HOT TOPICS IN EMPLOYMENT LAW

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WAGE AND HOUR UPDATE

FLSA OVERTIME EXEMPTIONS

- Per For executive, administrative, and professional exemptions, minimum salary threshold is currently $455 per week ($23,660 for a full-year employee), but this is likely to change soon.
- The DOL proposed rule would increase the exempt salary minimum threshold to $35,308.
- Unlike the proposed regulations during the Obama administration, there is no mechanism in place to automatically increase the minimum salary on an annual or 3 year basis.
- No effective date for the changes have been announced but it is possible that the changes will take effect on or around Jan. 1, 2020.

PERMITTED SALARY DEDUCTIONS

Seven exceptions from the exempt employee "no pay-docking" rule:

1. Absence from work for one or more full days for personal reasons, other than sickness and disability.
2. Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences.
3. Penalties imposed in good faith for violating safety rules of "major significance."

PERMITTED SALARY DEDUCTIONS (cont.)

4. To offset any amounts received as payment for jury fees, witness fees, or military pay.
5. Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rule.
6. Proportionate part of an employee's full salary may be paid for time actually worked in the first and last weeks of employment.
7. Unpaid leave taken pursuant to the Family and Medical Leave Act.

AVOIDING EXPOSURE

- Develop and enforce a timekeeping system
- Develop a policy regarding meals and breaks and work from home
- Specify what is and is not allowed in your handbook
- Avoid auto deductions for meal periods
- Establish that violations of policies related to breaks, overtime, etc. will result in disciplinary action (but still pay employees for time reported as worked).

OFF-THE-CLOCK WORK

- Common issues include:
  - Coming in early but not clocking in immediately
  - Staying in the office after clocking-out
  - After-hours use of cell phones and laptops for work purposes

- In an effort to prevent claims of failure to pay for the off-the-clock work, be clear in the policy about whether employees can elect to work at home with or without permission. It should be made clear that all time worked, regardless of where it was worked, should be properly reported so that it can be paid.

USE OF PAYROLL COMPANIES

- Payroll companies (ADP, etc.) and professional employer organizations serve a specific contractual function. Varies by agreement, but typically limited to issuing paychecks based on employer provided information and making certain withholdings.
- The payroll companies are typically not responsible for checking for wage and hour compliance.
- Employers are still ultimately responsible for proper payment of employees under wage and hour laws. Use of a payroll company or professional employer organization is typically no defense in an FLSA or State wage and hour lawsuit.

LAWS AND TRENDS IMPACTING RECRUITING AND HIRING

JOB APPLICANTS: WHAT YOU SHOULD NOT ASK

- Questions that would give you an idea of whether the applicant is disabled, i.e.:
  - Do you require a reasonable accommodation?
  - Can you perform the essential functions of the job without reasonable accommodation?
- Race/Ethnicity
- Religion – this includes avoiding questions about religious holidays observed.
- National origin
- Gender specific questions – for example, do not inquire into child care arrangements of only female applicants. Note that child care is a topic that is best of avoid in general.
- Genetic information and medical history
- Marital Status, pregnancy, plans for family, number of children

JOB APPLICANTS: WHAT YOU SHOULD NOT ASK

- Age - Do not ask about date of birth or graduation year from high school, college, etc. If DOB is ultimately needed for a particular position, background checks, etc., try to avoid having decision makers see the information.
- Sexual orientation - Obviously, avoid asking questions about sexual orientation, transgender status, etc. during the selection process. Be very careful in responding when an applicant mentions sexual orientation.
- Organizations – Try to avoid conversations about non-job related organizations to which applicant belongs that may provide insight into an individual's minority status, age, etc.
- Work comp claims or use of sick time at previous jobs.

SEASONS 52

- In 2018, Seasons 52, part of the Darden family restaurants, entered into a $2.85 million settlement with the EEOC to end a class action lawsuit related to the hiring process.
- Allegation was that there was age discrimination in the hiring process.
- More than 135 applicants provided sworn testimony that hiring managers asked them about their age or made age-related comments during interviews.
- Statements allegedly made included: (1) "We are looking for people with less experience"; and (2) "We are not looking for old, white guys."
- As part of the settlement, Seasons 52 agreed to have its hiring practices overseen by an independent monitor for 3 years.

