

Changes in the Workplace: 2021 and Beyond

**HRLA Annual Employment Law
Update**

September 22, 2021



What's New?

State Legislation

Federal changes

COVID-related updates

SCOTUS Update

Trending Topics

State Legislation



CROWN Act

Public Act No. 21-2 (“An Act Creating a Respectful and Open World for Natural Hair”)

- Modifies Connecticut Fair Employment Practices Act’s definition of “race” to include ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.
- Effective upon passage March 4, 2021

Unemployment

Public Act No. 21-5 (“An Act Concerning the Removal of COVID-19 Related Layoffs from the Unemployment Compensation Experience Account”)

- Provides that, to the extent allowed by federal law, “and as necessary to respond to the spread of COVID-19,” for any taxable year commencing on or after January 1, 2022, the experience period shall be calculated without regard to benefit charges and taxable wages for the experience years ending June 30, 2020, and June 30, 2021.
- Effect on October 1, 2021

Public Sector Union Access

Public Act No. 21-25 (“An Act Concerning Access to Certain Public Employees by the Exclusive Bargaining Representative of a Public Employer Bargaining Unit”)

A public employer is to provide exclusive bargaining representatives:

- Information relating to newly hired employees
- Access to new employee orientations
- Access to the public employees the representative represents
- Access to electronic mail systems of public employers to reach out to bargaining unit members
- Access to state and municipal governmental buildings and facilities owned/leased by the employer to host meetings with bargaining unit members.
- A public employer is liable for the entire amount of dues it does not send to the public employee organization.
- Effective October 1, 2021

Breastfeeding in the Workplace

Public Act No. 21-27 (“An Act Concerning Breastfeeding in the Workplace”)

- Modifies existing Connecticut law regarding breastfeeding in the workplace by requiring, absent undue hardship, that lactation rooms:
 - Be free from intrusion and shielded from the public while the employee expresses milk;
 - Include or be situated near a refrigerator or an employee-provided, portable cold storage device in which an employee can store expressed breast milk; and
 - Include access to an electrical outlet.
- Effective October 1, 2021

Salary Range Disclosure



Applicants: Employers must provide the “wage range” for the position upon the applicant’s request or prior to or at the time the applicant is made an offer of compensation, whichever comes first. Any applicant who receives an offer must be told the wage range for the position, even if the applicant did not make a request for the information.



Current employees: Employer must provide the wage range for the position at the time of hire, when the employee’s position with the employer changes, or when the employee requests the wage range.



Wage range: The range of wages an employer anticipates relying on when setting wages for a position, and may include reference to any applicable pay scale, previously determined range of wages for the position, actual range of wages for those employees currently holding comparable positions or the employer’s budgeted amount for the position.



Public Act No. 21-30: An Act Concerning the Disclosure of Salary Range for a Vacant Position

Effective October 1, 2021

New Wage Discrimination Standard

Public Act 21-30 (“An Act Concerning the Disclosure of Salary Range for a Vacant Position”)

- Employees must receive equal pay for “comparable” work regardless of sex
- Different pay may be made for comparable work
 - pursuant to seniority system
 - merit system
 - system based on quantity/quality of production, or
 - bona fide factors such as education, training, credential, skill, geographic location, or experience.
- Effective October 1, 2021

Non-discrimination Based Erased Criminal Records

Public Act No. 21-32 (“An Act Concerning the Board of Pardons and Paroles, Erasure of Criminal Records for Certain Misdemeanor and Felony Offenses, Prohibiting Discrimination Based on Erased Criminal History Record Information and Concerning the Recommendations of the Connecticut Sentencing Commission with Respect to Misdemeanor Sentences”)

- It will be considered a discriminatory practice for:
 - Employers to discriminate against a person,
 - Employers to fail or refuse to properly classify or refer for employment a person,
 - Labor organizations to exclude, expel, or discriminate against a member, employer, or a person employed by an employer,
 - Individuals, employers, employment agencies, or labor organization to advertise in a way that restrict employment to a person.
- Effective January 1, 2023

