A ROUNDTABLE DISCUSSION

LABOR & EMPLOYMENT LAW

STRATEGIES FOR EMPLOYERS

Earlier this year, legal experts predicted a more worker-friendly era via executive orders and rules set by agencies in the Biden administration. Three local labor and employment lawyers shared their thoughts with Crain's Content Studio on developments thus far in 2021 and how employers can start preparing for any shifts in the regulatory landscape while addressing the challenges of the continuing pandemic.

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

J. Scott Humphrey: Speaking as a non-compete/trade secret lawyer, the most important change was Public Act 102-0358, which amended the Illinois Freedom to Work Act and altered nearly 200 years of Illinois restrictive covenant law. Prior to the amendment, which is being correctly referred to as the Illinois Restrictive Covenant Act or Statute, Illinois restrictive covenant law was a creature of legal opinions from trial judges, appellate judges and, to a lesser extent, Illinois Supreme Court justices. Now, for restrictive covenant agreements entered into on or after Jan. 1, 2022, there are certain statutory guidelines and requirements relating to, among other things, income thresholds, consideration for the covenants and notice to future employees. It will be important for Illinois companies to understand these new requirements and guidelines because the new statute enables employees to recover their attorneys' fees if they successfully defeat an employer's attempt to enforce a restrictive covenant.

Laura B. Friedel: The amendment of the Equal Pay Act put into place new certification and reporting requirements that go way beyond what we've seen in Illinois and are really out in front of what we're seeing in other states. There also are new rules on non-solicitation and non-compete agreements, whereby employers need to revise their standard agreements before the end of the year so that new agreements entered into in 2022 and beyond meet the very specific requirements of the statute. While employers still have some time before the Equal Pay Act amendment's requirements around certification and reporting come into play, the underlying requirements are significant so employers should start thinking about them sooner rather than later.

Amber L. Cox: One significant development was employers' ability to use conviction records as a basis for employment decisions. Employers must now conduct an individualized analysis of the conviction to determine whether the position in question creates an opportunity for the employee to engage in the same or a similar criminal offense, or if the employee poses an unreasonable risk to the property or the safety or welfare of the employer and its employees. Employers are required to notify the candidate or employee in writing if a conviction record is determined to disqualify the individual from employment or promotion and include notice that the employee may file a charge with the Illinois Department of Human Rights.

Equal pay is getting a lot of attention currently—what are the most important developments for businesses?

Cox: The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. On the federal level, the Paycheck Fairness Act was introduced in the U.S. House of Representatives in January 2021. If passed, the legislation would address wage discrimination on the basis of sex by requiring employers to show that any pay disparities are job related. On the state level, recent amendments to the Illinois Equal Pay Act require that, beginning in March 2024, employers with more than 100 employees in Illinois must certify compliance with the Equal Pay Act by obtaining an equal pay registration certificate from the Illinois Department of Labor. Employers should conduct self-assessments now to address race- and sex-based pay equity within their organizations.

Friedel: Another big development involves Colorado. Since Jan. 1, 2021, companies with even one Colorado-based employee must disclose pay and benefit information in any job posting for a position that could be performed in Colorado. So, if you have any employees in Colorado and post a position that could be done remotely, you either need to include compensation information or clearly indicate that the job can't be performed in Colorado. The law also requires employers to notify Colorado employees of promotion opportunities, along with relevant compensation information. What's tricky, however, is that these opportunities are broadly defined and include any position in the company that could be viewed as a step up, regardless of location and employee qualification. Unless the current attempts to overturn some of the law's provisions are successful, we may see a push for similar provisions in other states.

What should employers consider before rolling out a mandatory COVID-19 vaccination requirement?

Friedel: We're waiting to see what the rule OSHA issues in response to President Biden's directive actually says and whether it stands up in court. That said, an employer considering rolling out a vaccine mandate now needs to consider how their workforce will react and whether it will lead to labor shortages. Employers also need to consider how they'll confirm vaccination status, what time off relating to the vaccine they'll pay for and how they'll process

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accommodation requests. And, of course, unionized companies must determine if they need the union's involvement.