CRIMINAL BACKGROUND INFORMATION

- Criminal convictions or guilty plea questions need to be avoided at the early stage of the hiring process in a lot of states.
  - Illinois, for example, prohibits criminal background inquiries, with limited exceptions, until an applicant has been determined qualified for the position.
  - Missouri state law does not have a blanket prohibition on asking about criminal background of an applicant during the screening process.
    - However, the City of Columbia prohibits criminal background inquiries prior to a conditional offer of employment.
    - Kansas City ordinance prohibits criminal background inquiries until after an interview and after the individual has been determined qualified for the position
  - The EEOC may take action against employers who they believe use criminal background information to discriminate. Regardless of the state, do not ask about arrests.
- However, failure to make an adequate investigation of an applicant's background that comes to light may subject a company to liability, e.g., on a negligent hiring theory if the employee subsequently commits a crime or tortious act on the job. Do not fail to note voluntary disclosure of criminal background by an applicant.

RESTRICTIONS ON QUESTIONS ABOUT COMPENSATION

- KC, MO – Effective Oct. 31, 2019, employers with 6 or more employees may not inquire (including through interview questions and searches of publicly available records or reports) about nor rely on salary history (this means wages, benefits, or other compensation) from applicant (any person applying for employment with an employer located in KC) when deciding to offer employment or in determining salary, benefits, or other compensation during the hiring process.
- NYC – employers in NYC cannot inquire into or rely on an applicant's salary history. Definition of "inquire" and "salary history" in NY law are very similar to the definitions in the KC law. Albany, Suffolk, and Westchester County have similar restrictions.

RESTRICTIONS ON QUESTIONS ABOUT COMPENSATION

- Illinois – Effective September 29, 2019, employers cannot ask applicants about their pay history. Employers are also banned from requiring employees to sign an agreement or waiver that would prohibit the employee from discussing compensation information, with the exception of HR or supervisors whose job duties allow access to such information. Employers are still allowed to communicate with prospective employees about their expectations regarding wages, salaries, and benefits.
- California – Employers, personally or through an agent, cannot seek an applicant's pay history information, including compensation and benefits. Even if an employer already has such pay history, it cannot be used in making a hiring decision or determining new hire pay. If requested after initial interview, employers must also provide applicants with pay scale information. "Pay scale" under the Cal. law means a salary or hourly wage range.

RETENTION OF DOCUMENTS IF NO JOB OFFER

- You should retain documents related to the screening process for at least one year for applicants who did not receive a job offer.
- The information to be retained includes:
  - Job Posting
  - Application
  - Interview notes
  - Outline of reasons that the applicant was not advanced to the next stage of the selection process.

LEAVE LAW UPDATE

FMLA PROTECTIONS

- Employers are required to continue group health coverage for employee on FMLA leave under same conditions as if employee had continued to work.
- Employee use of FMLA leave cannot be counted against employee under a "no-fault" attendance policy.
- After FMLA leave, employee is entitled to his/her previous position or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment.
- Exception: employee is not entitled to reinstatement if, because of layoff, reduction in force or other reason employee would not be employed at time he/she seeks to return to job.

FMLA DEFINITION OF "SPOUSE"

- Per FMLA regulation, "spouse" means "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized."
- Prior to the June 2013 U.S. v. Windsor Sup. Ct. decision, FMLA regulation's definition of "spouse" was superseded by DOMA. However, Windsor decision invalidated key provision of DOMA that excluded a same-sex partner from definition of "spouse" as the term is used in federal statutes.

FMLA DEFINITION OF "SPOUSE"

- In 2013, DOL updated FMLA fact sheet to indicate an individual in a same-sex marriage can qualify as a "spouse" for FMLA purposes if the state where the individual resides legally recognizes same-sex marriage. However, FMLA fact sheet did not address definition of "spouse" with respect to employees in a same-sex marriage in one of the many states that do not recognize same-sex marriage.
- In 2015, DOL rule became effective that indicates eligible employees in legal same-sex marriages are able to take FMLA to care for their spouse or family member regardless of where they live.

DISABILITY ACCOMMODATION/LEAVE POLICIES

- EEO or another policy should indicate employer will provide reasonable accommodation to individuals with disabilities.
- Avoid language in leave policies that indicates employees will receive only a max. of 12 weeks of leave in any year regardless of circumstances.
- EEOC has indicated it may be a reasonable accommodation for a disability to provide more than FMLA required leave depending on the circumstances.