Age Inquiries on Applications

Public Act No. 21-69 (“An Act Deterring Age Discrimination in Employment Applications”)

- Prohibits employers from asking about a job applicant’s age, date of birth, graduation date(s) or dates of attendance at an educational institution on an initial employment application unless the request is based on a bona fide occupational qualification or if the information is required for complying with federal or state law.
- Effective October 1, 2021

Expansion of Workers' Compensation for Health Care Workers

Public Act No. 21-107 (“An Act Expanding Workers’ Compensation Benefits for Certain Mental or Emotional Impairments Suffered by Health Care Providers in Connection with COVID-19”)

- Expands workers’ compensation benefits for post-traumatic stress injuries resulting from witnessing in the line of duty certain traumatic events
- Now includes EMS personnel, Department of Correction employees, and “telecommunicators.”
- Also provides such benefits to health care providers involved in responding to COVID-19, or who witness death or “traumatic physical injuries” linked to COVID-19

Worker Recall by Seniority

Public Act No. 21-189 (“An Act Requiring Employers to Recall Certain Laid-off Workers in Order of Seniority [Relates to COVID-19 Lay Offs”])

- Applies to employees laid off during the COVID-19 pandemic (occurring between March 10, 2020 and May 1, 2022) Requires all employers send notice to such laid-off employees of all job positions that become available for which they are qualified.
 - To be qualified, the worker must have either held the same or similar position at the time of their separation, or be, or could be, qualified with the same training that would be provided to a new employee.
 - The employer shall offer the position to a laid-off employee who is qualified for the position. If more than one laid-off employee is entitled to preference for a position based on their level of qualification, the employee with the greatest length of service must be offered the position.

CHRO

Public Act No. 21-109 (“An Act Concerning the Duties and Responsibilities of the Commission on Human Rights and Opportunities”)

- Allows employers to forgo workplace sexual harassment prevention training for employee who received in-person mandatory training or participated in the online training provided by the Commission on Human Rights and Opportunities (CHRO) under another employer within two years before their hire.
- Expands prior amendment regarding time to file complaint to 300 days for all alleged acts of discrimination that occurred on or after October 1, 2021.
- Effective October 1, 2021

Recreational Cannabis

Public Act 21-1 (June Special Session) (“An Act Concerning Responsible and Equitable Regulation of Adult-Use Cannabis”)

Allows adults age 21 and over to possess and use cannabis for recreational purposes.

Employers can regulate off-duty cannabis use only if they have a written policy in place.

Employers may not take action against palliative users or caregivers, subject to an exception if the action is “required by federal law or required to obtain federal funding.”

“Smoking rooms” in workplaces banned as of October 1, 2021.

Effective July 1, 2022

Budget Implementer Measures

Public Act No. 21-2 (“An Act Concerning Provisions Related to Revenue and Other Items to Implement the State Budget for the Biennium Ending June 30, 2023”)

- Time Off to Vote
- CTFMLA and PML
- Essential Workers COVID -19 Assistance Program
- Prohibition Against Misinformation for WC Claims
- Increase to WC Burial Expenses
- Non-Union State Employees
- Domestic Workers

Time Off to Vote

- Employers must provide 2 hours of unpaid time off to vote in any state or special election for U.S. Senator, representative in Congress, state senator, or state representative.
- Must request at least 2 working days prior to election.
- Effective until June 30, 2024

CT FMLA/Paid FML

- Requires PFMLA to begin repaying funds from bond authorizations allocated under OPM plan
- Permits (no longer requires) Commission of Labor to conduct hearing for aggrieved persons for denial of benefits, allowing decision based on record
- Eliminates provision that excluded State as covered employer under CTFMLA
- Requires complaints alleging FMLA violations to go through investigatory phase before proceeding to hearing
- Imposes 180-day statute of limitations

