

MILLER JOHNSON
Attorneys

EMPLOYMENT LAW SEMINAR



KALAMAZOO

Tuesday, September 27



GRAND RAPIDS

Wednesday, October 5



**ON-DEMAND
RECORDINGS**

Available Thursday,
October 13, 20 + 27

WELCOME!



MILLER JOHNSON
Attorneys

Employment Law Seminar 2022: General Session

- *Nate Plantinga*
- *Sarah Willey*

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The materials and information have been prepared for informational purposes only. This is not legal advice, nor intended to create or constitute a lawyer-client relationship. Before acting on the basis of any information or material, readers who have specific questions or problems should consult their lawyer.



Miller Johnson News

Welcome Alexander Dombrow

- Employee Benefits and Executive Compensation Practice Group
- An Associate in the firm's Grand Rapids office
- J.D. from Michigan State University College of Law in 2018



Welcome Barbara Moore

- Employment and Labor Practice Group
- An Associate in the firm's Kalamazoo office
- J.D. from the University of Michigan Law School in 2018



Welcome Leigh Schultz

- Employment and Labor Practice Group
- A Member in the firm's Kalamazoo office
- J.D. from Chicago - Kent College of Law in 2005



Best Lawyers in America

- Frank E. Berrodin
- James C. Bruinsma
- David M. Buday
- Keith E. Eastland
- William H. Fallon
- Jeffrey J. Fraser
- John F. Koryto
- Nathan D. Plantinga
- Leigh M. Schultz
- Mary L. Tabin
- Catherine A. Tracey
- Sarah K. Willey



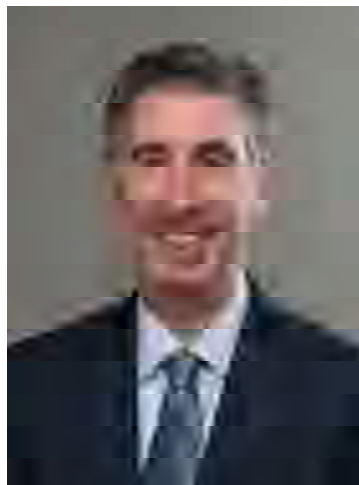
Best Lawyers in America: Ones To Watch

- Kevin D. Battle
- Matthew M. O'Rourke
- Brett Swearingen
- Tripp VanderWal

Best Lawyers
ONES TO WATCH

Miller Johnson Hires First CEO

- Rich joined Miller Johnson in March 2022 as our first CEO
- He previously was President, Consumer Self-Care Americas at Perrigo; CEO at Ranir; EVP at Bissell
- He serves on the Boards for Junior Achievement of Michigan Great Lakes and Broadway Grand Rapids
- Rich holds a MBA from the Kellogg School of Management at Northwestern University and a Bachelor's Degree in Economics and Political Science from the University of Vermont



Miller Johnson Launches MICHIGAN GROWTH ADVISORS



- Michigan Growth Advisors is a new subsidiary that will work to win tax breaks for corporations and commercial real estate developers.
- Led by statewide known economic development expert, Joe Agostinelli

For more information, visit:
michiangrowthadvisors.com



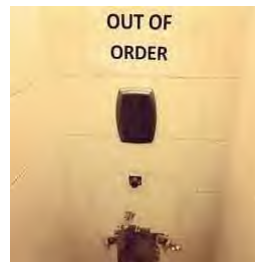
Legal Update

It's Not Business as Usual

- Standard Employment Section Annual Update: What are the latest changes or enforcement priorities from the EEOC or the NLRB or the DOL that create risk for my organization
- Today's Employment Section Annual Update: What are the latest changes or enforcement priorities from the entire, coordinated federal government that create risk for my organization

It's Not Business as Usual (Cont.)

- Federal Agencies run like your organization – the CEO decides priorities, drives change, and pursues opportunity.
 - Directly or through delegation
- New CEO typically means new policies, practices and procedures
- And new people to implement them



It's Not Business as Usual (Cont.)



