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Wyoming Legislature Considers Eleven Employment Bills

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The Wyoming Legislature convened last week, and our elected representatives have a full agenda of proposed employment laws. From changing the rules for time off for voting to prohibiting mandatory DEI training, the proposed legislation could result in more changes for Wyoming employment law than we have seen in decades. Wyoming employers should pay attention to these proposals.

Anti-Woke Proposals. The growing nationwide “anti-woke” movement and its related resistance to diversity, equity and inclusion programs (DEI) has influenced several bills before the legislature.

What is a Woman Act. House Bill 32 would create statutory definitions of the terms sex, male and female, tied to a person's biological sex at birth, and would define boy, girl, father and mother in relation to biological sex at birth. The bill would also establish, at least as a matter of Wyoming law, that separate accommodations based on biological sex are not inherently unequal, and that accommodations can be equal with respect to biological sex without being the same or identical.

The statute would provide protection for rules that recognize or enforce distinctions based on sex for athletics, prisons, domestic violence shelters, rape crisis centers, locker rooms and restrooms, and other areas where safety or privacy are implicated, by establishing that those rules are substantially related to important governmental objectives of protecting safety and privacy. Also, the statute would establish that, when constitutionally challenged, such rules are subject to intermediate constitutional scrutiny and the rules would not be unconstitutional when the distinctions are substantially related to important governmental objectives.

For employers, the most troubling provision of this proposal is its shorthand application of the Americans with Disabilities Act (ADA). The bill states that persons born with a medically-recognized disorder or difference in sex development “shall be provided legal protections and accommodations afforded under the ADA and Wyoming law.” The ADA has a very highly developed definition of disability and a large body of case law interpreting when reasonable accommodations are required. The Wyoming Fair Employment Practices Act basically adopts the ADA definitions and interpretations. A “disorder or difference in sex development” may not, in a particular person's circumstances, constitute a disability under the ADA or require any sort of accommodation in the workplace. The proposal creates a risk of being interpreted as expanding coverage of the ADA beyond conditions that constitute disabilities and in ways that the ADA might not apply under current case law.

HB 32 flew through the House Labor Committee on a 7-1 vote, and has passed its second reading in the House. It passed the House on a 50-9 vote, and is waiting action in the Senate.

Public Sector DEI Prohibition. House Bill 147 and Senate File 103 take aim at DEI programs and efforts by public employers in Wyoming.

House Bill 147 defines DEI as “any program, activity or policy” that promotes differential or preferential treatment of people or otherwise classifies people based on race, color, religion, sex, ethnicity or national origin. If adopted, the proposal would prohibit all governmental employers in Wyoming from engaging in any DEI program, activity or policy or requiring any employee or contractor to participate in any DEI program or training.

The bill also would prohibit “institutional discrimination” which it defines as a series of concepts, summarized as follows:

- That any race, color, religion, sex, ethnicity or national origin is inherently superior or inferior;
- That a person should be discriminated against or adversely treated because of the person's protected class;
- That moral character is determined by protected class;
- That a person is inherently racist, sexist or oppressive, whether consciously or subconsciously, because of the person's protected class;
- That a person is inherently responsible for actions committed in the past by other members of the person's protected class;
- That fault, blame or bias should be assigned based on protected class;
- That a person should accept, acknowledge, affirm or assent to guilt or complicity or a need to apologize because of the person's protected class;
- That meritocracy or other traits like work ethic are racist or sexist.

The bill would prohibit any public employer from engaging in or requiring instruction in institutional discrimination or requiring any employee or contractor to attend or participate in any such training.

The House Education Committee unanimously gave House Bill 147 a “do pass” and bill has passed the House on second reading. HB 147 passed the House on a 51-8 vote, and is awaiting action in the Senate.

Senate File 103 prohibits the use of public funds on DEI programs and activities. It defines DEI to include:

- Influencing hiring or employment practices, or promoting differential treatment or special benefits on the basis of race, color or ethnicity;
- Promoting policies or procedures designed or implemented in reference to race, color or ethnicity, except as necessary to comply

with law or court order;

- Conducting training, programs or activities implemented in reference to race, color, ethnicity or gender dysphonia, except as required to comply with law or court order.

If adopted, the law would prohibit all governmental entities, as a condition of receiving appropriated funding, from establishing a DEI office or program; hiring an employee or contracting with a person to perform DEI duties; compel a person to provide or abide by a DEI statement, or give preference based on adoption of a DEI statement; give preference to an applicant or employee based on race, sex, color, ethnicity or national origin; and, requiring participation in DEI training as a condition of employment.