Reminder – Effective January 1, 2022

- Employees will be eligible to submit claims for paid FML
- Changes to CTFMLA

Workers' Compensation Misinformation

- Unlawful for an employer to deliberately misinform or deliberately dissuade an employee from filing a claim for workers' compensation benefits or a claim for payment of benefits from the Connecticut Essential Workers COVID-19 Assistance Fund.
- Effective June 23, 2021

Reporting Employee Demographics

Employers must start reporting employee demographic information with quarterly unemployment reports, including:

- Gender identity, age, race, ethnicity, veteran status, disability status, highest education completed
- Hours/days worked and salary or hourly wage
- Employment dates

Applicable to employers based on number of employees

- Employers with 100 or more employees – Q3 2024
- Employers with up to 99 employees – Q3 2026*
- Employers with less than 49 employees – Q3 2028

Federal Update



Protecting Older Workers Against Discrimination Act of 2021

- Revises the evidentiary standard for age discrimination
 - Plaintiff need only show age was a motivating factor for an adverse action (mixed motive)
 - Permits reliance any type or form of admissible evidence, sufficient for a reasonable trier of fact to find that an unlawful practice occurred
- Where age discrimination shown, but employer demonstrates it would have taken same action absent motivating factor of age, authorizes declaratory and injunctive relief, but prohibits damages or issuing an order requiring any admission, reinstatement, hiring, promotion, or payment.

Juneteenth

- Recognized as a federal holiday
- Not formally recognized in Connecticut as a state holiday
- Currently no general legal obligation for non-federal public or private employers in Connecticut to treat the day as a legal holiday with respect to closures or holiday pay. Collective bargaining agreements may contain provisions regarding federal holidays.

COVID-19 Updates



COBRA Subsidy

- Available to COBRA qualified beneficiaries who became eligible for COBRA due to either a reduction in hours or involuntary termination of employment during the period April 1, 2021 through September 30, 2021.
- Subsidy expiration notices due no more than 45 days and no fewer than 15 days before the date that the COBRA subsidy will end for the AEI.
 - For current AEIs, this means that the notice must be provided by September 15, 2021 to reflect the end of the COBRA subsidy period on September 30, 2021.

Long COVID and the ADA

EEOC recognizes that “long COVID” may be a disability under the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act in certain circumstances.

- Agrees with the analysis of “long COVID” by the Departments of Health and Human Services and Justice in their “Guidance on ‘Long COVID’ as a Disability Under the ADA, Section 504, and Section 1557.”
- EEOC technical assistance about COVID-19 and ADA “disability” in the employment context will be released in the coming weeks.

COVID-19 Vaccines

Federal Mandates

- Health Care Employees
- Federal Employees
- Federal Contractors
- Private Employers with 100+ employees

State Mandates

- Long-Term Health Care Facilities
- State Employees
- School and Child Care Workers

Mandatory Vaccine Policies

Need to consider:

- Policy requirements
- Testing protocols
- Vaccine verification
- Medical record collection and retention
- Accommodations for religion, disability, pregnancy
- Wage and hour implications
- Bargaining requirements for unionized workforces
- Privacy and confidentiality issues

SCOTUS Cases



Affordable Care Act

California, et al., v. Texas, et al., No. 19-840 (Jun. 17, 2021), 7-2
decision, reversed and remanded the Fifth Circuit's ruling

- question of whether reducing the required coverage under the Affordable Care Act ("ACA") to zero rendered the minimum coverage provision unconstitutional.
- did not reach the question of the minimum coverage provision's constitutionality because it held that the plaintiffs lacked standing to bring the claims.

Takeaway: Employers covered by the ACA, then, must continue to comply with all ACA provisions.

