### A R@UNDTABLE DISCUSSION

# LABOR AND EMPLOYMENT LAW

### WHAT EMPLOYERS NEED TO KNOW

While COVID-19 has changed how Americans work—and for some, where they work from—employers are dealing with a myriad of laws that are evolving at a rapid pace. As the workplace environment continues to evolve, three Chicago labor and employment lawyers shared their insights on some current issues, pandemic-related and otherwise, that impact employers.

As the presidential election approaches, is it lawful for employers to prohibit or otherwise regulate political speech in the workplace?

Brian K. Jackson: It all depends. In the private work sector, employees don't enjoy U.S. Constitution guarantees of "freedom of speech" at work. Therefore, a private sector employer may bar such conversations on a neutral basis. In the public work sector, government employers can maintain reasonable limits on political speech for purposes of efficient operations. Political speech can be limited in the workplace when it negatively impacts the employee's performance, or the political speech otherwise interferes with the operations of the agency. Two other considerations are whether the speech contains false information that undermines public trust in the agency or it creates disharmony in the workplace.

**Sonya Rosenberg:** This area is rife with issues, particularly in the highly polarized political climate we're living in as we approach the general election. Employers in Illinois need to balance their legal obligations not to take adverse actions against employees based on their lawful off-duty conduct or prevent individuals' support of political candidates against the need to maintain a respectful, productive—and, importantly, a discrimination-free—workplace. This is the time for

amendments to HELP Act), Connecticut and Maryland as well as cities like Los Angeles, Seattle and Washington, D.C.

Rosenberg: With COVID-19 eclipsing so much of our attention, it's easy to forget that 2020 has been a very eventful year in terms of employment law changes in Illinois! To highlight a few, the Cannabis Regulation and Tax Act legalized recreational marijuana, raising questions about employers' existing drug-free policies and testing practices. The 2020 amendments to the Illinois Human Rights Act mandate that employers, regardless of size, revisit their anti-harassment policies and conduct compliant anti-harassment training for all of their employees before year-end. And the Workplace Transparency Act requires Illinois employers to revisit their employment and separation agreements to make certain they do not improperly prohibit communications regarding harassment or discrimination in the workplace.

Jackson: The Workplace
Transparency Act, which became
effective Jan. 1, brought about a
number of significant changes.
For example, employers can no
longer unilaterally select arbitration
as the means for resolving work
disputes. The new law also provides
that employment and settlement
agreements cannot contain provisions
that would preclude the employee
from making truthful statements to
governmental agencies. One of the



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impacts employees in a protected category—including sex, age or race—more severely than employees outside of these categories. In some circumstances, larger-scale employment losses can trigger certain statutory notification obligations to the impacted employees. Furloughs and terminations can also severely compromise employers' assets, including their confidential information,



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clients and intellectual property. That's why it's imperative for employers to work with their trusted employment counsel to plan and execute these decisions.

**Wolf O'Donnell**: Employers have used furloughs and permanent layoffs as a means to control costs. During a furlough, the employer-employee relationship continues, and employees generally remain on the business



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payroll roster and retain their access to benefits. However, employers must inform employees that no work is to be performed during the furlough period, including answering emails or work calls. This is because under state and federal law, hourly employees must be paid for hours worked; employees who are exempt from wage and hour laws typically must be paid on a "salary

### "THIS IS THE TIME FOR EMPLOYERS TO REVIEW AND, IF NECESSARY, UPDATE THEIR NON-SOLICITATION POLICIES..."

- SONYA ROSENBERG, NEAL GERBER EISENBERG

employers to review and, if necessary, update their non-solicitation policies and to remind employees, if/as may be necessary, that their communications while at work should be primarily for business-related purposes.

What are some of the most important changes to state employment laws this year?

Margo Wolf O'Donnell: Various states and localities have enacted legislation allowing for additional sick leave in response to COVID-19. Many of these laws allow employees to use paid sick leave if their workplace is closed by "order of a public official due to a public health emergency," or if they are caretakers for a child whose school or place of care has been closed by such an order. Employers should be aware of these new laws if they operate in states such as Arizona, Colorado (note

more challenging requirements is that settlement agreements must satisfy several requirements before they can contain confidentiality provisions directed at alleged unlawful employment practices. Employees may recover their reasonable attorneys' fees for successfully challenging an agreement's compliance with the new requirements.

What are some of the pitfalls of furloughs and permanent layoffs, and how can a company avoid them?