Cox: In this climate where many employers are facing a shortage of workers, consideration must be given to how to encourage employees to get vaccinated in a way that aligns with the employer's culture and values. Vaccination hesitancy exists, and will not go away simply because HR tells employees that vaccines are mandatory. On the other hand, employers cannot create an unsafe environment simply because employees don't want to get vaccinated. Employers may want to explore options including incentivizing vaccination or implementing regular testing requirements, keeping in mind that employers may be required to pay for the costs of testing and time spent testing. Employers must be mindful of the obligation to make accommodations for employees who are unable to get the vaccine due to documented medical reasons or sincerely held religious beliefs, practices or observances and train personnel to evaluate and respond to such requests.

How should an organization handle an employee who isn't comfortable coming into the office or traveling because of COVID?

Cox: A good first step is to have a conversation with the employee to determine their specific concerns and requests. If they're requesting a work from home accommodation, determine if they're seeking to work from home permanently, temporarily or sporadically. There are jobs that may only be performed at the workplace and accommodations may include changes to the work environment to reduce contact with others, such as designating one-way aisles, using plexiglass, tables or other barriers to ensure minimum distances between customers and coworkers. Employers should explore with the employee any measures to reduce face-to-face contact with others as well as other safety measures like personal protective equipment that can be implemented when coming into the office or when traveling that would reduce the risk of transmission and increase the employee's comfort level.

Friedel: The fact is, if an employee is just "uncomfortable" and doesn't qualify for an accommodation based on a medical condition or sincerely held religious belief, employers can require them to come into the office, travel and perform other essential job functions. Of course, employers don't want to lose good employees, so a first step should be to discuss other possible alternatives to coming into the office or traveling that would still allow the employee to perform their job functions.

What strategies can companies implement to protect trade secrets in today's digital age and workforce?

Humphrey: A trade secret audit can identify where a company's trade secrets currently reside, who currently possesses or has access to them and the measures in place to protect them. A company should also review its agreements and policies to see if they need to be updated based on any changes it made to the disclosure, use and/or protection of its trade secrets while its employees were working remotely due to COVID-19. It's also helpful to conduct outside research to learn about protective measures being implemented by competitors or other companies in its industry. After the company reviews the audit results, it can make changes and modifications to its protective measures based on its needs, resources and corporate culture.

Friedel: Wherever possible, employers should require that employees use company devices such as laptops and phones to conduct business. This allows the company to institute and monitor security protocols. It also helps the company keep information from walking out the door on personal devices when the employee leaves. Employers should also be training employees to spot attempts to infiltrate systems and make reporting potential breaches—including inadvertent clicking on links—part of company culture.

Have courts been handling trade secret cases differently in the COVID-19 era?

Humphrey: We've not noticed any material changes other than those that apply to all civil litigation matters. For example, injunction hearings were conducted over Zoom instead of in person. Some courts are now starting to hold in-person hearings with social distancing requirements and procedures, and we expect more courts will follow; however, several Illinois courts are still conducting these hearings remotely. Nevertheless, companies should feel comfortable that if they need to seek emergency relief from a court for a trade secret matter such as a temporary restraining order or preliminary injunction, the court system will be able to handle their matter on an expedited basis.

What should companies do to ensure compliance with the state's restrictive covenant law that takes effect on Jan. 1, 2022? What are the most dangerous/difficult provisions for a company?

Humphrey: The most dangerous provisions are requiring employers to advise the potential hire, in writing, to consult with an attorney before signing the agreement and allow the potential hire 14 days to consider the agreement; requiring the company to provide "adequate consideration" at the time of signing so that the restrictive covenants are immediately enforceable; and language allowing employees to recover their attorneys' fees for defeating a restrictive covenant action. Accordingly, companies should, prior to Jan. 1, 2022, make sure that all departments involved in the hiring process are aware of, and will be in compliance with, the law's notice requirements and determine what consideration can be tied to the restrictive covenants to make the covenants immediately enforceable. Otherwise, companies run the risk of not being able to enforce their restrictive covenants and could be subject to an adverse attorneys' fees ruling.

