Compliance Update – fourth quarter 2018

EEOC settles five major ADA lawsuits in December 2018

In December 2018, the EEOC announced five major settlements of claims alleging ADA violations. Brief descriptions of each settlement are set forth below:

- A leading retailer of women's fashion and accessories was accused of denying reasonable accommodations to pregnant employees or those with disabilities, by requiring certain employees to take unpaid leaves of absence, and terminating employees as a result of their disabilities. In addition to $3.5 million in monetary relief, the employer agreed to revise its employment policies, conduct companywide training of over 10,000 employees, and "report to the EEOC periodically for three years on its responses to requests for reasonable accommodation by pregnant employees or those with disabilities."
- A California-based healthcare company was charged with routinely denying reasonable accommodations to its pregnant and disabled employees. It frequently refused to accommodate employees with additional leave and fired them when they were unable to return to work at the conclusion of their leave. In some instances, the healthcare company even terminated employees prior to the end of their approved leave. The company settled for $1.75 million in monetary relief and also agreed to a three-year consent decree, which requires that it retain an "EEO monitor to review and revise the company's policies, implement training to prevent further discrimination or harassment based on disability or pregnancy, develop a centralized tracking system for requests for accommodations and discrimination complaints, and submit regular reports to the EEOC verifying compliance with the decree."
- A bank based in Buffalo, New York, allegedly had a long-standing policy of placing employees with impairments or disabilities on involuntary leave unless the employees could demonstrate that they could return to work with no restrictions. In its settlement, the bank agreed to pay $700,000 and to enter into a consent decree prohibiting the bank and its new parent company from requiring employees to work with no restrictions, or otherwise refusing to engage in the interactive process. The bank also agreed to conduct training on legal obligations under the ADA and other statutes enforced by the EEOC, including Title VII (as amended by the Pregnancy Discrimination Act).
- An Idaho-based wholesale and transportation company had two disability discrimination settlements in 2018. In the second, the employer was accused of failing to accommodate an employee recovering from wrist surgery and fired her because of her disability. The EEOC alleged that the employer ignored the employee's request for accommodations, including speech recognition software that would have permitted her to continue her dispatcher duties notwithstanding her wrist fracture that required surgery. The employer agreed to pay the former dispatcher $158,000 and also agreed to train managers, human resources and employees on the ADA, reasonable accommodations and the complaint process. In the earlier 2018 settlement, the employer agreed to pay $88,000 relating to a charge that it discriminated against and failed to interview a deaf applicant who notified the employer that he would need an American Sign Language interpreter for the interview.

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- A New York healthcare system agreed to settle charges that it denied a former employee a reasonable accommodation when it discharged her and that its employment policies concerning absences conflict with and violated the ADA. The employer agreed to pay $132,500 and also agreed to revise its ADA policies and provide ongoing training to ensure that management and staff understand their rights and obligations under the ADA. The employer also agreed to post notices of the conciliation agreement and periodically file reports with the EEOC concerning reasonable accommodations, disability-related terminations and discrimination complaints.

How is this applicable?

These sizable settlements are strong reminders to employers that compliance with the ADA's interactive process and reasonable accommodation requirements are top priorities for the EEOC. We also note that recent ADA settlements with the EEOC have – in addition to requiring monetary payments – required employers to take other steps to ensure ongoing compliance, including but not limited to adopting written ADA accommodation policies and conducting training of managers, human resources and employees on ADA reasonable accommodation and interactive process requirements and rights.

California expands Paid Family Leave (CA-PFL) to include qualifying exigencies

Effective January 1, 2021, California's Paid Family Leave program will provide benefits to employees who take leave for a qualifying exigency relating to a family member's active duty or call to active duty in the U.S. Armed Forces. For the purpose of this amendment, CA-PFL will pay benefits for exigencies concerning an employee's spouse, domestic partner, child or parent. Exigencies may include, among other matters, making new childcare arrangements, attending military events, making or revising financial and legal arrangements, and accompanying the family member while he or she is on temporary leave from deployment.

How is this applicable?

Although employees could previously take time off for qualifying exigencies under the FMLA, they would need to use their own accrued paid time off if they wished to receive pay. With this change in the CA-PFL, California employees will be able to apply for wage replacement benefits.

Illinois passes the Illinois Service Member Employment and Reemployment Rights Act (ISERRA)

Effective January 1, 2019, the Illinois state law governing military leaves changed. ISERRA (the Illinois Service Member Employment and Reemployment Rights Act) replaces a set of laws that formerly governed such leaves: the Military Leave of Absence Act, Public Employee Armed Services Rights Act, Municipal Employees Military Active Duty Act, and Local Government Employees Benefits Continuation Act.

ISERRA incorporates key provisions of the federal law (USERRA) providing for reemployment of service members, such as prohibiting discrimination against employees in the military and maintaining their right to reinstatement after leave. In addition, ISERRA recognizes additional types of military service that are not provided protection under USERRA, such as service covered by the Illinois State Guard Act, absence from employment while a service member is seeking treatment for a condition or illness that was sustained or aggravated during active service, and service in a federally recognized auxiliary of the U.S. Armed Forces when performing official duties in support of military or civilian authorities as a result of an emergency.

ISERRA applies to virtually all employees in the state of Illinois, both public and private. Certain provisions of ISERRA, such as those pertaining to concurrent and differential compensation, are only applicable to public employers.

How is this applicable?

Sun Life Absence Management Services will administer ISERRA as of its January 1 effective date. Private employers should take note of ISERRA's expanded definition of military service relative to USERRA as noted above, because those provisions will protect periods of leave that federal law does not. In addition, employers must ensure that they provide notice of employee rights under the law in a conspicuous location. This notice is available on the Attorney General's website.