**Rosenberg:** In addition to loss of morale and productivity—which are often coupled with a reputational loss—furloughs and group terminations tend to increase companies' legal exposure. For example, even when acting based on legitimate, non-discriminatory reasons, an employer may end up playing defense where the decision inadvertently



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### A ROUNDTABLE DISCUSSION

## LABOR AND EMPLOYMENT LAW

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basis," meaning that they must be paid a full salary for any week in which they perform any work. If salaried employees decide to perform even one minute of work during any work week, the employer would be obligated to pay the entire salary of that employee for that week. A permanent layoff is termination of employment, without specific right to be recalled by the employer. In this scenario, employee benefits end, and the termination usually triggers payout requirements under state wage laws.

# What are some considerations for employers in managing a newly remote workforce?

Rosenberg: Beyond engagement and productivity-related concerns, remote working arrangements raise a host of issues, not the least of which is the accurate tracking of and payment for all time worked. However, most of us—myself included—have observed and tend to agree that such purely legal issues generally can be resolved

through smart, consistent wage and hour policies and practices. The harder issues tend to revolve around continuing to maintain employee wellness, engagement, productivity and performance, as well as the related issues of retention and promotion in a remote environment. Managing these issues effectively requires a great deal of purposeful, thoughtful planning and coordination among the HR, legal and business stakeholders while maintaining the agility needed to pivot and change course quickly in an uncertain and still rapidly evolving environment.

Jackson: Employers should document "the good, the bad and the ugly" performers for current and future purposes. For example, an employer may desire to continue employing certain high performers on a remote basis to lessen the number of workers returning to the physical worksite. To reduce company exposure to discrimination claims, supervisors must document subordinates' performance to justify staffing decisions

on a myriad of issues; for example, who to continue staffing on a remote basis or who to keep or discharge if staffing reductions need to be made.

Wolf O'Donnell: Employers are also hiring in a newly remote environment and need to continue to be mindful of current laws governing the enforceability of their employment agreements and restrictive covenants. Employers also need to be aware of the requirements of the Illinois Artificial Intelligence Video Interview Act, which took effect Jan. 1 and prohibits employers from sharing video interviews except with persons necessary to evaluate an applicant's qualifications for a position. Employers must delete the videos within 30 days after they receive an employee's request. The Act also requires employers to obtain consent from applicants before using AI to evaluate their video interview and qualifications for the position. The consent must notify each applicant before the interview that AI may be used to analyze the applicants' video interview and fitness for the position—and explain the AI usage and the general types of characteristics considered in evaluating applicants. Having a lawyer draft this consent can insulate you from possible litigation.

What modifications to employers' policies and procedures are required in light of COVID-19?

Wolf O'Donnell: Employers should have policies and procedures in place that allow for sending employees home if they display certain symptoms, such as fever, chills, cough, shortness of breath or a sore throat. Employers should ask employees who report feeling ill at work, or who call in sick, questions about their symptoms to determine if they have or may have COVID-19. Employers may take an employee's temperature to determine whether he or she has a fever but must keep confidential any collected medical information about fevers or other symptoms. Employers should make any necessary changes to attendance policies to reflect the reality of the particular workplace and to ensure that any policies are enforced in a consistent manner.

Jackson: When preparing for 2021, if COVID-19 is not under control, employers should reinforce the importance of their performance review policies to reflect the actual state of the employees' performances. Continued remote workplaces, layoffs and position modifications may be applicable in 2021 and if so, employers may increase the changes for protracted litigation if their business records are inconsistent with their stated reasons for making employment decisions.

# What are some best practices for handling employee leave and accommodation requests related to COVID concerns?

Wolf O'Donnell: Employers and employees should use interim solutions to enable employees to keep working as much as possible, realizing that the challenges of the COVID-19 pandemic may result in delay in discussing requests and in providing accommodation where it may be warranted. An employer is always entitled to know why an employee failed to report to work. Asking why an employee didn't report to work is not a disability-related inquiry. CDC guidance discourages employers from requiring a doctor's note or a positive test result for employees to validate their illness or qualify for sick leave. This was designed to avoid overburdening health care

Rosenberg: Employers should be flexible and, when in doubt, err on the side of granting reasonable time off and accommodation requests. It's imperative for employers to designate an experienced and thoughtful go-to person who employees feel comfortable reaching out to immediately when they're concerned about COVID-related exposure or symptoms. Employees with such concerns shouldn't feel like they're being forced to choose between keeping their jobs and protecting their health and safety, and that of their coworkers. And employees who are considered at high risk—for example, due to age or an underlying health condition—should be provided reasonable accommodations to the greatest extent possible. On this last point, however, employers should avoid unsolicited accommodations on the basis of protected categories because this could create a foundation for actionable discrimination arguments.

