

Employment Law: Looking Back & Ahead

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About Me

- Management-side employment attorney & HR consultant
- Human Resources Officer for the U.S. Department of State in Jerusalem & Zambia
- Hostile Work Environment Podcast
- Investigations
- Policies
- Trainings

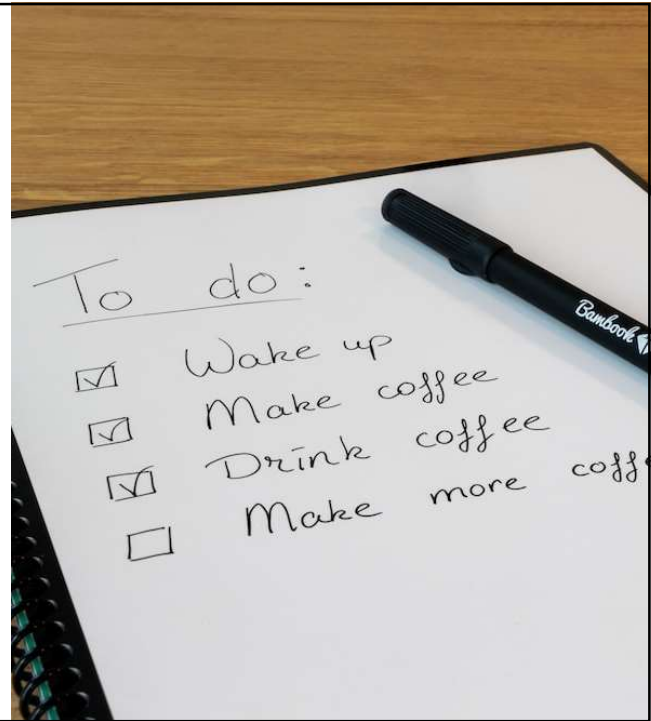


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What We'll Cover

- Discrimination laws
- Privacy
- LGBTQ+ issues
- Overtime
- Leave
- Labor law
- Pay equity
- Weed



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Federal Government

- Split Congress
 - Republican-controlled House of Representatives
 - Democrat-controlled Senate
- Biden Administration
 - Equal Employment Opportunity Commission
 - National Labor Relations Board
 - Department of Labor



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Minnesota

- HUGE changes from the Minnesota Legislature
- Trifecta of DFL control
- How the Legislature works
 - Budget year
 - Policy/Bonding year

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Discrimination

- Increased evidence of discrimination & harassment are everywhere
- Tolerance of hate & hate speech is a significant risk for employers, especially when the hate-filled employee is in management
- *303 Creative* could signal the use of religion to discriminate
- Expect laws to work around the edges of this



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Scenario: Becky

Becky has been with the team for some time. She was really upset that the company celebrated Indigenous People's Day & not Columbus Day. A newer employee just brought you Becky's Facebook profile. In her intro, she calls herself a "homophobe & antisemite."

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The CROWN Act

- 19 states & 44 jurisdictions have passed the CROWN Act
- Prohibition on discrimination based upon natural & protective hairstyles
- Added definition to "race" in the Minnesota Human Rights Act
- No changes needed to policy



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End(ish) of COVID

- Should be coming out of religious accommodation cases
- Disability & leave related issues
 - EEOC considers COVID a disabling condition
 - DOL considers COVID a condition that could be a serious medical condition under the FMLA



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Scenario: Maria

XYZ company requested everyone come into work two days a week for collaboration & team building. This seems to be working so far.