Cox: One of the most significant provisions of the bill for employers is that it establishes a statutory framework for investigation and enforcement by the Illinois Attorney General's office. As we previously saw in Illinois, the Attorney General has an interest in pursuing claims against employers based on employee non-competes when the state believed they may have been used unfairly. The remedies available to the Attorney General also are broad, including monetary damages to the state; restitution and equitable relief, including temporary restraining orders and injunctive relief; and a civil penalty of up to $5,000 for each violation or $10,000 for repeat violations. The Attorney General's history in this area shows that these possible penalties are not idle threats.

Friedel: It's critical that employers be prepared with a compliant document for anyone signing after the first of the year. Beyond that, I think that the two most difficult issues practically will be the requirement that people be given 14 days to review the agreement before signing and the salary minimums. Many of our clients are adamant that employees sign agreements before they start—so if a new hire wants to take the full review period, that could delay start dates. Turning to the salary minimums, the challenge for employers is going to be deciding whether to issue new agreements when employees cross the compensation thresholds or whether they prefer to include modular language in the agreement indicating certain provisions will only apply if compensation is over the benchmark.

With more employees working remotely, what should organizations be doing to ensure that confidential information stays confidential?

Friedel: I recommend that companies implement—or revisit—their technology and confidentiality-related policies to require employees to follow data protection standards. This would include requiring strong passwords, prohibiting the use of public networks, setting standards for home networks, implementing VPN protocols and mandating reporting of breaches. Employers should

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> — J. SCOTT HUMPHREY, BENESCH

also seriously consider requiring employees to use company-provided devices for company business, so that the employer can monitor security and maintain control over information. Employers should also be training employees to spot attempts to infiltrate systems.

Cox: Employers can consider requiring employees to sign confidentiality or non-disclosure agreements and carefully defining confidential information to include information in electronic and hard-copy formats. Businesses should try to make sure that their information is stored on employer-owned devices, especially in a remote work environment. Organizations should also implement measures to build digitally safe workplaces even in remote environments like requiring dual factor authentication, confirming network security, password protection for all devices, limiting access to trade secrets internally, finding private places to have telephone conversations and ensuring that an employee's computer screen is not being viewed by others. Employers may also want to evaluate whether it's necessary to encrypt sensitive data on local and cloud services and in employees' emails and on their devices. Also, businesses need to stay abreast of possible data security risks created by electronic devices in the home.

Humphrey: It's important to monitor mobile devices to ensure that confidential information is not being improperly downloaded or transmitted to an outside party. Companies also need to have a consistent and practical approach for retrieving confidential information when an employee leaves the company, as well as a process that allows the company to move quickly if it's determined that the employee retained confidential information and/or the information is at risk, such as being used or transmitted to a competitor or disclosed in a public forum.

and FMLA compliance, navigating sensitive terminations and workplace violence prevention. Training is key not only to improving general management skills, but to avoiding costly lawsuits, agency charges and arbitrations.

Humphrey: Training on Illinois' new Restrictive Covenant Statute and developing a process for management teams involved with hiring to comply with the statute should occur before Jan. 1, 2022. Periodic training that covers steps a management team can take to protect confidential information and what a manager should do when they become aware of the actual or potential improper use and/or disclosure of confidential information is always a good thing and can be part of any confidential information or data protection plan.

Friedel: The most important training for management teams is in performance management, which has gotten much more difficult with a remote workforce, when employees and managers interact informally on a less frequent basis. Shortfalls in performance management are a huge issue in defending against unfair termination claims. But failing to effectively manage employees' performance also plays into employee engagement. Employees crave feedback, and when performance management isn't effective, it leads to disengagement, which is dangerous in our current labor market.