Jackson: Employers must keep in mind the different purposes and obligations related to the ADA, traditional FMLA, and the current federal COVID-19 leave laws. For traditional FMLA and federal COVID-19 leave laws set to expire at the end of 2020, the best practices are straight-forward—employees should be permitted to take protected leave as long as they qualify for the leave and a triggering event has taken place. With respect to the ADA, employers need to take individual assessments as to whether accommodations that in the past would have been deemed unreasonable or unduly burdensome now make sense in today's setting. For example, a diabetic employee's request to work remotely without supervision should be reviewed more carefully today than in the past. Likewise, an at-risk employee's request for leave because of COVID-19 concerns should be carefully vetted. If several employees have confirmed COVID-19 diagnoses, an at-risk employee's request for a short leave of absence should be viewed in the context of the company's operations; for example, will operations continue smoothly without the employee for a short period of time?

# How should employers handle employee travel to COVID hot spots?

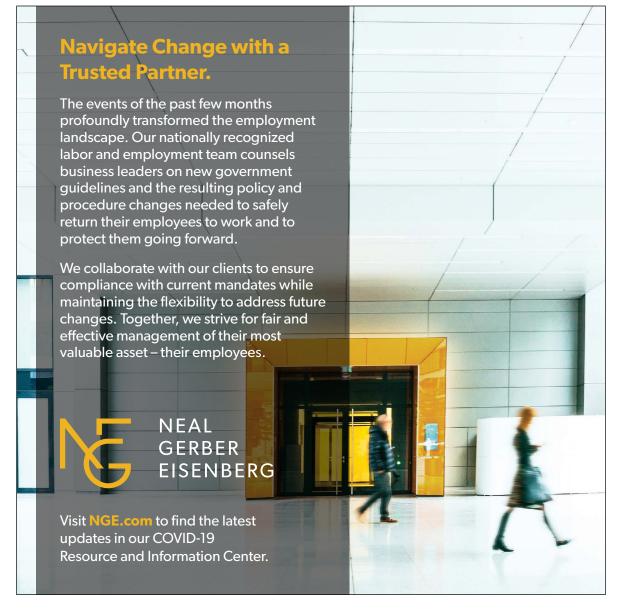
Rosenberg: Employers should implement a policy discouraging employees from traveling to COVID-19 high-risk areas, require them to notify management of such travel in advance, and then quarantine following such travel. At the same time, employers should take care to avoid prohibiting personal travel. Those employers who are subject to the Families First Coronavirus Response Act (FFCRA) also need to be mindful of paid time off requirements stemming from government-ordered post-travel quarantines, such as, for example, those imposed by Chicago's Emergency Travel Order. These complexities should be accounted for in the employer's COVID-19 travel policy.

Wolf O'Donnell: Employers may ask employees about their exposure to COVID-19 during travel. According to the EEOC guidelines, employers may follow the advice of the CDC and state/ local public health authorities regarding an employee's return to the workplace after visiting a specific location, whether for business or personal reasons. New EEOC guidance explains that mandatory COVID-19 testing also can be administered periodically to determine whether an employee poses a direct threat to others in the workplace. As a reminder, the burden remains on employer administrators to ensure accurate and reliable tests, and employers must consider the impact of false positives or false negatives in testing. Employers are encouraged to check the U.S. Food and Drug Administration's (FDA) guidance on safe and accurate

How should employers handle communication of a confirmed COVID case among its employees?

### "DURING THE PANDEMIC, EMPLOYERS SHOULD HAVE POLICIES AND PROCEDURES IN PLACE THAT ALLOW FOR SENDING EMPLOYEES HOME IF THEY DISPLAY CERTAIN SYMPTOMS..."

-MARGO WOLF O'DONNELL, BENESCH LAW



### "EMPLOYERS MUST KEEP IN MIND THE DIFFERENT PURPOSES AND OBLIGATIONS RELATED TO THE ADA, TRADITIONAL FMLA, AND THE CURRENT FEDERAL COVID-19 LEAVE LAWS."

- BRIAN K. JACKSON, LANER MUCHIN, LTD.

Rosenberg: Employers should have composed and vetted communication and contract tracing protocols ready to deploy immediately upon learning of a positive COVID case. In particular, employers should let all employees who work in the same building know, in writing, that an employee tested positive, and where and when that employee was last at the physical workplace. When communicating these facts, employers should protect a diagnosed employee's privacy, and take appropriate care to not reveal his or her identity—even when the employee says that it's OK to do so. Employers also should include information about a timely implemented office closure and deep cleaning procedures.

