

GC Cheat Sheet: The Hottest Corporate News Of The Week

By **Michele Gorman**

Law360 (June 19, 2020, 4:23 PM EDT) -- Attorneys predicted that the workplace experiences of LGBT lawyers could improve after the U.S. Supreme Court's blockbuster ruling on sex-based bias, and lawyers warned that employers' recent mental health initiatives may carry risk under the Americans with Disabilities Act.

These are some of the stories in corporate legal news you may have missed in the past week.

Blockbuster LGBT Decision Could Create Change in Firms

Lesbian, gay and transgender attorneys say they see broad improvements on the horizon when it comes to the workplace experiences of LGBT lawyers after the U.S. Supreme Court sent a strong message to employers that discrimination based on sexual orientation and gender identity is illegal.

The U.S. Supreme Court's June 15 decision found that Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating based on sexual orientation and gender identity.

The ruling, attorneys from several LGBT bar associations and others involved in employment law say, holds the potential to drive law firms to double down on their diversity and inclusion efforts and make legal workplaces better places to be for attorneys who are sexual minorities.

"This is sending a message recognizing the rights of LGBTQ-plus employees. I think that in and of itself will further the idea that attorneys can confidently show up at work as their authentic selves. That's huge," said Vincent Rizzo, secretary of the Lesbian and Gay Bar Association of Chicago.

Employers' Mental Health Services May Carry ADA Risk

A global pandemic and nationwide civil unrest over police violence have employers increasingly eyeing ways to augment the mental health and wellness services available to their employees. But those well-intentioned efforts could land businesses on the wrong side of the Americans with Disabilities Act.

Employers are already paying some attention to workplace mental health, and it will only increase as the year goes on, said Michelle Barrett Falconer, co-leader of Littler Mendelson PC's leaves of absence and disability accommodation practice group.

While everyday stress generators aren't things "typically covered" under the ADA, Falconer said it's not impossible that they could form the basis of an ADA claim if a "special set of circumstances" arises and a doctor is able to say that a person has developed a condition because of the pandemic.

But where things could get especially tough for employers isn't when an employee approaches them seeking an accommodation, but rather when they only hint at the existence of a mental health issue.

One scenario that employers may encounter, particularly as stresses from the pandemic and social unrest mount, is workers who ask for a day off by citing depression, anxiety or a feeling of being overwhelmed, according to Maria Greco Danaher, a Pittsburgh-based shareholder at Ogletree Deakins Nash Smoak & Stewart PC, who said this situation leaves employers with a dilemma.

Employers in that situation need to ask themselves if what the employee is citing is the sort of condition that's covered under the ADA and, if so, whether the employer can accommodate it, Danaher said.

How the Legal Industry Hopes to Prevent Recession-Era Diversity Mistakes

"How do I look for a new job during COVID-19?"

"How do I know the firm is telling me the truth about their financial stability?"

"How do I talk to my law firm partners about how I'm feeling in the wake of George Floyd's death?"

These were some of the questions submitted anonymously by lawyers participating in the Metropolitan Black Bar Association's "Support for Black Law Firm Associates" webinars amid the ongoing pandemic and the civil unrest over Floyd's death in Minneapolis, said Anta Cisse-Green, president-elect of the MBBA.

The virtual series is one example of how legal organizations are creating initiatives to try to prevent diversity efforts from moving to the back burner as firms and in-house departments begin to emerge from the pandemic and reassess their budgets and priorities.

Feds Release Simplified Application for PPP Loan Forgiveness

The Small Business Administration and U.S. Department of the Treasury on Wednesday unveiled a simplified version of the application that small businesses must file to receive forgiveness of their Paycheck Protection Program loans, a move that comes amid calls to lighten the paperwork burden facing borrowers.

The agencies' new "EZ" loan forgiveness application clocks in at just three pages and can be used by self-employed borrowers and businesses that didn't significantly cut worker wages or salaries after taking out loans from the \$660 billion coronavirus relief program.

Businesses using the simplified form would also need to have either kept their employee head counts steady or taken a lasting hit to their activity levels because of public health restrictions tied to the COVID-19 pandemic, according to the agencies.