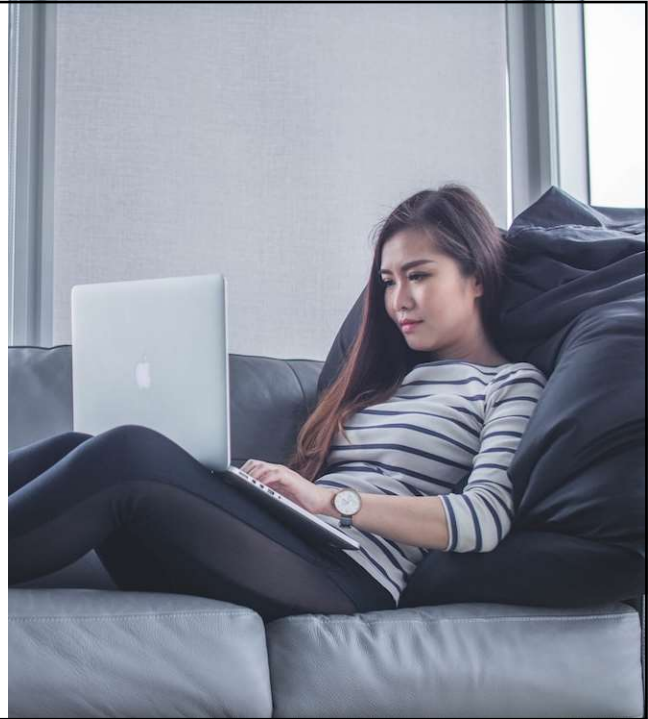
Maria is recovering from a serious bout of COVID. She tells you her doctor has diagnosed her with Long COVID. She requests to continue to work from home.

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Remote Work

- Pandemic taught how to work from home
- Remote work was NOT a guaranteed reasonable accommodation before
- Is it now?



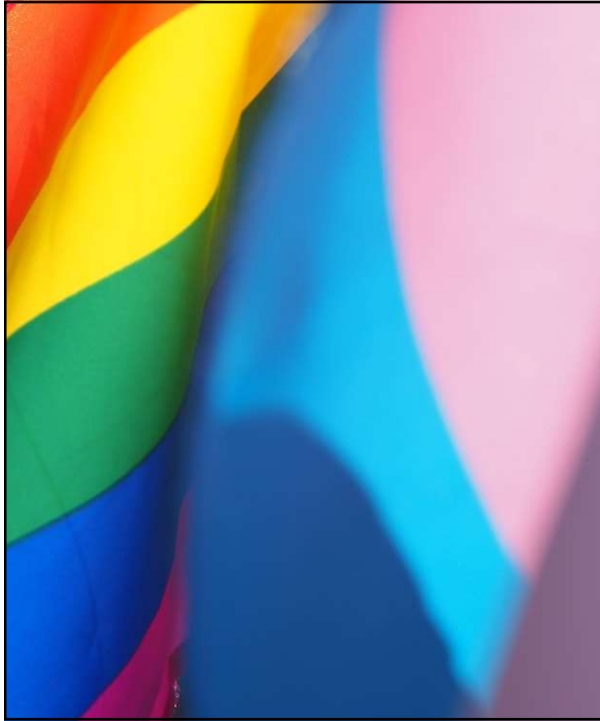
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Employee Privacy

- Employees have a privacy interest in work away from the office
- Increased surveillance
- Privacy laws
- National Labor Relations Board General Counsel
 - Capture concerted protected activity
 - Violation of the NLRA regardless of unionized workforce



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LGBTQ+ Issues

- Equality Act codifies protections for the LGBTQ+ community – more than the *Bostock* decision
- EEOC has tried to issue guidance on LGBTQ+ issues, but the guidance has been struck down
- Expect no action from Congress on this

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Scenario – Maxine

- Maxine transitioned & most things have gone well
- Carolanne refuses to call Maxine by her name & has complained that Maxine uses the women's bathroom
- Considerations:
 - Payroll
 - Email
 - Bathroom

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Mental Health

- Mental health care will continue to be a focus
- DOL issued a new fact sheet on mental health care under the FMLA
- Expect more action from the EEOC as well



