2023 REWIND: HOT TOPICS IN EMPLOYMENT LAW

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I. AMENDMENTS TO THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

A. What is the Elliott-Larsen Civil Rights Act?

1. The Elliott-Larsen Civil Rights Act, 1976 PA 453 ("ELCRA") is Michigan's Civil Rights Act.

2. ELCRA prohibits discrimination against individuals based on various attributes including race, age, religion and sex, in various contexts, including employment.

B. What's different about ELCRA?

1. On March 16, 2023, the Governor signed a bill into law that expanded ELCRA's prohibitions on discrimination to prohibit discriminatory treatment based on a person's sexual orientation, gender identity, or gender expression.

2. Section 102(1) of ELCRA, as amended, now reads:

   a. The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, familial status, or marital status as prohibited by [ELCRA], is recognized and declared to be a civil right.

3. Section 202(1) of ELCRA, as amended, now reads in pertinent part:

   a. An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment ... (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity or otherwise adversely affects the status of the employee or applicant...

C. Understanding ELCRA's new protections.

1. How does ELCRA define sexual orientation, gender identity and gender expression?

   a. Section 103(l): "Sexual orientation" means having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation.

b. Section 103(f): “Gender identity or expression” means having or being perceived as having a gender-related self-identity or expression whether or not associated with an individual’s assigned sex at birth.

2. How can we differentiate between those core concepts?

   a. The Genderbread Person

   b. Sex: Physical traits that we understand as “sex characteristics”.

      i. Examples: Body hair, voice pitch, genitalia, chromosomes.

   c. Orientation (also called Attraction): The categories of person that an individual is romantically or sexually attracted to.

      i. Examples: Homosexual, heterosexual, asexual.

      ii. Note that the amended ELCRA only addresses heterosexuality, homosexuality, and bisexuality specifically.

   d. Identity: An individual’s internal experience of their own gender.

      i. Examples: Woman, man, agender, bigender.

   e. Expression: How an individual exhibits gender in the way they present themselves to the world.

      i. Examples: Haircut (short vs. long), makeup, clothing, mannerisms.

3. Applying the amended ELCRA to the Genderbread person.

   a. If our Genderbread person goes to work, the amended ELCRA prohibits their employer from treating them differently based on their...

      i. Sex: This requirement remains unchanged by the amendments, though our understanding of what sex discrimination means has been shifted by the Michigan Supreme Court’s ruling in *Rouch World, LLC et al v. Michigan Dept. of Civil Rights et al*.

      ii. Sexual Orientation: Who an employee is married to, dating, or attracted to.

      iii. Gender Identity: The employee’s stated gender, regardless of the relationship between their gender and any physical sex characteristics they may possess.

iv. Gender Expression: The employee's outward presentation relating to gender, regardless of the relationship between their presentation and any physical sex characteristics they may possess.

II. PROPOSED FTC RULE ON NONCOMPETE CLAUSES

A. Proposed Rule in Matter No. P201200

1. The Federal Trade Commission proposed Rule P201200 in January 2023 which, if enacted, would ban employers from imposing noncompete causes on workers.

2. The proposed addition would add a new subchapter J to 16 CFR § 910 identifying noncompete clauses as "an unfair method of competition" prohibited by law.

B. Where did this rule come from?

1. The proposed rule is based on a preliminary finding that "noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act." FTC Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (January 5, 2023).

2. The FTC has been ramping up enforcement actions against various entities that impose illegal noncompete requirements on workers.

   a. One recent example can be seen in the consent judgment regarding Michigan-based companies Prudential Security, Inc. and Prudential Command Inc., which enforced noncompete clauses against minimum wage former employees who sought higher paying jobs at competitors.

C. What would Rule P201200 do if enacted?

1. The Rule would make it illegal for an employer to:

   a. Enter into or even attempt to enter into a noncompete with a worker;

   b. Maintain a noncompete with a worker; or

   c. Represent to a worker (in some circumstances) that the worker is subject to a noncompete.

2. This Rule would be applicable to employees, independent contractors, and even to unpaid workers such as interns.

D. When would Rule P201200 go into effect?

1. We don't know yet.

a. The FTC's required notice and comment period for the rule concluded in 2023, and from here, the FTC could move to finalize the rule or adopt alternatives at any time.

2. If finalized, the Rule will go into effect 60 days after it is published in the Federal Register, and provides for a 180-day compliance period from the date of publication for employers to work towards compliance.

E. FAQs about Rule P201200

1. If the Rule goes into effect, will existing noncompete language be invalidated?

a. In short, yes.

b. The Rule is retroactive, and will invalidate existing noncompete language that may already be in employment agreements or other contracts with workers.

c. The Rule also requires that employers affirmatively inform workers that any existing noncompetes are no longer in effect, and provides model language for that notice.