ADA LEAVE

- Courts have not always been agreeing with the EEOC's recent position regarding leave as an accommodation under the ADA. ADA applies to qualified individuals with a disability. Employee must be able to perform the essential functions of the job with or without reasonable accommodation.
- ADA applies to employers with 15 or more employees.
- ADA leave determinations should be made on a case-by-case basis focus on the need of employee and the undue burden, if any, on the employer.
- Employers are not required to pay a disabled employee on leave, unless its policies would require payment generally.

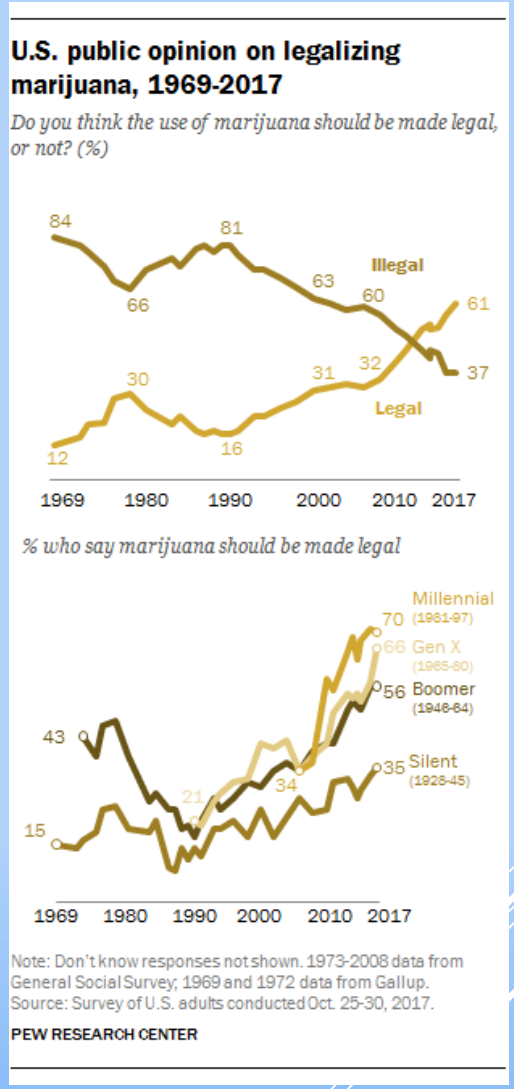
WORKERS' COMPENSATION

- Employees may be on workers' comp due to an on-the-job injury that also qualifies as a serious health condition under FMLA.
- Per federal regulations, the workers' comp related time off and FMLA leave can run concurrently if employer provides proper notice to the employee regarding designation of FMLA leave.
- If employee with work-related injury who is on FMLA leave is cleared for light duty by health care provider providing treatment for work comp injury, employee is permitted but not required to accept light duty. Declining light duty work may cause employee to be disqualified from payments under work comp plan, but employee is still entitled to remain on FMLA leave until able to return to same or equivalent position or until FMLA leave expires.

MEDICAL MARIJUANA

WHERE ARE WE?


11 Legal Recreational Marijuana States & DC
33 Legal Medical Marijuana States & DC
WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MS
MI
IN
KY
TN
AL
OH
WV
GA
FL
SC
NC
VA
PA
NY
VT
NH
ME
MA
CT
RI
NJ
DE
MD
DC
AK
HI
States with Legal Medical Marijauana
States with Legal Medical & Recreational Marijuana
PROCON.ORG


U.S. public opinion on legalizing marijuana, 1969-2017
Do you think the use of marijuana should be made legal, or not? (%)
84
66
81
63
60
61
37
Illegal
12
30
16
31
32
Legal
1969
1980
1990
2000
2010
2017
% who say marijuana should be made legal
Millennial (1981-97)
70
Gen X (1965-80)
66
Boomer (1946-64)
56
Silent (1928-45)
35
43
15
21
34
Note: Don't know responses not shown. 1973-2008 data from General Social Survey; 1969 and 1972 data from Gallup.
Source: Survey of U.S. adults conducted Oct. 25-30, 2017.
PEW RESEARCH CENTER

MISSOURI'S MEDICAL MARIJUANA LAW

- Unlike many of the state laws referenced previously, Missouri's medical marijuana law **does not** contain a specific anti-discrimination provision
- In fact, it has language that specifically prohibits employees from filing claims against a Missouri business for wrongful discharge, discrimination, or similar causes of action based on the employer prohibiting the employee from being under the influence of marijuana while at work or disciplining the employee for working or attempting to work while under the influence of marijuana.
- Claims could arise alleging discrimination for using medical marijuana **outside of work** as the statute does not address whether employers can prohibit use of medical marijuana outside of work.