As President, Biden will:

- Check the abuse of corporate power over labor and hold corporate executives personally accountable for violations of labor laws
- Encourage and incentivize unionization and collective bargaining
- Ensure federal dollars do not flow to employers who engage in union-busting activities
- Make it easier for workers who choose to unionize to do so
- Aggressively pursue employers who violate labor laws
- Ban right to work laws
- Strongly support the PRO Act

Leadership Matters



Leadership Matters (Cont.)



Teamwork Matters



Teamwork Matters (Cont.)

- The Task Force on Worker Organizing and Empowerment was established last spring.
- “A historic effort to put the federal government’s policy of encouraging worker organizing and collective bargaining into action.”
- “Dedicated to mobilizing the federal government’s policies, programs, and practices to empower workers to organize and successfully bargain with their employers.”
- “The Task Force will include more than twenty cabinet members and heads of other federal agencies who will take a **whole-of-government approach to empower workers.**”

Whole-of-Government Approach



Unions 101

What is a union, and how can you form one?

[Learn More](#)



The Union Advantage

Learn how joining a union can improve pay and benefits, especially for women and people of color.

[Learn More](#)

Whole-of-Government Approach (Cont.)

- In January, the NLRB and the DOL/WHd unveiled an MOU to collaborate on “information sharing, joint investigations and enforcement activity, training, education, and outreach.”
- The announced goal is to provide “better enforcement against unlawful pay practices, misclassification of workers as independent contractors, and retaliation against workers who exercise their rights.”

Come on, That's Not Even Fair

- Each agency will train the other's staff to recognize potential violations
- Each agency will advise employees of rights they have under the other's jurisdiction
- Each agency will share "informational materials," including contact information
- Each agency may refer the case to the other

What Do We Do?

- Have a plan for employee organizing
- Educate your C-Suite
- Don't view routine agency actions too narrowly
- If you use independent contractors, make sure you understand the legal risks and obligations

DOL: Who Doesn't Love A FMLA Audit?

- DOL announced ramp-up FMLA audits in February, particularly in the warehouse/logistic industry.
- As you refocus HR priorities and prepare your budgets for 2023 and beyond, consider FMLA processes and compliance.



DOL: Focus on Mental Health

- 5/22: DOL announces it is “determine to ensure that job-protected leave under the FMLA is not another obstacle to overcome when workers seeks the mental health support they need.”
- Examples of FMLA qualifying requests:
 - Intermittent time off to work due to severe anxiety
 - Attending a family counseling session for a spouse who is in a treatment program for substance abuse
 - Caring for an adult child who is unable to work or attend school due to a mental health condition

FMLA and Mental Health

- Employee was an executive assistant. We will call her Lisa. For 6 years, Lisa had excellent performance review in which her supervisors described her as “extremely dependable” and “free from error.”
- Her mental health began to deteriorate; she experienced insomnia, weight loss, uncontrollable crying, an inability to concentrate and exhaustion. She arrived late because she was exhausted and left early because she could not control her crying.
- She had several conversations with her told her leader, “I’m so confused. I’m not eating. I’m not sleeping. I’ve been losing weight. I’m so overwhelmed. I don’t understand what’s happening to me.”

FMLA and Mental Health (Cont.)

- In response, her leader told her that she needed to decide whether she was “staying or leaving.” She denied her request to change positions and offered no help to Lisa.
- Lisa eventually resigned but then asked to rescind her resignation and begged for her job back. Leader denied the request.
- Lisa sued and got a jury trial....



FMLA and Mental Health (Cont.)

- Both the judge and jury concluded that Lisa put the employer on notice that she might have a qualifying need for FMLA leave and the employer did not provide her notice of her FMLA rights.

