FIVE THINGS IN-HOUSE COUNSEL SHOULD CONSIDER THIS WEEK ON THE PATH TO MANAGING RISK

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Employers today are faced with a landscape fraught with unprecedented change. The legal landscape continues to evolve, with new and onerous obligations, the workplace is not entirely free of COVID-19, and it is harder today than ever before to find and retain a skilled workforce. Against this backdrop, risk management today poses some of the toughest challenges in decades. With this in mind, here are five things to consider this week as part of your risk management journey.

1. MONKEYPOX – *NOT QUITE PANDEMIC II BUT A CONSIDERATION NONETHELESS*

On July 23, 2022, the Director of the World Health Organization (WHO) declared monkeypox virus ("MPV") a public health emergency. Less than two weeks later, on August 4, 2022, the U.S. federal government declared MPV a public health emergency. Despite, MPV being declared a public health emergency, it does not yet trigger the types of employer obligations seen with the COVID-19 pandemic.

Importantly, unlike COVID-19, according to the Centers for Disease Control and Prevention (CDC), MPV is not an airborne disease, rather it spreads primarily through close, personal, often skin-to-skin contact. For many businesses, the risk of MPV spread or outbreaks at work is often very low.

Although MPV is less easily transmitted than COVID-19, there are several considerations employers may want to consider in terms of addressing positive MPV cases in the workplace. First, employers may wish to take proactive measures to educate their employees and avoid misinformation in the workplace. These measures may include communicating to employees how MPV can be transmitted, encouraging employees to remain home when ill, and encouraging employees to take precautions to wash their hands and disinfect their work areas.

Second, the CDC advises that individuals who have MPV should isolate and remain outside of the workplace for the duration of their illness, until all symptoms have resolved. This may last anywhere from two weeks to four weeks.

Third, it is important that employers check applicable state and local guidance and requirements for employer contact tracing obligations, if any. In the event contact tracing obligations apply, employers should be careful not to disclose the identity of the employee who is ill with MPV.

Fourth, because one way that MPV can be spread is by sexual contact, employers may want to consider taking steps to avoid the stigma potentially associated with MPV and remind their employees of applicable anti-discrimination and harassment policies.

Finally, employers should keep in mind the confidentiality obligations under the Americans with Disabilities Act (ADA) and applicable state and local law. Disability-related medical inquiries and medical examinations of current employees must be job-related and consistent with business necessity.

2. GEOGRAPHIC IMPLICATIONS OF REMOTE WORKER MOBILITY – *WHERE EXACTLY ARE YOUR REMOTE WORKERS LOCATED?*

Without doubt, the COVID-19 pandemic caused a shift in the working patterns of employees on an unprecedented scale. The success of remote working has forced or encouraged many to rethink the traditional office working arrangements. While many employers are open to such requests in a bid to maximize employee engagement, well-being and retention, it remains important to be mindful of just how well your company is tracking the mobility of these remote workers and understand the potential risks associated with such arrangements.

As an initial matter, it is important to have an accurate understanding of where exactly remote workers are working. In the minds of many, the freedom to work remotely bleeds into the perceived ability to be much more geographically mobile than was ever possible when employees were expected to come to the office. In fact, employees may well be working from a second home for part of the year, or even a foreign country. To these employees, who have no requirement to be in an office, why does it matter where they are physically located so long as they perform the work required of them and are available during their working hours? As a result, employers sometimes remain unaware of geographical shifts in their workforce since these shifts are not always required to be reported to the employer. However, there are very real risks associated with this type of workforce mobility, particularly where it is unreported to the employer.

First, having a remote employee move to a new jurisdiction to work may, depending on the host jurisdiction and the nature of the work activities, create a nexus or a permanent establishment (a taxable presence for corporate income tax purposes) in the host state or country. For most U.S. states, a business with a single remote employee, even if working only temporarily from another state, will create a physical, taxable presence or nexus for the employer, regardless of whether it has no other connections to the state. This could leave the employer with an income tax return filing obligation in that state or host country as well as an unexpected obligation to source, apportion or attribute the associated profits accordingly. Remote workers could also trigger an additional corporate income tax liability in different states and host countries and may even trigger an obligation for the business to qualify with the secretary of state in the secondary location.

Second, if any remote workers have relocated internationally, employers must ensure these workers are contributing to the correct social security system based on any bilateral social security agreements or rules which may be in place. Oftentimes these moves also bring a resultant employer liability and additional payroll requirements. Moreover, social security rates (including the employer portion) vary greatly between jurisdictions and, in some cases, it may also become necessary to obtain an A1 application or Certificate of Coverage to demonstrate

continuing liability to the "home" country social security system to be exempt from contributions to the host country.