"These changes will result in a more efficient process and make it easier for businesses to realize full forgiveness of their PPP loan," the SBA and Treasury said in a statement Wednesday.

EEOC Says Businesses Can't Mandate COVID-19 Antibody Tests

Businesses can't make workers take tests that detect COVID-19 antibodies without violating the Americans with Disabilities Act, the EEOC said in new guidance Wednesday, answering a question left open when the commission recently gave businesses the green light to test employees for the virus itself.

The U.S. Equal Employment Opportunity Commission's guidance is its latest addition to a technical assistance document it has periodically updated in recent months that answers various questions surrounding employers' response to the novel coronavirus pandemic and their obligations under federal anti-discrimination laws.

The latest entry deals with antibody or serology tests, which determine whether a person was ever infected with COVID-19 — even if they were asymptomatic — and built up antibodies to the disease.

Pointing to recent guidance by the Centers for Disease Control and Prevention that says in part that antibody tests shouldn't be used to determine if someone is immune to the virus or as a basis for decisions about allowing workers back on the job, the EEOC said that employers for now can't mandate those tests before allowing people back to work.

Landmark LGBTQ Ruling Tees Up Religious Defenses

The U.S. Supreme Court's ruling on June 15 that federal law forbids discrimination against gay and transgender workers left the door open for certain employers to mount religious defenses to bias claims, setting the stage for a new wave of legal battles over LGBTQ rights in the workplace.

Though Justice Neil Gorsuch alluded to employers' religious concerns near the close of the landmark 6-3 ruling that Title VII's ban on sex-based bias covers sexual orientation and gender identity, he declined to delve into them. But as LGBTQ workers file job discrimination claims in the ruling's wake, other courts will.

"That last page or so of the decision was an invitation to such defenses," said Jennifer Pizer, the law and policy director for LGBTQ legal advocacy group Lambda Legal.

The court's ruling in *Bostock v. Clayton County* that Title VII covers LGBTQ individuals closed a deep divide between circuit courts, handing a win to equal rights advocates after a hard-fought legal **battle** and dealing a blow to conservative groups and the Trump administration.

Justices Called On to Revamp Workplace Religious Bias Precedent

A Jehovah's Witness suspended for refusing to work during his religious obligations has urged the U.S. Supreme Court to revisit the legal test for denying religious accommodations in the workplace, just months after the justices declined to review a similar case.

Jason Small asked the justices on June 15 to overturn the Sixth Circuit's decision that Memphis Light, Gas & Water didn't violate Title VII of the Civil Rights Act because speculation that accommodating his religious needs might cause "undue hardship" excused the company from the obligation to provide that accommodation.

If the court takes up Small's case, it will clarify the standard to determine whether an accommodation imposes enough of a burden to reject it under the Supreme Court's 1977's *Trans World Airlines Inc. v. Hardison* ruling, according to the petition.

While Title VII requires employers to provide "reasonable accommodations" to workers whose faith clashes with their job so long as the accommodations don't impose an "undue hardship," the high court in *Hardison* ruled that a hardship is "undue" if it translates to "more than a de minimis," or trivial, burden on the employer.

SEC Urged to Require Virus Disclosures From Public Cos.

A Wall Street reform group Tuesday called on the U.S. Securities and Exchange Commission to make public companies disclose how they are protecting workers from COVID-19, saying that the information is critical to investors and public health.

Americans for Financial Reform said in a letter to SEC Chairman Jay Clayton that the agency should mandate new disclosures to help shareholders analyze how companies are protecting workers, limiting the spread of the coronavirus in workplaces and using the trillions of dollars in bailout funds doled out by the federal government in recent months.

The letter comes as the U.S. economy emerges from months of lockdown, with some states easing restrictions even as they set new records for daily COVID-19 case counts and hospitalizations. The authors, including nearly 100 investors, state treasurers and securities law experts, said transparency on pandemic mitigation efforts will be critical to the recovery.