No action has been taken on this proposal. Referred to the Senate Agriculture Committee

Compelled Use of Preferred Pronouns. Senate File 77 would prohibit all governmental employers from requiring any employee to refer to another using the other employee's preferred pronouns as a condition of employment or under threat of adverse action by the employer. More broadly, the law would prohibit governmental entities from requiring the use of preferred pronouns by members of the public as a condition of any contract, grant, loan, license or permit, or any other benefit provide by the entity. Any person who is compelled by a governmental entity to use preferred pronouns can bring a civil action against the entity and its employees responsible for the violation and seek damages and attorneys' fees.

This proposal has been referred to the Senate Judiciary Committee. May have been heard in Judiciary on 1/28.

Covenants Not to Compete. Senate File 107 would void all covenants not to compete that restrict the right of any person to receive compensation for skilled or unskilled labor, apparently including those included in employment agreements, except for "executive and management personnel and officers and employees who constitute professional staff for executive and managerial personnel" and covenants providing for the protection of trade secrets. The proposal does not define its main exception of executive or management personnel or officers and employees and their professional staff, and does not address when a covenant would be necessary to protect trade secrets. All covenants that restrict the right of a physician to practice medicine after termination of the physician's employment or affiliation with a corporation or partnership would be voided by the law.

The law would not apply to covenants not to compete in contracts for the sale of a business, and it would permit contractual provisions to recover the expense or training or educating an employee who has been employed for less than two (2) years.

Judiciary gave it a "do pass" recommendation on a 4-0 vote; was moved to

general file.

Voting Time. Wyoming law currently requires employers to give employees one hour of paid time off to vote on election day if an employee does not have three consecutive hours off work during the polling hours. House Bill 178 would extend the paid leave time to two hours, and require it be provided on election day or during the period of early voting.

The House has taken no action on this bill. Referred to House Corporations Committee

Guns and Public Employers. House Bill 172 is not proposed as an employment law, but if passed, it will prohibit most public employers in Wyoming from prohibiting employees from carrying concealed weapons at work. It is intended to repeal the gun free zones currently defined in Wyoming law and allow the carrying of concealed weapons in those zones by individuals who would otherwise be allowed to do so under Wyoming law, with or without a permit, and create a criminal offense for those who prohibit concealed carry that is permitted by the law.

The law would authorize people who may legally carry a concealed weapon to do so at any meeting of a governmental entity and in any public building, other than schools, colleges and the university. Those who have a concealed carry permit may carry a concealed weapon into public schools, and on college and university campuses. School districts are authorized to adopt rules regarding the concealed carry by employees with concealed carry permits.

The proposal would not permit concealed carry onto health or human services facilities that are licensed by the Department of Family Services or the Department of Health, such as hospitals, long term care facilities and childcare centers. The law also excludes facilities where explosives or volatile materials are present, and expressly permits private property owners to restrict the presence of firearms on private property.

This bill has been referred to the House Judiciary Committee. Amended to permit governmental entities to adopt rules regarding safe storage and handling of firearms. Passed the house by 50-10, and is awaiting action in the Senate.

Health Care Employers

The House is considering two bills – House Bill 115 and House Bill 222 – to provide broad protections for the conscience and free speech rights of health care employees and institutions, and to protect such employees from retaliation for reporting suspected violations of law or ethical guidelines, as well as managerial misfeasance.

These proposals would protect a wide range of health care professionals and all employees of hospitals, clinics, nursing homes and pharmacies from actual or threatened adverse action because of the person's decision not to participate in a health care service that violates the person's conscience, defined as the ethical, moral or religious beliefs of the person. The exercise of the right of conscience must be limited to a specific health

care service and does not excuse any duty to provide health care services required under the Emergency Medical Treatment and Labor Act. Also under House Bill 115, health care institutions are required to adopt policies for health care providers to exercise the right to refuse to participate in health care service based on the provider's conscience.

The bills would also protect a wide variety of health care institutions, defined as any "institution, facility or agency licensed, certified or otherwise authorized or permitted by law to provide health care in the ordinary course of business." The bills also protect institutions and payers from being required to perform or pay for health care services that violate the entity's conscience. The protection would apply to institutions or payers when those entities hold themselves out to the public as religious, state a religious purpose in governing documents and maintain internal operating policies to implement its religious beliefs regarding employment, staffing, contracting and admitting decisions.