Lessons Learned

- Train your leaders and HR staff on how to respond to mental health concerns
 - To understand FMLA requests
 - To be empathetic
 - To recognize potential mental health concerns and know available resources (time off work, EAP, etc.)
- Develop a well-being strategy for the workforce



Cleaning Our COVID Closets

- Overreaching principle: *Follow CDC guidance*
- EEOC: Can request information and testing if supported by CDC guidance
- OSHA/MIOSHA: Take basic precautions to limit workplace exposure, look to CDC
- State by state requirements
 - Paid time off

Current CDC Recommendations

- If test positive: Isolate for 5 days after symptoms start (different if moderate/severe illness) and wear a mask for 10 days
- If exposed: Wear a mask for 10 days and get tested after day 5
- Testing: No longer recommending screening testing of asymptomatic people without known exposure
- Masking: Based on COVID-19 community levels



Cleaning Our COVID Closets

- FMLA: Time off due to a “serious health condition”
 - PA 238 has been rescinded
- ADA: Accommodations needed to perform job due to disability

Religious Accommodation

- Available to employees with a sincerely held religious belief
- Used to be infrequently invoked
- Used to be invoked about relatively minor issues
 - I cannot work on a particular day
 - I cannot work after a particular time
 - I cannot follow your dress code
 - I need time to pray
- Vaccine mandates changed all of that



Religious Accommodation (Cont.)

- We are (re)learning how it works
- Two primary problems
 - Broad definition of “religion”
 - Difficult to judge “sincerity”

Problem 1: Religious?

- Not only traditional, organized religions
- New or uncommon religions
- Religions of one
- Or no religion at all



Problem 1: Religious?

- Underwhelming exceptions:
 - Social beliefs
 - Political beliefs
 - Economic philosophies
 - Personal preferences
- Courts have regularly resolved doubts about particular beliefs in favor of finding that they are religious

Problem 2: Sincere?

- Employers are entitled to request information where they have reasonable doubts or just need more information
- Factors that might undermine sincerity
 - Whether the employee has behaved in a manner “markedly inconsistent” with the professed belief
 - Whether the accommodation sought is a particularly desirable benefit
 - Whether the timing of the request is suspect

Problem 2: Sincere? (Cont.)

- Limitations on Employer inquiries:
 - Cannot require a specific form of a response
 - Cannot require verification from a church official or member
- Difficult to disprove sincerity
 - Usually entirely subjective
 - Objective factors don't work as well as you'd expect
 - Belief can be illogical or unreasonable
 - Belief is not defeated even if the religious group in question does not espouse or recognize it

Conclusion?

- Saying the employee's belief is not religious, or the employee is not sincere, is almost always a risky endeavor
- Focus on the interactive process for religion

Same Standard, but Completely Different

- Must provide a reasonable accommodation unless it would constitute an undue hardship
- But a “de minimis” ceiling
 - Requires more than ordinary administrative costs
 - Diminishes efficiency in other jobs and causes co-workers to be overburdened
 - Infringes upon the job rights or benefits of other employees
 - Impairs workplace safety
 - Conflicts with another law, regulation or company obligation, such as complying with sanitation or public health regulations
- Seems pretty favorable – but changing?

One Area of Application

- Religious objections to DEI training or policies, or employee requests to use preferred pronouns, or bathroom/locker room use
- *Bostock* supports both sides of the equation
 - Gender identity and sexual orientation clearly protected
 - Religious liberties clearly protected
 - The intersection of the two left for future cases
- EEOC’s Guidance was ruled unlawful on Monday

Best Practices

- Except in rare cases, fight the battle on the undue hardship front
- Hold the line, every time, on bigotry or harassment
- Case-by-case determination
 - By someone who understands the standard
- Understand your flexibility to follow up
- Understand your flexibility to provide alternate accommodation
- Understand your organization's philosophy and risk tolerance

Legal Changes We Did Not See Coming

- July 19, 2022: Michigan Court of Claims issued an opinion in a case that was filed in 2019 challenging the current minimum wage law and Michigan Paid Medical Leave Act.
- The Court of Claims ruled that the Michigan Legislature violated the Michigan Constitution in 2018 when it adopted and then *amended* the two ballot initiatives that raised the minimum wage and required certain employers to provide paid sick time.
- That initial decision reinstated the original ballot initiatives, rather than the amended versions, effective immediately.
- But a second decision hit the pause button until 2/19/23.