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Fair Labor Standards Act

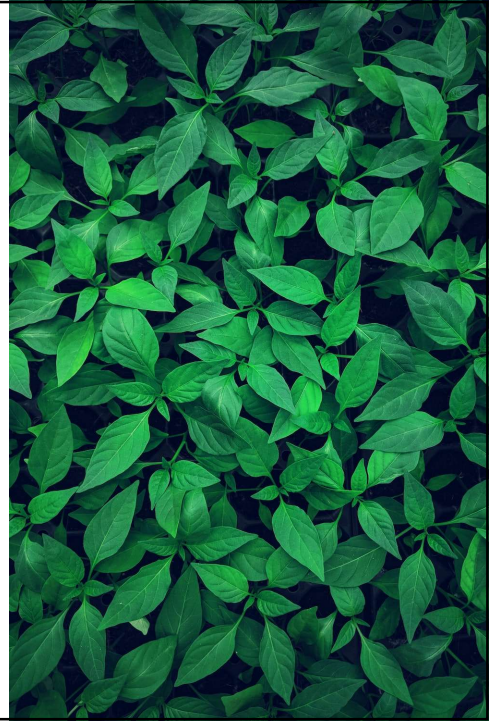
- No changes to federal minimum wage
- DOL spent 2022 listening to stakeholders on changes to overtime
- Still no Wage & Hour Administrator
- Will be changes to overtime
 - Raise the salary threshold or
 - Changes to duties tests?
- Supreme Court & the \$200K/year oil rig worker

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Paid Leave

- Paid family & medical leave may be coming, but not likely from Congress
- 11 states have paid leave that has either started or will start shortly
- Where we're at in Minnesota
 - Unemployment-like program with tax split between employer & employee
 - 12 weeks for kids & 12 weeks to care for family member
 - Eligible start 2025 with taxation in 2024 (.31% of wage - about \$2 a week for average worker)



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Sick & Safe Time

- 14 states already have requirements for sick & safe time with more to come
- Minneapolis, St. Paul, Bloomington & Duluth already
- How it will work in Minnesota
 - 1 hour earned for every 30 hours worked
 - 48 hours per year with a cap of 80 hours
 - No use in the first 90 days
 - Most PTO already compliant with some minor tweaks



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Labor Laws

- Unions have had a bang-up year
- NLRB expected to make union campaigns easier
- Labor laws apply to employers regardless of whether the workforce is unionized
 - Surveillance
 - Employee speech
 - Joint employer
 - Severance agreements



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Severance Agreements

- *McLaren Macomb* decision on 2/21
- Offering a nondisparagement & confidentiality provision to nonsupervisory employees violates the National Labor Relations Act
- Questions whether this will be upheld by courts
- Fundamental changes to how we let folks go

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Pay Equity & Transparency

- Continuing concern as the pandemic only added to wage disparities
- Salary history bans
- Salary ranges listed in job announcements
- Possible federal contractor changes, but little other action on the federal level
- Expect the Minnesota Legislature to act on these next year



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Scenario – Steve

- Steve is a hiring manager
- His Engineer II role is going to be posted
- You've explained that adding the salary range could help with recruitment
- He does not want to include it
- An applicant from Colorado applies



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Affirmative Action

- SCOTUS pondering whether race can be taken into account in college admissions, again
- College admissions is generally followed by employment law analysis
- Expect a decision late June that could have ripple affects

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Noncompetes

- FTC announced rule prohibiting noncompetes
- California, North Dakota, Oklahoma & DC prohibit
- 5 other states have strict limitations for workers earning <\$100,000
- Minnesota considering ban



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Weed

- Legalization is coming to Minnesota
- Already “accidentally” legalized edible & drinkable THC
- Likely THIS year with taxation & limitations
- Runs into Minnesota’s Lawful Consumables Statute



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Scenario – Joey

- Joey is a forklift operator
- Uses THC for his PTSD stemming from his military service
- Tests positive for THC in preemployment testing
- Can you hire him?
- If you do, what should you do?

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Scenario – Maria

- Your organization is subject to the Drug-Free Workplace Act
- You have a random testing program
- Maria, in your Finance Department, gets pulled for a random
- She tests positive
- When asked, she says she had some THC seltzer over the weekend when she wasn't working



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Takeaways

- Employment laws are rapidly changing, like always
- Pay attention to state & local law changes specifically in 2023
- Consult with your friendly neighborhood employment attorney with questions

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Questions?

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