Jackson: Without revealing the impacted employee's name, employers should first contact co-workers who have been in direct contact with him or her. These co-workers should be quarantined for a period of time consistent with the CDC's most recent guidance. The remaining workforce should be informed that there's been a confirmed case of COVID-19 and that co-workers who'd been in contact with the impacted employee have already been contacted. The employer should check with the local health department regarding any reporting obligations. The key is to provide employees information that's relevant to their particular situation while protecting the health information of impacted

# With the current COVID employment leave laws set to expire at the end of 2020, what should employers be doing now to prepare for 2021 if the pandemic hasn't yet come under control?

**Jackson:** Schools may continue to be impacted next spring. As a result, employers should expect to see large numbers of requests to work remotely from working parents of grade school students. For this, employers should be documenting "the good, the bad, and the ugly" performance of employees for future purposes. For those employees who have remained productive, the employer should consider remote worksites as an option. To reduce company exposure to discrimination claims from non-productive employees desiring to continue to work on a remote basis, supervisors must document their subordinates' performance to justify staffing decisions.

**Rosenberg**: Employers would be wise to expect that COVID-related

challenges are likely to continue well into 2021. COVID time off protections are likely to be further defined or, at a minimum, extended in the coming months, and related anti-retaliation protections are likely to be further tested and enforced by the courts. With these expectations in mind, employers, regardless of size, should review their existing sick leave policies now to determine what changes, if any, should be implemented with an eye toward encouraging employees who may have COVID to stay home and reasonably accommodating high-risk employees, while preventing leaverelated abuse.

#### What challenges and strategies are employers facing/ implementing to comply with Illinois' Dec. 31 deadline for Sexual Harassment Prevention Training?

Wolf O'Donnell: Any employer with employees working in Illinois should take steps now to provide this training by the end of the year. The training may be done virtually and should cover issues relating to civility, antiharassment and anti-discrimination policies, and complaint-reporting procedures. Even if the training is virtual, it's important that there be some interactive component, which requires knowledge of the platform on the part of the individual conducting the training. This requirement can be fulfilled by using the virtual platform to conduct a customized question and answer session. It's essential that the training explain that employers protect themselves best by ensuring that all complaints of discrimination, whether written or oral, and even those that are anonymous—via blogs or tweets or through a hotline—are investigated.

Jackson: Employees are still allowed to have interactive training while also practicing social distancing. For employers who have large production or field staff, video formatted training produces its own set of challenges because employees likely don't have access to computers while working. For these settings, we recommend that live video training sessions (for employees with access to computers at work) be taped and employees scheduled to review the recording on computers designated for the training. For the taped sessions, employees should be provided an email address to submit their questions about the training so that a limited quasi-interactive training can take place.

### **ABOUT THE PANELISTS**



**BRIAN K. JACKSON** is a partner at Laner Muchin, Ltd., a law firm that concentrates exclusively on representing employers nationwide in labor relations, employment litigation, employee benefits and business immigration matters. He represents employers in a broad range of labor and employment issues, including traditional labor law. He defends cases before arbitrators and federal/state courts, and represents employers in



administrative agency proceedings, including state and federal departments of labor, the EEOC and analogous state agencies. On a daily basis, he counsels employers on important employment issues that arise in the workplace, provides management and non-management training, and solutions that help employers get back to business.



**SONYA ROSENBERG** is a partner at Neal Gerber Eisenberg, one of the largest single-office law firms in the nation, where she counsels companies and organizations on employee-related legal issues that arise through the many stages of the



employment relationship. She also represents employers in litigation, her experience including the successful defense of numerous administrative charges, lawsuits and

appellate proceedings at the state and federal levels. She is a frequent presenter and author of numerous articles on current employment law topics, including effective employment audit and risk management practices; #MeToo and other harassment and discrimination in the workplace; and technology-related issues concerning social media.



MARGO WOLF O'DONNELL is a partner and cochairs the Labor and Employment Law group at Benesch, an AmLaw 200 business law firm. She has more than 25 years of experience litigating



restrictive covenant disputes and defending federal, state and administrative agency litigation involving discrimination and breach of contract claims. She also counsels on best practices for layoffs and internal investigations. She has been recognized as one

of the top employment lawyers in the country by Leading Lawyers, Super Lawyers, Best Lawyers and Martindale-Hubbell, which awarded her their highest possible peer rating. She also leads B-Sharp, a group at Benesch that provides leadership training to women in-house counsel.



As an attorney, Meredith Ritchie understands the importance of maintaining a compliant, risk-aware workplace. As a leader, she knows the value of a high-performing team in serving customers and meeting organizational goals.

Meredith says working with Benesch has given her both an on-call resource for labor and employment matters and a supportive advocate to help Alliant maintain a positive and productive environment for its people.

To learn more about Benesch's relationship with Alliant, visit beneschlaw.com/myteam



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