"Investors are becoming increasingly aware that businesses that take appropriate action to protect workers and supply chains are ensuring their ability to continue operations at an appropriate capacity through the crisis," the group said. "Businesses that institute responsible worker safety and health practices are also helping to limit the damage to their suppliers and customers."

Ex-Morgan Stanley Diversity Leader Alleges 'Systemic' Bias

Morgan Stanley's former chief of diversity sued the investment firm Tuesday in Brooklyn federal court, claiming her efforts to advocate for employees and job candidates of color were stymied and she was eventually fired for complaining about racial inequality.

Marilyn Booker, a Black woman who signed on as Morgan Stanley's first diversity officer in 1994, said in her complaint that less than 1% of the firm's financial advisers are people of color, and only a few dozen of its thousands of managing directors are racial minorities. The disparity in its workforce and its senior leadership fits the firm's pattern of keeping women and people of color down, she said.

Booker contended Morgan Stanley terminated her in December in retaliation for speaking out on behalf of employees of color.

"Morgan Stanley, in line with its repugnant track record, had decided it had had enough of Ms. Booker and her efforts at addressing the systemic racial inequality that existed at the firm once and for all," the complaint said.

COVID-19 Optimism Grows Among Legal Leaders

Top legal professionals at more than 100 corporations are increasingly optimistic about how their companies are handling the COVID-19 pandemic and the long-term impacts on their business, according to a study released on June 15 by Morrison & Foerster LLP.

While the legal professionals rate the current impact at 6.7 on a scale of 1 to 10, they say they believe the impact will drop to 3.7 within two years, according to MoFo's study, the second on the subject since March.

About two of every five legal professionals believe the novel coronavirus is having a "severe" impact on their business, down from about half in March, according to the report. Morrison & Foerster believes companies are increasingly adapting to the challenges brought by the pandemic, with increasing confidence about the ability of employees to successfully work from home, according to the report.

"The pandemic continues to have a dramatic and disruptive impact on companies and legal departments, and that significant disruption is expected to remain the norm for at least the next two years," said David A. Newman, head of Morrison & Foerster's coronavirus task force. "While the overall assessment of disruption is largely unchanged from the previous survey conducted two months ago, we are seeing cautious indications of optimism."

Enforcement Fights Loom as Final Calif. Privacy Regs Drop

The California attorney general declined to clarify several key ambiguities in his final rules for implementing the state's landmark privacy law, leaving businesses bracing for enforcement battles and putting the spotlight on a likely ballot initiative that is poised to further complicate matters.

Through three rounds of public comments dating to last October, business groups and consumer advocates have pressed Attorney General Xavier Becerra to provide more specifics on how to interpret key terms in the California Consumer Privacy Act, including what constitutes a "sale" of personal information that consumers can opt out of and how to determine the value of consumer data.

But the attorney general failed to deliver this clarity with his final version of the regulations, which in a largely procedural step were sent to the state's Office of Administrative Law for approval June 2 and were nearly identical to the last iteration of the rules.

"The aspects of the CCPA regulations that were ambiguous in March when the second set of modifications were issued remain ambiguous today as we approach the enforcement date," said Reece Hirsch, co-head of the privacy and cybersecurity practice at Morgan Lewis & Bockius LLP.

Q&A: 15 Minutes With Discovery's General Counsel

Discovery general counsel Savalle Sims predicts the COVID-19 outbreak will result in more innovation and authentic production of content in her industry.

She has already seen its effects through the company's ability to create content with employees working from their homes.

"That has been wonderful to see the authenticity of that content production and the innovation as well,

to be able to pivot that quickly and to invite consumers into the homes of our talent in such an intimate way," she said.

During a recent interview with Law360, Sims also discussed the effects the pandemic has had on her legal team, how she keeps up morale, and how she and other top corporate lawyers can increase diversity and inclusion in the profession.

--Additional reporting by Aebera Coe, Vin Gurrieri, Jon Hill, Braden Campbell, Kevin Stawicki, Jack Queen, Jon Steingart, Kevin Penton and Allison Grande. Editing by Kelly Duncan.