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**COVID-19 UPDATE** **Client Advisor** **June 22, 2020**

This week, in addition to providing updated resources to assist with your safety plans and reopening efforts, we are including a summary of the United States Supreme Court's recent decision in *Bostock v. Clayton County*. One of two significant rulings issued by the Court this month, the *Bostock* decision confirms that Title VII of the Civil Rights Act of 1964 protects gay and transgender workers from workplace discrimination. At its simplest, the 6-3 decision provides that "[a]n employer who fires an individual merely for being gay or transgender defies the law." The other significant decision, not addressed here, involves the Deferred Action for Childhood Arrivals (DACA) program, and a ruling by the Court that the Trump administration cannot immediately end the program as planned.

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## A. Bostock v. Clayton County, 590 U.S. ____ (2020)

### 1. Supreme Court Issues Opinion Protecting Rights of Employees Based on Sexual Orientation and Gender Identity

In a landmark opinion issued on June 15, 2020, the U.S. Supreme Court in *Bostock v. Clayton County*, 590 U.S. __ (2020), addressed the question of whether sex discrimination under Title VII of the Civil Rights Act of 1964 includes an employee's sexual orientation and gender identity. In a 6-3 opinion, the majority concluded that Title VII protection extends to employees discriminated against based on their sexual orientation or gender identity, and held that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." The opinion included three consolidated cases where the employer in each case terminated the employee after learning of the employee's sexual orientation or transgender status.

While acknowledging that the ordinary meaning of "sex" in Title VII referred to the biological distinctions between males and females, Justice Gorsuch wrote that whenever an employer takes an adverse action against an employee because of the employee's sexual orientation or transgender status, the employer takes such action, at least in part, because of an employee's sex. The Court clarified that an individual's sex does not have to be the sole motivating factor for the adverse

action using the "but-for" causation standard, but an employer would still incur liability under Title VII if it intentionally took such action based on the employee's sex when making the decision.

Additionally, the Court reasoned that an employer who terminates an individual for being homosexual or transgender necessarily considers certain characteristics or traits that it would not otherwise question in members of the opposite sex. Furthermore, even if an employer discriminates against both men and women on account of their sexual orientation or gender identity, the employer violates Title VII because it discriminates against each employee based on their sex.

Relying on the unambiguous statutory language, the Court rejected the arguments that Congress did not intend to provide Title VII protection based on sexual orientation or gender identity at the time it was enacted. Moreover, the Court stated it must apply the law as written and cannot refuse to enforce the statute based on unexpected or unintended applications of the law when it was passed. With this decision the Court ultimately announced a straightforward rule that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex."

The dissenting justices disagreed that Title VII's protection against sex discrimination extended to sexual orientation or gender identity because Congress did not intend to provide such protection when the law was passed in 1964 and that Congress, not the Court, is responsible for amending Title VII.

Notably, Massachusetts, along with several other states, already prohibits discrimination based on sexual orientation and gender identity.

### B. EEOC Prohibits Antibody Testing for Employees Returning to Work

On June 17, 2020, the Equal Employment Opportunity Commission (EEOC) updated its existing COVID-19 guidance with respect to testing requirements for employees returning to the workplace. The updated guidance provides that employers may not require employees to undergo COVID-19 antibody testing prior to returning to the workplace.

Relying on the Centers for Disease Control and Prevention (CDC) guidelines that antibody test results "should not be used to make decisions about returning individuals to the workplace," the EEOC opined that antibody testing constitutes a medical examination under the Americans with Disabilities Act (ADA), but such testing does not meet the "job related and consistent with business necessity" requirement.

The antibody testing is different from viral testing used to determine whether an employee has an active case of COVID-19, which the EEOC previously explained is permissible under the ADA.

### C. COVID-19 Waivers and Releases in the Workplace

Recently, there has been much discussion centered around COVID-19 liability waivers and releases as employees return to work and businesses across the Commonwealth continue to reopen. Many of these waivers contain language to the effect of requiring an employee to release and hold harmless their employer from claims for serious illness or death resulting from the employee being exposed or contracting COVID-19 in the workplace.

Ordinarily, employees who suffer a work-related injury or illness, including COVID-19, would be entitled to workers compensation benefits. As a result, such employees are barred under the Massachusetts Workers Compensation Act (MWCA) from pursuing common law tort claims against their employers. Given the high risk of transmission of COVID-19, however, it will be extremely difficult for an employee to establish that he or she contracted COVID-19 in the course of their employment.

Generally, releases of liability are enforceable in Massachusetts. The implications of liability waivers especially in the context of relationships between public employers and employees, however, are less clear and Massachusetts Courts have never squarely addressed the issue. In Gonsalves v. Commonwealth, 27 Mass.App.Ct. 606 (1989), the Appeals Court, without deciding the issue, intimated that such a contract could run afoul of public policy. Id. at 608-609. In Gonsalves, the employee, a municipal police trainee, was required to release the police academy from any liability from accident or injury as a result of her attendance at the academy, which was mandatory. Id. The Appeals Court reasoned that Gonsalves was otherwise eligible for compensation under M.G.L. c. 41, §111F for her injuries and that worker's compensation benefits would ordinarily be available to employees in similar situations. Id. at 609. The Court also rejected the argument that M.G.L. c. 152, § 66, which prohibits voluntary assumption of risk as defense for work-related injuries, applied in that context because that provision was enacted prior to compulsory workers compensation insurance. Id. at 610.

As such, any agreement that would specifically operate to restrict an employee's eligibility for worker's compensation would likely not be enforceable on the grounds that it violates public policy. Consequently, these waivers also present interesting questions regarding volunteer employees, such as Senior Tax Work-Off participants who are statutorily excluded from workers compensation benefits. We recognize that many municipalities already required waivers for such employees. A court may be less likely to find that a liability waiver is contrary to public policy where the activity is strictly voluntary.

From a practical standpoint, employers may want to consider the downside to requiring employees to sign a release prior to reporting to work. While an employee's generalized fear of contracting COVID-19 at the workplace is not a compelling reason for an employee to refuse to report to work, requiring employees to sign a release or waiver may give the impression that the workplace is unsafe and discourage them from returning to work. According to the Department of Unemployment Assistance, employees who refuse to return to work may still be eligible for unemployment benefits if they can demonstrate that their fear of being exposed to COVID-19 was reasonable under the circumstances.

In the alternative, recognizing that it is virtually impossible to guarantee that employees will not be exposed to COVID-19 at the workplace, employers should emphasize that they have implemented and are strictly following all required workplace safety protocols along with any additional protections and taking steps to ensure that all employees understand and acknowledge their responsibility to adhere to all required workplace safety protocols while at the workplace.

Ultimately, employers should recognize that waivers will not absolve them from their duty to provide a workplace free from recognized hazards that are likely to cause serious injury or death under OSHA's general duty clause and strictly adhere to all required workplace safety protocols.

### D. COVID-19 Postings on NMP Website

NMP continues to post COVID-19 orders, advisories, guidelines and legislation on its website (www.nmplabor.com). The following is a list of the new materials added since our last Advisor:

- Civil Rights Act of 1964 Protects Gay and Transgender Workers

If you have any questions or would like to discuss the above in more detail, please contact:


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