What employment law changes are you anticipating for early 2022?

Cox: In addition to the changes to Illinois law regarding non-competes and non-solicit covenants, I anticipate potentially expanded OSHA rules and increased enforcement, and increased employer regulations. Employers should also be aware that penalties under our state wage payment law increased, and are steep. There also are several pieces of pending legislation at the federal level including legislation aimed at holding employers accountable for systemic pay discrimination; prohibiting employers from requiring employees to sign pre-dispute arbitration agreements; bolstering reasonable accommodations for qualified applicants and employees affected by pregnancy, childbirth or related medical conditions; and enhancing the power of workers to organize and collectively bargain.

Friedel: The big issue to watch is whether the fact that an employer allowed employees to work remotely for a period because of COVID means that remote work is a reasonable accommodation going forward. In 2020, the EEOC said that allowing employees to work remotely due to COVID didn't mean that remote work would be a reasonable accommodation later. I don't think anyone anticipated that offices would be closed for over a year. The EEOC has recently filed a lawsuit saying that a disabled employee who was permitted to work from home during the pandemic could not be required to return to the workplace because remote work was a reasonable accommodation. If the EEOC is successful, it would give lots of employees an avenue to demand remote work under the Americans With Disabilities Act.

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>
> — LAURA B. FRIEDEL, LEVENFELD PEARLSTEIN

What type of employment law training should organizations consider for their management teams?

Cox: In addition to statutorily required training such as sexual harassment prevention training in Illinois, employers should consider training on basic supervisory skills including leadership and team building; effective communication and listening; and motivating employees. Employers should also consider training management on the importance of effective documentation and discipline, ADA

ABOUT THE PANELISTS

AMBER L. COX is a partner at Laner Muchin, a law firm that concentrates exclusively on representing employers nationwide in labor relations, employment litigation, employee benefits and business immigration matters. She counsels clients on compliance-related and strategic issues arising under a broad range of federal, state and local employment laws. She conducts employment-related corporate investigations in a variety of settings and frequently leads supervisory training on employment topics such as maintaining a discrimination and harassment-free workplace; effective documentation and discipline; and positive employee relations.

LAURA B. FRIEDEL is a partner and chair of the Labor & Employment Group at Levenfeld Pearlstein, which provides legal and business counsel to clients across a broad range of corporate, tax, real estate, estate planning and litigation matters. When disputes arise, she works closely with clients to determine their business goals relating to the claim and then targets the litigation, arbitration or settlement discussions to meet those goals. And when a union is involved—or seeking to insert itself—she helps companies understand and meet their obligations under labor laws while still adhering to their larger business goals.

J. SCOTT HUMPHREY is a partner and chair of the Trade Secrets, Restrictive Covenants and Unfair Competition Practice Group at Benesch, an AmLaw 200 business law firm. He has extensive litigation, arbitration and counseling experience involving a wide range of complex commercial contract disputes and business torts, including matters arising from trade secret appropriation, breach of restrictive covenants, contract disputes, manufacturing and distribution issues, fraud and insurance disputes. As a result, he serves as lead litigation and consulting counsel for a broad range of clients, ranging from small business owners and startups to Fortune 100 companies.

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United's CEO speaks his mind

KIRBY from Page 1

Dallas-based Plane Business Banter, who has known Kirby for more than 20 years, back to his days at America West. "That's his personality. He's always been direct."

What's different now is Kirby has the world's attention as CEO of a global airline. His words and actions—which affect customers, shareholders and employees—are playing out against the backdrop of a pandemic that has caused the worst downturn in aviation history. They're also the clearest signal yet that nearly 18 months into Kirby's tenure as CEO, United is very much his airline.

MAKING HIS MARK

Kirby is a self-proclaimed nerd who made his mark in the industry over the past 25 years as a savvy network planner who helped carriers such as America West, US Airways and American Airlines figure out where and when to fly to make the most money. He was known as a smart, sometimes brash executive who wasn't afraid to defend his ideas.

