expiring this year, thereby giving Democrats a 3-2 majority. The new Board will likely reverse certain decisions issued by the Republican controlled Board during the Trump administration.

EEOC Guidance on COVID-19 Vaccinations

As the United States rolls out COVID-19 vaccinations, employers will need to decide whether to require employees to be vaccinated. On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) published additional Guidance to employers related to requiring COVID-19 vaccinations in the workplace. Read more at eeoc.gov. The EEOC determined that the administration of a vaccination is not a medical examination under the Americans with Disabilities Act (ADA), but cautioned that pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. An employer who requires employees to be vaccinated and who asks the pre-screening questions must show that the questions are "job-related and consistent with business necessity." However, where vaccinations are voluntary, and not required, disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement as long as the employee can elect not to answer the questions. Employers are reminded that employee medical information obtained in the course of a vaccination program must be kept confidential.

The EEOC addressed the issue of how an employer should respond to an employee who objects to complying with a vaccination requirement because of a disability. Where a vaccination requirement screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation. To reach a conclusion that there is a direct threat, there needs to be a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the workplace, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation that would eliminate or reduce this risk such that the unvaccinated employee does not pose a direct threat. Although the ADA allows an employer not to provide a reasonable accommodation if doing so would create an undue hardship to the employer, the employer's burden of showing an undue hardship under the ADA is high.

The EEOC Guidance also addresses how to respond to an employee who objects to being vaccinated based upon religion. Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless doing so would pose an undue hardship under Title VII of the Civil Rights Act. The EEOC noted that "undue hardship" under Title VII means having more than a de minimis cost or burden on the employer. This definition differs from the "undue hardship" requirement under the ADA discussed above. The EEOC points out that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief. If an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer is justified in requesting additional supporting information.

An employer requiring its employees to have the COVID-19 vaccination should consider consulting with legal counsel to ensure that its vaccination program and handling of any objections or other issues related to the program are in compliance with federal law. For additional information on COVID-19 vaccinations, see "*EEOC Issues Guidance Regarding Mandatory Vaccinations*".

Lawsuits Under the Families First Coronavirus Response Act

Lawsuits by employees alleging violations of the Families First Coronavirus Response Act (FFCRA) began in 2020 and are expected to continue in 2021. The FFCRA provided covered employees with two types of benefits related to COVID-19 through December 31, 2020: paid sick leave under the Employee Paid Sick Leave (EPSL) provisions of the Act; and emergency leave under the Family and Medical Leave Act (EFMLA).

Covered employees who were not provided paid sick leave or who were – or are - discharged, disciplined or otherwise discriminated against for taking paid sick leave, filing a complaint or instituting a proceeding under the EPSL provisions of the Act, may recover wages that should have been paid to them and an equal amount as liquidated damages. If the employee brings a lawsuit to recover actual and liquidated damages and prevails, he or she may also recover attorneys' fees and costs of litigation. In addition, the U.S. Department of Labor (DOL) has the authority to pursue relief on behalf of employees denied EPSL rights, including actual damages and liquidated damages, and to

issue monetary penalties against an employer. An employer who willfully violates the EPSL provisions of the FFCRA could be subject to criminal penalties.

Employees may not bring a private action against an employer for violating the EFMLA provisions of the FFCRA unless the employer is a covered employer under the FMLA, meaning the employer had 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. However, the DOL can investigate written complaints regarding violations of the EFMLA lodged with the Wage and Hour Division and has the power to issue subpoenas to employers in connection with those investigations.

Lawsuits filed to date alleging violations of the FFCRA include allegations that employers terminated employees for taking protected leave under the Act, refused to provide protected leave, and required the use of paid time off for the leave. Although the time period covered by the FFCRA expired December 31, 2020, the time for filing a lawsuit has not. Attorneys representing employees and former employees, particularly in any type of COVID-19 related matters such as an unemployment claim or layoff, will consider issues related to the FFCRA in determining the possible relief available to their clients.

The New Stimulus Package

On December 27, 2020, President Trump signed the Consolidated Appropriations Act, 2021, a new stimulus package that extends programs first authorized by the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) earlier this year. The legislation includes the “Continued Assistance for Unemployed Workers Act of 2020,” which provides for enhanced unemployment benefits of $300 per week beginning after December 26, 2020, and continuing until March 14, 2021. It also extends the Pandemic Unemployment Assistance (PUA) program created by the CARES Act, which provides unemployment benefits to contractors, gig workers and others not traditionally eligible for unemployment benefits.

Although the Act does not extend the requirements of the Families First Coronavirus Responses Act (FFCRA), which expired December 31, 2020, employers who voluntarily offer paid leave based on the framework of the FFCRA will receive a continued tax credit until March 2021. For more information on the provisions of the new stimulus package, see "*It’s a Roll of the Dice: The Fate of the CARES Act and FFCRA Under Congress’s New Stimulus Bill*".

Concluding Thoughts

While we are hopefully optimistic that 2021 will bring about the end of the pandemic, legal issues related to the pandemic and its effect on pay, leave, furloughs, terminations and other personnel issues are likely to linger throughout the year. With a new administration in place, employers can anticipate changes in the laws and regulations that are favorable to employees, more focus on employer compliance and strict enforcement of rules and regulations by governmental agencies. Now is the time for employers to review existing policies and make sure that processes are in place to ensure compliance. Doing so will make it easier to deal with the changes that will come in the new year.

[1] Many states have established laws imposing greater limitations on an employer's right to monitor employees. As a result, employers need to be aware of any applicable state law before engaging in monitoring activities.

[2] South Carolina and North Carolina are not among the states that have increased the minimum wage.