2. If the Rule goes into effect, will it apply to agreements not to compete in connection with a sale of a business?

a. Section 910.3 of the Rule provides an exception for noncompetes "entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity" if the person is a "substantial owner of" the business entity at the time they agree to the noncompete.

i. The Rule defines "substantial owner" as someone who holds at least a 25% ownership interest in the business entity.

b. The Rule is targeted towards employers rather than sales of a business, but the exception carries a very high bar for ownership which might significantly expand its application.

3. If the Rule goes into effect, will it prohibit compensation that is contingent on non-competition?

a. Example: An employment agreement states that the employee will receive a $50,000 severance bonus, but if that employee competes then the severance bonus is void.

b. While the answer to this question isn't entirely clear, Section 910.1(b)(2) makes it clear that the FTC intends to looks to the effect of the language as opposed to its text by providing a "functional test" to identify covered language:

i. "The term non-compete clause includes a contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from

seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."

ii. The Rule goes on to provide examples of functional noncompetes including NDAs that are so broad as to effectively prevent employment by a competitor, and terms requiring repayment of training costs which may function as a penalty to a departing employee.

III. LESSONS LEARNED IN NAVIGATING 2023'S MOST POLARIZING ISSUES

A. Stay current on developments in the law: *Groff v Dejoy*

1. *Groff v Dejoy*, 600 U.S. 447 (2023).

a. Supreme Court holding addresses religious accommodations in the workplace.

b. Prior ruling by the Supreme Court provided that an employer was not obligated to accommodate an employee's religious beliefs if it would cause the employer to bear more than a "de minimis" cost. *See Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1997).

c. The facts in *Groff:*

i. 2012: Gerald Groff is hired as a mail carrier for USPS.

ii. 2013: USPS enters into an agreement with Amazon that provides that USPS carriers will now deliver Amazon packages 7 days a week.

iii. Groff requests that, due to his religious observance of a Sunday Sabbath, he should not be scheduled to work on Sundays.

iv. USPS accommodates his request for some time, but eventually disciplines Groff for his refusal to work on Sundays.

v. Once Groff realizes that he will be terminated for his refusal, he files a lawsuit against USPS.

d. The Supreme Court overturned the rule set out in *Trans World Airlines*, and held instead that an employer denying a religious accommodation to an employee must show that the accommodation would result in "substantial increased costs in relation to the conduct of the particular business."

i. Exactly how this standard will be applied, including what other courts will determine is a "substantial increased cost," remains to be seen as new law develops after the *Groff* decision.

B. Stay current on what your employees value: the abortion debate in the workplace.

1. In the widely discussed 2022 case *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned the 1973 ruling in *Roe v. Wade*, which established abortion as a constitutional right.

   a. While *Dobbs* was a 2022 decision, 2023 brought a follow-up wave of changes throughout the country, and has showcased the nation's shifting views on abortion nationwide.

   b. Some states enacted bans on abortion with varying requirements immediately after the *Dobbs* decision was released, and others have followed suit through 2023.

2. Data gathered since the ruling in *Dobbs* indicates that employees are attuned to their employers' practical responses to that decision.

   a. "Most employees under age 40, regardless of their political affiliation, want to work for a company that supports access to abortion. Many of these employees would consider switching jobs to preserve this access." Kim Elsesser, *More than 75% of Employees Want to Work for Companies That Support Abortion Access: Survey*, Forbes.com (Aug. 2022).

3. Employers are responding to these employees' priorities by implementing new benefits packages which specifically address these concerns.

   a. Benefits offered by some employers include:

      i. Specific extension of healthcare plan coverage to cover abortion care.

      ii. Reimbursement for costs of travel to employees who travel to a state where abortion is legal for the procedure.

      iii. Industry-specific protections against state law provisions (*e.g.*, Lyft has agreed to defend drivers against a Texas law that could punish Lyft drivers who drive customers to abortion care appointments).

4. Considerations relating to abortion access may be particularly impactful for employers operating in multiple states.

   a. State laws may apply differently depending on where your company maintains offices.

   b. The home states of each remote worker may also impose certain obligations or requirements.

5. Understand how the applicable laws may limit your ability to provide benefits in certain categories, and where pitfalls for employers may be hiding.

a. Example: Texas and Oklahoma have enacted legislation imposing criminal and civil penalties on anyone who "aids or abets" an abortion. See A. Zablocki & M. Sutrina, "The Impact of State Laws Criminalizing Abortion," Lexis Nexis (27 Sept. 2022).

b. In those states, Employers who provide travel benefits to employees for the purpose of obtaining an abortion in another state where abortion is legal could have legal exposure under those state laws.