House Bill 115 goes further. It also addresses employees' rights to avoid involvement in abortion. The bill specifically protects employees from being scheduled for, assigned to, requested to directly or indirectly perform, facilitate or participate in abortions, or to refer patients for abortion. Health care institutions may involve employees in abortions only after employees have affirmatively consented in writing to perform, facilitate, refer or participate in abortion.

The proposals would also protect employees who report violations of conscience rights to state agencies, or who testify and participate in any proceeding concerning a violation of the law. Health care professionals, institutions and payers can bring a civil action for damages or injunctive relief to address alleged violations of the law. Also, health care providers and institutions are protected from civil or criminal liability for exercising the right to refuse to participate in a health care service on the basis of conscience.

These bills are not limited to conscience rights. The bills also provide protection for health care employees who disclose information when an employee believes the information demonstrates a violation of federal or state law or regulation, violation of a standard of care or other ethical guideline for health care, or "gross mismanagement, a gross waste of funds, an abuse of authority, practice or methods of treatment that may place a patient's health at risk or a substantial and specific danger to public health or safety." Also, the bills prohibit licensing boards or agencies from taking action to revoke a license of a health care provider for engaging in speech or expressive activity protected by the First Amendment unless the licensing agency can demonstrate that the speech was the direct cause of physical harm to the health care provider's patient.

The Legislature has not taken action on House Bill 115 or 222. No action on 115; 222 referred to House Labor.

Immigration

The Legislature is considering two immigration-related measures:

House Bill 163 would create a misdemeanor criminal offense for employing or contracting with a person who is or becomes unlawfully present in the United States in violation of federal law, or who is not lawfully authorized to work or becomes not lawfully authorized to work in the United States. Violations carry a penalty of \$1,000 for a first offense, and \$5,000 for each offense after the first. Also, each person who is employed in violation of the statute would constitute a separate offense.

Senate File 124 would require every employer to ask potential employees or contractors about their immigration status before commencing employment or entering into a contract, and, if an employer discovers a current employee or contractor is not authorized to work, the employer is required to report the person to law enforcement or immigration authorities. Any person who knowingly hires, contracts with, recruits, or refers for a fee an unauthorized worker will be guilty of a misdemeanor, with fines that range from \$375 to as much as \$16,000 for multiple offenses. The measure also creates a felony criminal offense for transporting or attempting to transport in the state any unauthorized alien knowing that the person is present in the United States illegally, or conceal, harbor or shelter any person illegally in the country. Violations of this felony provision can result in imprisonment for up to five years, and a fine of up to \$5,000.

The Legislature has not acted on either proposal. SF124 referred to Senate Judiciary

Bottom Line. Despite having strong Republican majorities in both houses, the Wyoming Legislature appears poised to saddle large and small employers with a variety of new burdens. Your humble author's take on a few of the more damaging proposals:

- *Senate File 107* would outlaw covenants not to compete and be very disruptive to employment relationships, particularly in healthcare, technology, financial services and sales. It would also deprive Wyoming employers of the investments made through signing bonuses, training expenses, and similar benefits paid in exchange for such covenants. Enforcing covenants not to compete in Wyoming is already an uphill battle after a series of negative Wyoming Supreme Court opinions. This legislation is unnecessary.
- *House Bills 115 and 122* go well beyond conscience protection for health care providers. The proposals would create new whistleblower protections for employees of any health care employer, including your local doctor's office, in any situation an employee believes is below a standard of care, or constitutes an "abuse of authority." The terms of this new protection are undefined and expansively vague. These provisions should be striped from HB115 and HB122, and those bills should be considered as a straightforward conscience protection measure.
- *Senate File 77* may be legislation in search of a problem. Hopefully, the legislators will require the sponsors to identify any governmental employer who is currently requiring employees to

use preferred pronouns before making this a new Wyoming law.

- *House Bill 32*, which requires state law to define sex based on biological characteristics at birth, is likely to spark constitutional litigation. If it makes progress, the Legislature should remove the paragraph regarding the application of the ADA to avoid Wyoming employers being subjected to a more ambiguous, and perhaps stricter, application of that law than employers in other states.
- *House Bill 163* and *Senate File 124* would criminalize actions already prohibited under federal law. Employers are already required by federal law to complete a Form I-9 for every new employee which requires review of documentation establishing the person's work authorization status, and failure to do so can result in significant civil and criminal penalties. Subjecting Wyoming employers to additional state law penalties seems unwarranted.

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