

GWINN LEGAL PLLC

Attorneys and Counselors at Law
900 Wilshire Drive, Suite 104
Troy, MI 48084
(248) 970-0310
(248) 970-0311 facsimile
www.gwinnlegal.com

Daniel A. Gwinn
daniel@gwinnlegal.com

Laura Bradshaw-Tucker
laura@gwinnlegal.com

Fall 2022

Dear Friends and Clients:

Work and the laws and policies that surround it have been in the news a lot in the last few months. A Court of Claims ruling may require employers to pay a higher minimum wage and give workers up to 72 hours off for “sick time.” Managers and assistant managers who are exempt from overtime might be getting a statutory pay bump. And sexual orientation and gender identity have been recognized as protected categories under Michigan’s Elliott-Larsen Civil Rights Act. And that’s just for starters.

But, before we give you a quick round-up of some of the news and decisions that might affect your business, below, we have an announcement of our own to make.

GWINN LEGAL to Offer Small Workshops to Help Identify and Avoid Workplace Issues and Litigation

Attorney Daniel Gwinn will be offering two separate one-day workshops on October 20 and 27 to discuss work-related laws and issues in a small, interactive setting. Enrollment is limited to 10 people per workshop. Topics include “Off-Duty Conduct, Social Media and the First Amendment in the Workplace,” “Best Practices for Hiring, Retaining and Discharging Employees,” and “Accommodation, Leave and Time Off Under the ADA, FMLA and PMLA.” For more information, or to register, contact Gwinn Legal at 248-970-0310.

And, now, back to the news!

Railways Show Dangers of Lean Staffing

The United States narrowly averted a crippling railway strike this month after workers and management reached an agreement that addressed schedules workers described as “punishing.” The dispute involved a business model that focuses on paring labor and other costs to improve shareholder earnings. In the case of railways, staffing was so lean that workers were sometimes “on-call” for weeks or months.

GWINN LEGAL PLLC

Fall Newsletter

Page 2 of 6

While lean staffing is popular with investors on the theory that lower fixed costs mean a larger profit and dividend, it is unpopular [with workers and many consumers](#). According to a report, [85 percent of workers surveyed](#) indicated that scheduling impacts their overall job satisfaction. The value of lean staffing has been questioned in recent years. A [2018 study involving retailer the Gap found that giving workers more stable schedules](#) resulted in a dramatic increase in sales and increased profits.

Ignoring workers' need for predictability in scheduling and reasonable time off may have boosted profit margins for railways, but it almost lead to a strike that could have shut the country down. It may be time to re-think lean scheduling.

Pay for Exempt Workers May Rise Again

The salary employers must pay managers and other administrators may be due to increase for the second time in less than four years, as the Biden Administration promises to issue a [proposed rule in October](#).

While a proposal would take time to come to fruition, any increase could be fairly hefty, as current administration may seek to put back in place a rule implemented under former President Obama and then withdrawn under then-President Trump.

Back in 2016, the Obama Administration passed a rule that would have increased the pay required to qualify certain workers as exempt from the overtime requirements of the Fair Labor Standards Act. Under the FLSA, employers are not required to pay a minimum hourly wage or overtime to bona fide "executive, administrative, professional and outside sales employees," but must pay such workers a minimum salary. The Obama rule would have bumped that salary from \$455/week (\$23,660 per year) to \$913/week (\$47,476 per year).

The increase never happened. Late in 2016, a federal court in Texas placed a nationwide injunction on enforcement of the rule. The Court's ruling was not challenged by the Trump Administration, which put in place its own rule for salaries for exempt workers, increasing weekly pay to at least \$684/week (\$35,568 annually).

The 2016 rule was in part a response to rampant employer misclassification of workers as exempt — especially in the retail and hospitality industries — in an effort to avoid paying overtime. Many "assistant managers" were managers in name only, who ended up working 50 or 60 hours per week without overtime, taking on additional responsibility, and earning less than the co-workers they supposedly supervised.

Time to Update Employee Handbook: Sexual Orientation and Gender Identity Are Protected under Elliott-Larsen Civil Rights Act

Employers would do well to review the Anti-Discrimination/Equal Rights section of their handbooks to make sure sexual orientation and gender identity are included as protected categories.

On July 28, Michigan's Supreme Court ruled in *Rouch World LLC v Dept of Civil Rights* that discrimination because of sexual orientation or gender identity is discrimination "because of sex" under Michigan's Elliott-Larsen Civil Rights Act (ELCRA). The decision followed the 2020 ruling of the U.S. Supreme Court, which held that LGBTQ people are protected from discrimination at work under Title VII of the federal Civil Rights Act. However, until *Rouch World*, LGBTQ people in Michigan who worked for small businesses were still without legal cover: The federal civil rights law applies only to businesses with at least 15 employees. Michigan's ELCRA, however, is more expansive. Now, any business in the state with even one employee is barred from employment discrimination against LGBTQ people. The holding also protects LGBTQ people from discrimination in housing.

Election Could Decide Hot-Button Employment Issues

Several bills introduced in the Michigan House and Senate this year that would have beefed up worker protections never got as far as a vote. That could change in November if the balance of power in the state Legislature shifts.

Among the proposals that have languished in legislative purgatory are a prohibition against consideration of certain arrests and convictions in employment decisions ([HB 5914](#)); an increase in sanctions and penalties against employers for a deliberate violation of wage and fringe benefit laws ([HB 6024](#) and [HB 6025](#)); a prohibition against the use of non-compete agreements with low-income workers ([HB 6031](#)); expanded whistleblower protections ([SB 592](#)); prohibitions against employer monitoring of worker communications without notice and consent ([SB 912](#)); and the use of credit history in the hiring process ([SB 913](#)).