As CEO of United, he was an early and unapologetic advocate of mandatory vaccines for employees, although it took more than six months before he could fully implement that policy. It involved delicate negotiations with labor, and United has been sued by some employees. But faced with losing their jobs, all but about 300 of United's 67,000 employees got shots or requested religious or medical exemptions. Other airline bosses who initially balked at vaccine mandates have since followed Kirby's lead.

Asked why he did it, Kirby pointed to the data. "The reality is once you've been vaccinated, even if you've been exposed, the chances that you're going to get a severe hospitalization or die is very low," Kirby said during a Sept. 27 appearance at the Atlantic Festival. "I view my highest obligation to protect all of our employees."

Kirby's action drew attention at the highest levels. President Joe Biden's visit to Chicago last week included a meeting with Kirby.

Jeffrey Sonnenfeld, a professor at Yale School of Management, says Kirby "championed science over superstition and proved that American workers want to do the right thing when they are told the truth. United was one of 10 companies to step out front on this matter, and there are now over 200 major employers."

His stand on climate change was also driven by the numbers. United has been working on ways to reduce pollution and reliance on traditional jet fuel for more than a decade. Last December, Kirby stepped out ahead of the industry's pledge to become carbon neutral by 2050 by several months. He underscored the commitment with a multimillion-dollar investment in a startup that's developing technology to capture and trap carbon emissions underground and publicly rejected the idea of purchasing pollution credits through projects such as planting or preserving trees.

"Mankind emits 4,000 times as much carbon today as we did in the preindustrial era," Kirby, a history buff who quotes Churchill biographies on earnings calls, later said on a Washington Post podcast. "There is not room on the planet to plant 4,000 times as many trees, and as long as every corporation gets there in the convenient, easy way and checks the box on carbon offsets, the planet is never going to solve this problem."

When the airline announced that half the 500 students coming through United's pilot-training school each year would be women or people of color, Kirby explained the rationale to the Economic Club of Washington, D.C., with the data. "Today 81% of our pilots are white men. Only 19% of our pilots are people of color or women."

That's not to say emotion doesn't figure into his decisions. Kirby has said that writing letters to families of United employees who had died from COVID-19 helped motivate him to require vaccines.

CEOs increasingly are wading into politically charged issues—such as climate change, immigration, voting rights and racial equality—that would have been off-limits before, says M.K. Chin, an assistant professor at Indiana University's Kelley School of Business.

"CEOs of U.S. public companies are speaking out way more than 10 years ago," says Chin, who has researched the topic. "They feel more comfortable or sometimes feel more pressure to take a stance on issues that are controversial."

BACKLASH

United braved backlash on the voting rights issue when it criticized controversial new election laws proposed in Georgia and Texas. The comments gave "air cover" to rivals Delta and American, which had taken flak for speaking out, says Sonnenfeld.

It's a balancing act, as CEOs try to address the often-competing interests of customers, employees and investors.

"There are downsides to talking publicly on these issues," Chin says. "Baby boomers and Generation X respond negatively. Millennials want to see CEOs take a stand."

United was criticized by some on social media over its diversity and mask initiatives, but the company has said that reaction from employees and customers for policies has been more positive than negative.

"Effective leadership is hard. If you attempt to lead by populism, you're bound to fail," says Todd Insler, who leads the Air Line Pilots Association union at United and sits on the company's board. "Scott is aggressive. So am I. We don't always agree. There have been many difficult decisions over the past few years, and United is better positioned because of them."

Kirby also has shown a willingness to go his own way on business decisions. For example, he made no friends in the industry when United eliminated fees to customers who change flights, a source of significant revenue for airlines. Delta and American soon followed. Kirby has said it's a change he had wanted to make for 20 years, but it's the kind of "billion-dollar decision" that only the CEO gets to make.