

2019 Year in Review

We laughed, we cried, we're still scratching our heads

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Headlines

- Very important summary judgment decisions
- Sweeping state legislation
- Further clarity on regulatory issues

Key Court Cases from 2019

Movement toward more summary judgment?

Rule 56

- “No genuine issue of material fact”
- “Genuine issue” means we assume all reasonable factual disputes in favor of the non-moving party
- “Reasonable factual dispute” means a reasonable jury, hearing all the evidence, could find in favor of the non-moving party
- Recently, courts have taken this to the extreme removing the word “reasonable”

Bailey v. DAL Global

- Most employment claims require proof of an adverse employment action
- Plaintiff claimed constructive discharge
- Constructive discharge requires conditions “so intolerable a seemingly voluntary resignation was void of choice or free will.”
- Court went into each accusation of bad behavior on the part of the supervisor
- Dismissed the case

Webb v. Calais Regional Hospital

- Medical incident
- In root cause analysis meeting nurse brought up a staffing issue
- Hospital concluded nurse was negligent and terminated her
- Nurse sued under Whistleblower Protection Act claiming retaliation for bringing up staffing issue
- Nurse was subject to CBA
- Court held that terms of the CBA preempted the whistleblower protection act

Robson v. Shaw's Supermarkets

- Court dismissed claim that employer refused to engage in an interactive process under the ADA
- Employee asked for 6 months of leave
- Court held “request must be facially reasonable” and no reasonable jury could find such a request reasonable

Johnson v. York Hospital

- “You remind me of my ex-husband” not enough to show severe and pervasive hostile work environment or sex-based animus
- In dismissing whistleblower retaliation claim, Maine Supreme Court goes back to “pretext-plus”
- Completely dismisses temporal proximity causation arguments

Lee v. Town of Denmark

- Code enforcement officer had a contract with town
- Town manager asked CEO to report to him rather than town counsel
- CEO complained that such a reporting change was a breach of his contract and therefore illegal
- CEO was suspended pending an investigation about padding his hours
- “A dispute over the interpretation of an employment contract, without more...does not constitute a report of illegal activity”
- “neither the law, nor the charter by any reasonable reading makes the town’s actions unlawful”

Legislation and Policy

Sweeping changes with gradual implementation

The SECURE Act: Major Changes Starting 2020

- Promotes access to employer-sponsored retirement benefits, especially 401(k) plans
- Allows plan participants to preserve and use retirement benefits more effectively after the cessation of employment
- Relaxes certain administrative rules in a way that should make it easier for employers to establish and enhance 401(k) plans
- Raises revenue by limiting use of retirement accounts as estate planning vehicles and by increasing penalties

SECURE Act: Promoting Retirement Savings

- Changes for non-elective safe harbor 401(k) plans
 - Advance notice requirement eliminated
 - Ability to elect safe harbor status as late as 11 months into the year (or even later if certain requirements are met)
- Increase in maximum default deferral rate for QACAs
- Maximum waiting period for long-term part-time employees to become eligibility for 401(k) plan
- New open MEPs (pooled employer plans) for small employers

SECURE Act: RMDs and In-Service Distributions

- Triggering age for RMDs increased from age 70½ to age 72
 - Retirees who reached age 70½ in 2019 have to take RMDs for 2019 and 2020 plan years
 - Employees who work beyond age 72 still can delay RMDs
- Triggering age for in-service distributions in pension plans decreased from age 62 to age 59½
- Penalty-free distributions up to \$5,000 for birth or adoption of a child

SECURE Act: Promoting Lifetime Income

- New lifetime income disclosure requirements – intended to show how retirement savings may last longer if taken in the form of an annuity rather than a lump sum
- Fiduciary liability safe harbor if certain procedures followed in selecting an annuity provider for a retirement plan
- Lifetime income products (e.g., annuity) distributable without penalty if lifetime income investment option eliminated from the plan and certain distribution requirements are met

SECURE Act: Facilitating Plan Administration

- Extension of time frame for retroactive adoption of a plan – due date of tax return rather than last day of plan year
- Nondiscrimination testing relief for DB pension plans after a soft-freeze and for DC plans that provide make-whole benefits
- Termination of custodial account 403(b) plans allowed by distribution of individual custodial account