City of Lansing Sued after Refusal to Provide Religious Accommodation

The City of Lansing is belatedly appreciating the danger of not seeking clarification on an ambivalent response to an interview or application question.

According to a complaint filed against the city by the Department of Justice, the city hired the plaintiff, a woman who it ought to have known was unable (for religious reasons) to work on Saturdays, then fired her when she refused to work on Saturdays.

The 12-page complaint filed on the plaintiff's behalf by the Equal Employment Opportunity Commission claims that the plaintiff clearly indicated on her application for the position

that she was not available on Saturdays. She later repeated this fact in a phone interview, in which she also explained that, as a Seventh Day Adventist, she observed the Sabbath from sunset Friday to sunset Saturday. When the plaintiff stated in an in-person interview that she had a “flexible” schedule and could work different shifts, the City did not seek any clarification of this apparent inconsistency with her earlier statements. The plaintiff was hired.

However, she didn’t work for the City for long: When the plaintiff was placed on the schedule to work a Saturday shift, and refused to do so, stating it would violate her religious beliefs, she was terminated.

In the July lawsuit, she claimed the discharge discriminated against her on the basis of her religion in violation of Title VII of the Civil Rights Act. The law requires an employer to make reasonable accommodations to the sincerely held religious beliefs of its workers where to do so would not cause undue hardship.

The moral of the lawsuit is twofold: If an applicant’s response is ambiguous, ask follow-up questions; religious beliefs must, within reason, be accommodated.

Employers: Be Ready to Pay More and Provide More PTO in 2023

On July 19, the Michigan Court of Claims ruled that amendments that significantly changed two laws passed in September 2018 were void, and the laws as originally passed — which govern paid sick time and the minimum wage — should be reinstated.

The bottom line is that unless that ruling is reversed or modified on appeal (and the decision is already being appealed), employers must pay a minimum wage of at least \$12 per hour and provide employees 72 hours of paid sick time (or, for small businesses, 40 hours paid sick time, and 32 hours unpaid).

The good news? On July 29, the Court of Claims judge gave Michigan employers until February 19, 2023 to comply with the law.

For a comparison of the original and amended laws, visit our website at www.gwinnlegal.com, open “What’s the Story on the Minimum Wage?” and click on the link near the end of the piece.

Pandemic May be ‘Over’ But Employers Can Still Call the Shots on Vaccine Requirements

President Biden may have [declared the pandemic “over,”](#) and the [Supreme Court](#) may have ruled that OSHA lacks authority to mandate large private employers to require vaccines, but there’s no bar to a business requiring its workers to get a job as a condition of employment.

As discussed below, Michigan is an “at-will” employment state and, within legal limits, employers can pretty much create any work environment they want, including asking workers to mask up or get vaccinated. Employers must allow workers an exemption from a vaccine requirement for medical reasons or to accommodate their sincerely held, bona fide religious beliefs.

And there are still good reasons for requiring vaccines. COVID is not over; [about 400 people are dying](#) from the virus each day, although — thanks in part to vaccines and improved treatment options — those numbers have declined drastically from the more than [3,000 people](#) the virus claimed at the height of the pandemic.

According to [news sources](#), the current vaccine, which helps protect against the original strain of the virus and the Omicron variants, may provide longer-lasting protection against the virus, and be more effective. (The original vaccine provided some protection from getting a more severe form of COVID, but did not prevent people from contracting the Omicron variant, sometimes more than once.)

A vaccine that might prevent workers from getting (and spreading) the virus would also reduce the possibility of contracting “long COVID.” The Census Bureau estimates that [about 16 million working-age Americans have long COVID](#), which can include debilitating fatigue, headaches, and “cognitive and sensory disturbances.” According to a study by researchers at Case Western Reserve University School of Medicine, seniors who survived a COVID infection have a [much higher risk of Alzheimer’s](#).

Employer Has Right to Fire Worker for Posting Porn on Private Site on Own Time

Recent headlines reinforced the fact that workers can be fired for what they do on their own time, even if that conduct is legal.

A female Detroit police officer resigned after her employer discovered she had been posting pornographic images of herself on a paywalled site. According to a [news article](#), she advertised the site on her Instagram account, where she appeared in her uniform. Her activities violated the DPD’s “professional standards,” which require officers to be “unsullied” in their private lives.

In New York, a television [meteorologist got the axe](#) after his employer received screen shots of his nude appearance on an adult webcam website. The conduct was not illegal; the weatherman claimed he was the victim of revenge porn.

Employers in “at-will” states — every state except Montana — have broad control over the on- and off-duty conduct of their workers, and can terminate an employee at any time, for any legal reason, or for no reason at all. It is increasingly common for workers to get in trouble for off-duty conduct that is posted online, especially where that conduct is viewed as questionable or controversial.

GWINN LEGAL PLLC

Fall Newsletter

Page 6 of 6

That said, workers cannot be disciplined or terminated because of their sex, race, orientation, gender identity, color, religion, national origin, weight, marital status, age, or disability or for trying to blow the whistle on an employer's illegal conduct.

We look forward, with you, to brisk days, bright fall colors, crisp Michigan apples and hope the next few months will bring good news. Please call us if we can be of assistance.¹

Very truly yours,

GWINN LEGAL PLLC

Daniel A. Gwinn

Laura Bradshaw-Tucker

¹ This newsletter is for informational purposes only and is not a substitute for legal advice, nor does it establish an attorney-client relationship. Call us for professional recommendations regarding your specific situation. Laws and regulations are subject to change. This newsletter is available in electronic form — with hyperlinks to the cases and facts mentioned — on our website, gwinlegal.com.