Computer Access

***Van Buren v. United States*, No. 19-783 (Jun. 3, 2021)**, 6-3 decision by Justice Barrett, held

- “[a]n individual exceeds authorized access [under the Computer Fraud and Abuse Act of 1986 (“CFAA”)], when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders or databases—that are off-limits to him.”
- CFAA did not “cover” people like the officer who “have improper motives for obtaining information that is otherwise available to them.”

Takeaway: Significantly narrowed the applicability of the CFAA to employment cases. Employers should review employee computer policies to further define the computer activities that are and are not authorized to ensure protection of sensitive data.

Hostile Work Environment

Collier v. Dallas County Hospital District, dba Parkland Health & Hospital System, No. 20-1004 (May 17, 2021)

- Issue whether the display of the N-word might create a hostile work environment under Title VII of Civil Rights Act
- Reaffirmed its holding in *Harris v. Forklift Systems, Inc.* 510 U.S. 17 (1993) that a single use of an epithet may not be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.

Arbitration Clauses

***Piersing v. Domino's Pizza Franchising LLC*, No. 20-695 (Jan. 25, 2021)**

- Whether a non-signatory of an arbitration agreement may enforce the agreement's terms against a signatory.
- Affirmed prior holdings in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019) and *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) that, where there is “clear and unmistakable” evidence of an agreement to arbitrate “arbitrability” a court will not disregard that evidence.

Joint Employers

Employer Solutions Staffing Group, LLC, et al., v. Scalia, No. 20-660 (Feb. 22, 2021),

- Whether joint employers have a right to indemnification or contribution from each another where there is a collective, willful failure to pay overtime under the Fair Labor Standards Act.
- Reaffirmed its decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), where it rejected the argument that where joint and several liability is found, contribution must also exist.

Trending Topics



EEOC FY2020



67,448 charges filed

- **2019: 72,675 filed**
- **Decreasing steadily since 2016**

Disability and retaliation among top two reasons

- **Disability claims have been on the rise since 2002**
- **Retaliation claims had been on downward trend**

Connecticut represents less than 0.5% of EEOC charges

CHRO FY2021

- **2,149 charges filed**
- **Declining since FY 2019**
- **Race continues to represent greatest number of cases**
- **Growing number of disability claims
both physical and mental**



Sexual Orientation

In ***Bostock v. Clayton County, Georgia***, No. 17-1618 (S. Ct. June 15, 2020), SCOTUS held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex.

EEOC guidance addresses

- Gender Stereotypes and Dress Codes
- Pronouns and Names
- Bathroom and Locker Room Facilities

Non-Compete Agreements

President's EO Promoting Competition in American Economy Issued July 9, 2021

- Directs FTC to “address agreements that may unduly limit workers’ ability to change jobs” through rule-making authority
- Seeks to curtail use of non-compete clauses and “other clauses or agreements that may unfairly limit worker mobility.”
- May also address non-solicitation and non-poach provisions

Wage and Hour

U.S. Department of Labor has shifted priorities under new administration

- Independent Contractors – withdrew prior administration's IC rule that would have made it easier for employers to classify workers as IC rather than employees
- Minimum Wage and Overtime – already have EO for federal contractors increasing to \$15/hr.
- Joint Employer Liability – moved to rescind rule narrowing FLSA definition of joint employer
- More aggressive enforcement

Questions?



Contact



Paula N. Anthony, Esq.

Partner

Berchem Moses PC

203-783-1200

panthony@berchemmoses.com

For more information please visit our
website at: www.berchemmoses.com

and our blog at

www.berchemmoses.com/category/connecticut-labor-employment-law-journal

Due to the constantly changing nature of government regulations, it is impossible to guarantee the total and absolute accuracy of the material contained in this presentation. Berchem Moses PC cannot and does not assume any responsibility for omissions, errors, misprinting or ambiguity contained in this presentation. Berchem Moses PC shall not be held liable in any degree for any loss, damage or injury caused by any omission, error misprinting or ambiguity present.