New Jersey streamlines statutory temporary disability and paid family leave benefits

Effective October 4, 2019, employees who submit an application for statutory temporary disability benefits to the state will have an application automatically submitted for paid family leave benefits unless the employee has chosen to opt out. In addition, employees will be allowed to submit applications for temporary disability and paid family leave benefits up to 60 days prior to the start of leave, if they know when their leave will begin. Employers must submit eligibility information within nine days of the employee's request so that a benefits determination may be made.

How is this applicable?

Although employees could previously submit a claim prior to the start of leave, employers were not required by law to provide the information until the ninth day following the start of leave. With this change in the law, employees will be able to receive pay benefits at the onset of their leave.

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New York City amends human rights law to require cooperative dialogue

Effective October 15, 2018, New York City's amendment to its Human Rights Law (NYCHRL) requires employers to engage in a cooperative dialogue in response to requests for accommodation from employees in relation to a disability; pregnancy, childbirth or related medical conditions; religious needs; or their status as a victim of domestic violence, sex offenses or stalking.

The law provides an independent cause of action against employers who fail to engage in a cooperative dialogue within a reasonable period of time. The law defines cooperative dialogue as a "process by which a covered entity and a person entitled to an accommodation, or who may be entitled to an accommodation under the law, engage in good faith in a written or oral dialogue concerning the person's accommodation needs; potential accommodations that may address the person's accommodation needs, including alternatives to a requested accommodation; and the difficulties that such potential accommodations may pose for the covered entity."

Furthermore, the law requires employers to provide employees a final written determination in response to a request for accommodation. The NYC Commission on Human Rights issued a Legal Enforcement Guidance discussing the requirements of this new law. It is available at the following link: https://www1.nyc.gov/assets/cchr/downloads/pdf/NYCCHR_LegalGuide-DisabilityFinal.pdf

How is this applicable?

In many respects, New York City's "cooperative dialogue" is similar to employers' responsibility to engage in the interactive process under the Americans with Disabilities Act (ADA). Under the NYCHRL, an employer may not forgo engaging in a "cooperative dialogue" even if the employer believes that there is no reasonable accommodation that would permit the employee to effectively perform his or her job. An employer may conclude that no reasonable accommodation is available only after engaging in cooperative dialogue. The amendment also provides employers greater clarity on how to engage in cooperative dialogue with pregnant employees, even if the pregnant employee has no pregnancy-related complications.

In order to help our Clients comply with this law, Sun Life Absence Management Services is preparing to implement a reminder that will be visible on our weekly reports for applicable leave requests in situations where the data we receive indicates a New York City location. Keep in mind, however, that this will only apply to leaves, and the law applies to a much broader set of human rights protections covered under the New York City ordinance (e.g., religious discrimination).

For our ADA customers, Sun Life Absence Management Services already provides employees a final written determination for accommodation requests that manifest as a need for leave. Nonetheless, employers must ensure that they are engaging in a cooperative dialogue in response to all requests for accommodation under the NYCHRL because the law provides employees with an independent cause of action. In addition, employers must provide their own written response to all requests for accommodation that do not manifest as a need for leave.

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New York Paid Family Leave (NY-PFL) changes forthcoming for 2019

A number of changes to the NY-PFL program begin on January 1, 2019. Eligible employees will be able to take up to 10 weeks of leave (increased from 8 weeks in 2018) to bond with a new child, care for a family member with a serious health condition, or for qualifying military exigency when a family member is on covered active duty or is called to covered active duty status. In addition, employees will also receive an increased wage replacement benefit of 55% (up from 50% in 2018) of their average weekly wage, with a maximum weekly benefit of $746.41.

Moreover, effective February 3, 2019, NY-PFL will expand the reasons for leave to include a family member's preparation and recovery for "tissue and organ donation" as a result of the Living Donor Protection Act of 2018.

On December 28, 2018, Governor Cuomo vetoed legislation that would have expanded the NY PFL to permit employees to take paid bereavement leave. The governor's office explained the veto as being based on, among other reasons, concern that the law would substantially increase employee premiums under the NY PFL.

How is this applicable?

The increased period of leave and the wage replacement benefit are part of NY-PFL's four-year phase-in, having begun on January 1, 2018. Through annual filing requirements, insured policies have already been updated to align with the new benefit duration and amount as well as with language reflecting the passage of the Living Donor Protection Act of 2018.

State of Washington Paid Family and Medical Leave (WA-PFML) premium collection begins

As a reminder, employers in Washington State must begin deducting premiums for WA-PFML from employee payroll beginning on January 1, 2019. Employers must remit both the employee and employer shares of the WA PFML premiums to the Washington Employment Security Department (WA ESD) quarterly in arrears, with the first payment due April 30, 2019. Nearly all Washington employers, including employers who are out-of-state but have Washington employees, must participate. Although employers with fewer than 50 employees located in Washington are not required to pay the employer portion of the WA PFML premiums, they must still collect and remit the employee portion of the premiums. As indicated in our previous Compliance Updates, employers may also file and seek approval of a Voluntary Plan that meets or exceeds the state plan's requirements.

How is this applicable?

Employers need to hold the employee share of the premium in trust in a separate account in a financial institution until the premium is remitted to the state. While employers must begin employee payroll deductions on January 1, 2019, and must start remitting premiums to the WA ESD quarterly in arrears, employees are not eligible to begin paid leaves under the WA PFML until January 2020. Employers should also begin preparing for quarterly reporting requirements; the report for the first quarter of 2019 must be submitted by April 30, 2019.

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