SECURE Act: Revenue Raisers and Penalties

- Stretch IRAs and stretch RMDs eliminated – so beneficiaries must now complete distributions within 10 years after death of account holder/plan participant
- Failure to file Form 5500 penalties increase from \$25/day to \$250/day and maximum penalty increased from \$15,000 to \$150,000
- Penalties increased for failure to file registration statements and withholding notices as well

Greater Restrictions on Non-competes

- Must make 400% over poverty line (\$50-60k)
- Restrict no more than necessary to protect trade secrets, confidential information, or goodwill
- Must give advance notice of offer if conditioned on non-compete
- Cannot take effect until 1 year after hire, or 6 months after signing
- No anti-poaching agreements between companies
- Not just unenforceable, but now a \$5,000 fine

Good News!!

- NDA's are still enforceable

Mandatory Paid Time Off

- More than 10 employees who work more than 120 days per year
- Accrued when they start working, but not available until after 120 days
- 1 hour for every 40 hours worked up to a maximum 40 hours in a year
- Employee must give “reasonable notice” to prevent undue hardship on the employer
- Effective 1/1/2021

Increase in Minimum Salary for Exempt Workers

- Was \$455 per week
- Now \$684 per week (\$35,568 annually)
- Highly compensated employee threshold moves from \$100,000 to \$107,432
- No changes in duties test
- Count certain bonuses to satisfy 10% of the minimum salary threshold

Pay Equity

- Employers may not seek compensation history until after an offer has been negotiated
- Employer may then verify prior compensation history
- Time to update those form applications if you use them

Concurrent Leave Clarification

- DOL clarified that FMLA leave begins to run on the first day of a qualified leave, regardless of whether or not the employee wants to use it
- Employers may still offer more than 12 weeks, but only the first 12 are protected under FMLA

Me Too? Not So Fast.

- 508 employment discrimination cases filed in Maine
- 3% increase over prior year. Over the decade, the max was 618 in 2010/11
- Slight decrease in sex-based employment claims nationally
- 24,655 with a peak of 30,356 in 2012
- Retaliation, Whistleblower, and Sex still the top 3 classes
- Of the cases that generated an investigator's report, only 16.8% found reasonable grounds

Takeaways

- Claims are flat or falling nationwide
- Claims appear to follow economic, rather than social trends
- Social trends can be countered with training and awareness
- A large % of the cases that stay with the Commission are dismissed with a finding of “no-reasonable grounds”
- Keep setting standards, training, and documenting
- When we fight, we win

Marijuana in the Workplace

- Laws in effect:
 - Substance Use Testing Law
 - Maine Medical Use of Marijuana Act
 - Marijuana Legalization Act
 - Maine Human Rights Act
 - Maine Workers' Compensation Act

Substance Use Testing Law

- If any employees are subject to federal drug testing law, all employees can be subject to the same
- Otherwise, must develop DOL-approved drug testing policy
- 20 or more employees= EAP

Maine Medical Use of Marijuana Act

- Does not require an employer to “accommodate the ingestion of marijuana in any workplace or any employee working while under the influence of marijuana”
- “An...employer...may not refuse to...employ...or otherwise penalize a person solely for that person’s status as a qualifying patient or primary caregiver unless failing to do so would put the ...employer...in violation of federal law or cause it to lose a federal contract or funding”

Marijuana Legalization Act

- Not required to permit or accommodate the use, consumption, possession, trade, display, transportation, sale or cultivation of marijuana or marijuana products in the workplace
- May enact and enforce workplace policies restricting the use of marijuana and marijuana products by employees in the workplace or while otherwise engaged in activities within the course and scope of employment; and
- May discipline employees who are under the influence in the workplace or while otherwise engaged in the course and scope of employment in accordance with workplace policies

Maine Human Rights Act

- ADA
- Religious discrimination

Maine Workers' Compensation Act

- Employer/Insurer not responsible for reimbursement/payment for medical marijuana (see *Bourgoin v. Twin Rivers Paper Company*, 2018 ME 77)
- Possible intoxication defense to claim of injury
 - But can you prove *cause* of injury?
 - No scientifically established level to show intoxication