What Difference Does it Make?

- Earned Sick Time Act
 - Applies to employers with 1+ employee
 - No exemptions for certain employees
 - Must accrue 1 hour for every 30 hours worked; cap at 72 hours
 - Business with <10 employees: 40 hours paid; 32 hours unpaid
 - Must allow carryover
 - Mandates use can be in smallest increment available in payroll system
 - Expanded definition of “family member”
 - Presumption of discrimination/retaliation for adverse action within 90 days of
 - Clear civil cause of action

What Could Happen Next?

- The stay is in place until 2/19/23
- In the meantime, the Court of Claims decision is on appeal. We are not optimistic that there will be a final decision on appeal before 2/19/23.
 - If the stay is not extended, employers would likely be required to comply with the original laws until there is a decision on appeal.
- Court of Claims decision could be overturned on appeal, which would mean the current laws would remain in effect.
- Court of Claims decision could be upheld, which would mean that the original laws would be in effect.
- The legislature could pass new legislation.

Legal Changes With Unexpected HR Impact

- US Supreme Court overturned *Roe v. Wade* in *Dobbs v. Jackson Women’s Health Organization*.
- States now regulate abortion. All 50 states with their own laws, many of which are under legal challenge.

TEXAS FREEDOM CAUCUS

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July 7, 2022

Yvette Ostolaza
Chair of the Management Committee
Sidley Austin LLP
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yvette.ostolaza@sidley.com

Dear Ms. Ostolaza:

It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children. It also appears that Sidley has been complicit in illegal abortions that were performed in Texas before and after the Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392. We are writing to inform you of the consequences that you and your colleagues will face for these actions.

Abortion is a felony criminal offense in Texas unless the mother’s life is in danger. *See* West’s Texas Civil Statutes, article 4512.1 (1974) (attached). The law of Texas also imposes felony criminal liability on any person who “furnishes the means for procuring an abortion knowing the purpose intended.” West’s Texas Civil Statutes, article 4512.2 (1974). This has been the law of Texas since 1925, and Texas did not repeal these criminal prohibitions in response to *Roe v. Wade*, 410 U.S. 113

***Dobbs* – Employee Benefits**

- Benefit Considerations
 - Possible illegality (including criminal) of group health plans that cover abortion services.
 - Consideration of travel reimbursement benefit.



***Dobbs* – Title VII / Pregnancy Discrimination Act**

- Prohibits adverse employment action based on “pregnancy, childbirth, or related medical conditions.”
- EEOC: employers cannot discriminate against employees on the basis of an employee’s decision to have an abortion.
- Many state laws have parallel anti-discrimination provisions.

***Dobbs* – FMLA**

- DOL issued a statement on June 24 criticizing the *Dobbs* decision and stating that “the Department of Labor will work to advance our mission by empowering women using every tool we have.”
- FMLA can apply to leave to obtain and recover from an abortion.
 - Pregnancy and related conditions
 - Incapacity + treatment.
- Courts have applied FMLA to miscarriage and to elective surgery so long as a healthcare provider determines that the employee has a serious health condition.
- Courts have found that necessary travel is intertwined with the need for leave that it is also protected.

***Dobbs* – Paid Time Off**

- Knowingly providing PTO to employees to receive an abortion could violate the law in states that prohibit assisting, or aiding and abetting an individual from procuring an abortion.
- It is critical to know and follow the current law of the states in which employees work.

Legal Changes You Thought Already Happened

- July 2022: Michigan Supreme Court rules that the Elliott-Larsen Civil Rights Act prohibits discrimination on the basis of sexual orientation.
- ELCRA expressly bans “sex” discrimination. Michigan SC held that the term “sex” includes sexual orientation.
- Revise policies and training materials.



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