Third, allowing employees unrestricted mobility (or being unaware of their relocation) also raises questions relating to compliance requirements from an employment law perspective. In this respect, different states have different notice requirements, different legal standards and obligations, different approaches to the viability of non-competes and waivers, geographic pay differentials, as well as treatment of PTO and sick leave requirements. Yet an employer cannot assess its risk or comply with local legal requirements without first truly understanding where its workforce components are located.

3. POST-PANDEMIC HIRING AND THE CLASSIFICATION OF WORKERS IN A WORLD WHERE EMPLOYEES ARE BECOMING A SCARCE RESOURCE

Another offshoot from pandemic lockdown days, and the subsequent Great Resignation, is the engagement of non-traditional work arrangements. Following the uncertainty of work flow in the times of COVID-19, many employers supplemented their workforce on an as-needed or as-available basis. This can result in a workforce which, from a legal compliance perspective, looks very different from two or three years ago. In reality, most large companies would be shocked by how many gig and independent contractor arrangements exist among the ranks of their workforce. Misclassifying these workers is an expensive yet easy proposition.

The Department of Labor (DOL) has publicly proclaimed that "the misclassification of employees as independent contractors presents one of the most serious workplace problems in our economy today." While this is a call we have heard for years, the DOL appears to be proactively pushing misclassification forward in the agenda. First, the DOL withdrew the proposed independent contractor rules issued in 2021, and a review of activity appears to reveal an uptick in enforcement actions on misclassification issues. In short, this is a great time to solve the mystery of just how much of the current workforce is characterized as non-employees and whether these workers are properly classified.

4. MICHIGAN MINIMUM WAGE – *IMPORTANT PAY CHANGES TO PLAN FOR IN 2023*

On July 19, 2022, the Michigan Court of Claims held that, in 2018, the state legislature violated the Michigan Constitution when it enacted, and amended, two ballot initiatives, one to raise the minimum wage and the other to require employers to provide paid sick leave. However, the court has granted a stay of the resulting implementation until February 20, 2023.

Absent a further stay the Improved Workforce Opportunity Wage Act (IWOWA) (the minimum wage law) and the Paid Medical Leave Act (PMLA) will remain in effect until February 20, 2023. Thereafter, the ballot initiatives as they originally existed in 2018 will become law, and with them the corresponding minimum wage and paid sick leave obligations. Accordingly, as of now, on February 20, 2023, the following will take effect: (1) the standard minimum wage will increase from its current $9.87 per hour to at least $12.00 per hour; and (2) the minimum wage

for tipped employees will increase from its current $3.75 per hour (38% of standard minimum wage) to at least $9.60 – and possibly $10.80 – per hour.

Nearly all Michigan employers will be required to offer 72 hours of sick leave annually, moreover. For large employers (those with at least 10 employees), all 72 hours of leave must be paid. Small employers, on the other hand, must provide at least 40 hours of paid sick leave annually, while the balance of the 72 hours of leave may be unpaid.

Employers must be prepared, no later than February 20, 2023, to ensure that they are paying their non-exempt employees (both tipped and non-tipped) properly, and are providing their employees with sick leave, in accordance with the requirements of the ballot initiatives and any forthcoming regulations.

5. **MICHIGAN SEXUAL ORIENTATION DISCRIMINATION – *EXPANSION OF COVERAGE UNDER THE MICHIGAN CIVIL RIGHTS ACT***

Michigan's Elliott-Larsen Civil Rights Act (ELCRA) prohibition of sex-based discrimination also prohibits discrimination based on sexual orientation, the Michigan Supreme Court has held. *Rouch World, LLC et al. v. Department of Civil Rights et al.*, No. 162482 (July 28, 2022).

This opinion follows the U.S. Supreme Court ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held that Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on sexual orientation and gender identity.

Following legal arguments from both sides, the Michigan Supreme Court adopted the reasoning in *Bostock*. The Court held that sexual orientation is "inextricably bound up with sex" because a person's sexual orientation is determined by reference to their own sex. The Court determined that discrimination based on sexual orientation also requires the discriminator to intentionally treat individuals differently because of their sex. Accordingly, the Court held that, because discrimination on the basis of sexual orientation inherently involves discrimination on the basis of sex, the prohibition of discrimination "because of … sex" under the ELCRA includes sexual orientation.

Michigan employers should review their policies and ensure they reflect protections against sexual orientation and gender identity discrimination.

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