ILLINOIS RECREATIONAL MARIJUANA

- In May 2019 Illinois legalized recreational marijuana via the Cannabis Regulation and Tax Act of 2019, which goes into effect January 1, 2020
  - Became the first state to legalize marijuana sales through the state legislature rather than a ballot initiative
- Adults over the age of 21 will be able to legally purchase cannabis for recreational use from licensed dispensaries across the state
- Does not alter the state's medical marijuana program

ILLINOIS RECREATIONAL MARIJUANA

- Nothing in the Illinois Act prohibits employers from adopting "reasonable employment policies" (drug free workplace policies) concerning smoking, consumption, storage, or use of cannabis in the workplace or while on call **provided that the policy is applied in a nondiscriminatory manner**
- Nothing in the Act limits an employer from disciplining an employee or terminating employment of an employee for violating an employer's reasonable employment policies or workplace drug policy.

ILLINOIS RECREATIONAL MARIJUANA

- Amends the Illinois Right to Privacy in the Workplace Act which prohibits employers from restricting employee use of "lawful products" during non-work and non-call hours.
- There is some uncertainty as to whether employers can still terminate an employee for failing a random drug test that is part of a non-discriminatory drug policy.
- Cannibas Act does not create a legal cause of action against an employer who disciplines or terminates an employee based on good faith belief that an employee was impaired from the use of cannabis or under the influence of cannabis while at work, performing job duties, or while on call.

LAWS AND TRENDS IMPACTING EMPLOYER-EMPLOYEE AGREEMENTS

CONFIDENTIALITY AND NON-DISCLOSURE STATEMENTS/AGREEMENTS

- Per NLRB, you cannot prohibit employees from discussing wages, hours, and other terms and conditions of employment. Avoid provisions with broad statements that arguably prevent employees from discussing such topics.
- Additionally, avoid statements in handbook provisions that all investigations will be confidential. NLRB has previously indicated such statements can be considered as having a chilling effect on the exercise of the right of employees to discuss terms and conditions of employment.
- Be aware of the Defend Trade Secrets Act and include DTSA immunity and anti-retaliation language to preserve ability to recover all available damages under the Act for an employee's unlawful activity, including attorney fees and punitive damages. The anti-retaliation language should be included in any confidentiality agreements.

SEPARATION AGREEMENTS

- ADEA and OWBPA – specific language is needed to secure effective release of ADEA claims of employees 40 year of age or older
- Include language that indicates employer is not admitting any wrongdoing.
- Effective date of agreement should be the employee's effective end of employment date or later.
- Have employee verify in agreement that he has already or will return employer's property

SEPARATION AGREEMENTS

- It may be necessary to include provision governing how parties agree employment references will be provided.
- Indicate agreement is to be considered confidential.
- Consider including language about non-disclosure of confidential information
- Address any additional benefits being provided (ex. 3 months of company payment of COBRA premiums)
- Special requirements for a reduction in force

ARBITRATION AGREEMENTS

- Best practice to have arbitration agreements set out in a stand alone document signed by the employee and authorized employer representative.
- There should be a mutual agreement between the parties to resolve disputes through arbitration.
- Be aware that under government contract requirements and some recent state laws there may need to be exceptions carved out of the agreements for issues such as sexual harassment.
- Google recently announced that it will end forced arbitration requirements and class action waivers for its employees. There is pressure for other large companies to do the same.
- Understand that Missouri courts have not favored arbitration agreements in the recent past and often look for a reason to consider an arbitration agreement to be unenforceable.

NON-COMPETE AGREEMENTS

- Non-compete agreements are becoming more and more disfavored by Missouri courts and other courts.
- Agreements should be narrowly tailored to the needs of the employer. Geographic territory should not be overbroad and number of years for restrictions should be reasonable depending upon the position at issue and nature of the business.
- Be as specific as possible regarding the nature of the restrictions, including as to which "customers" cannot be solicited by former employee.
- Consider adding a provision indicating employer can recover attorney fees if it prevails in a lawsuit to add some teeth to the agreement.

QUESTIONS?