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HRAGC LEGAL UPDATE

JUNE 21, 2018

FEDERAL

United States Supreme Court

On June 4, 2018, the U.S. Supreme Court, in a 7-2 decision, overturned a finding that a Colorado baker who refused to make a wedding cake for a same-sex couple had violated Colorado's anti-discrimination law. The case was *Masterpiece Cake Shop Ltd. v. Colorado Civil Rights Commission*. The baker claimed his refusal to make the wedding cake was based on his sincerely held religious beliefs, but the Colorado Civil Rights Commission found he had violated the state law against sexual orientation. The Supreme Court overturned the decision because the record demonstrated some of the Commission members were hostile toward the baker's sincerely held religious beliefs. One Commissioner stated at a public hearing the use of religious beliefs "is one of the most despicable pieces of rhetoric that people can use." Because the Commission had violated its duties (Colorado law, after all, prohibits discrimination on the basis of the religion as well as sexual orientation), the Supreme Court overturned the Commission decision.

The Court side-stepped the ultimate issue and did not resolve which must yield when there is a tension between sincerely held religious beliefs and anti-discrimination laws. Employers must be sensitive to the rights of both and carefully balance the interests of all sides when a dispute in the workplace brings this issue to a head.

On May 21, 2018, the Supreme Court ruled, in a 5-4 decision, to uphold the use of class-action waivers in arbitration agreements. The case was *Epic Systems Corp. v. Lewis*, which involved decisions in three cases (the three were FLSA cases where employees had signed agreements waiving the right to bring a class-action suit). The majority of the Court held that class-action waivers were not unlawful under the Federal Arbitration Act or the National Labor Relations Act, rejecting the NLRB's position that class-action waivers violated the NLRA. The impact of this major decision is that employers who use written agreements to require arbitration of wage and hour disputes may require employees to waive class-actions and otherwise join forces. Employers must continue to be mindful that arbitration agreements must be fair, not unconscionable toward the employee, and not violate other provisions of state or federal law.

NEW HAMPSHIRE

Legislative Update

SB 428 – Payment of Wages

This bill was signed by the Governor on May 30. This bill requires employers to pay all wages due to an employee "within 8 days after the expiration of the work week if the employee is paid on a weekly basis, or within 15 days after the expiration of the work week if the employee is paid on a bi-weekly basis."

This new law takes effect July 29.

Employers should immediately update both their payroll practices and their written payroll policies so that they may be in full compliance with this law and also in compliance with New Hampshire law requiring written notification to employees of payroll policies. If you use a payroll service, communicate with the service provider to understand what changes are being made to the provider's practices to ensure compliance.

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HB 1319 – Prohibiting Discrimination Based on Gender Identity

This bill prohibits discrimination in house and employment based on gender identity. The Governor signed the bill June 8.

This new law takes effect July 8.

The law amends Sections RSA 354-A, New Hampshire's Law Against Discrimination by adding "gender identity" as a protected category.

Employers should immediately update company handbooks, personnel policies and practices to be in compliance with this new law. Any business involved in owning, leasing, or managing a place of public accommodation, should also immediately update its policies and practices.

It is not expected that this law will dramatically change operations at the Human Rights Commission, as the Commission has already recognized gender identity as a protected class and has been accepting discrimination claims based on gender identity.

HB 628 – Family and Medical Leave Insurance

After an amazing journey through two legislative sessions, three votes to pass by the House and numerous Committee reviews in the Senate, and multiple efforts to amend or kill the bill in the House, the Senate referred the bill to interim study in April. Whether this bill has more life remains to be seen.

HB 1201 – Earned but Unused Vacation

After passage by the House in March, this bill was killed by the Senate in late April.

PRACTICE POINTER

Employers should consider a dating or anti-fraternization policy

When a consensual relationship between co-workers, or between an employee and a vendor, is going well, there is little thought about the company's anti-harassment policy. However, when the relationship ends, or the relationship adversely impacts the workplace, trouble lies ahead. To prevent these relationships from turning into harassment claims, disrupting morale, or creating other liabilities, and to successfully investigate and manage the claims when they do arise, employers should consider adding a dating or anti-fraternization policy to the handbook. Such a policy should include:

- The employer's policy on what it considers appropriate relationships;
- Does the employer prohibit close personal relationships between supervisors and subordinates;
- Does the employer maintain the right to alter reporting structures once a relationship begins;
- Are employees required to report certain relationships, and what activity rises to the level that it must be reported; and
- Reaffirm the supremacy of the company's anti-harassment policy and reporting obligations.

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