

# 2016 EMPLOYMENT LAW: HOT TOPICS TO WATCH

Maria Fracassa Dwyer  
(248) 988-5899  
mdwyer@clarkhill.com

Mikyia S. Aaron  
(313) 965-8528  
maaron@clarkhill.com

CLARK HILL

# MEDICAL MARIJUANA & WORKPLACE DRUG TESTING

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# MEDICAL MARIJUANA AND THE WORKPLACE: UPDATE

- There are now 24 jurisdictions, including Michigan, with laws that legalize the use of marijuana for medical purposes
- Five of those jurisdictions—Colorado, Washington, Oregon, Alaska, and the District of Columbia—have gone so far as to legalize the drug for recreational use
- State Marijuana Statutes

---

# MEDICAL MARIJUANA AND THE WORKPLACE: VEXING QUESTIONS FOR MULTI-STATE EMPLOYERS

- The most pressing question for employers is whether they may lawfully impose discipline (including termination) on an employee who tests positive for marijuana. The answer is dependent on state law!
- All 50 states allow employers to restrict marijuana use, therefore, even though marijuana use may be legalized in their state, employees can still face sanctions or dismissal by their employers if they use illicit drugs on employer premises

---

# MEDICAL MARIJUANA AND THE WORKPLACE: STATE SURVEY

- Michigan: Legalizes medical use of marijuana, however, employers may take adverse action following a positive drug test result in conjunction with their policies
- Illinois: Legalizes medical use of marijuana, however, employers may enforce drug testing, zero-tolerance or drug-free in conjunction with their policies if they are applied in a nondiscriminatory way
- Some states (such as Ohio and PA) have not yet passed laws that legalizes the use of medical marijuana

*NOTE:* Each of the states legalizing medical marijuana use prohibits employers from penalizing an employee solely for his or her status as a registered, qualifying patient (or caregiver), unless failing to do so would cause the employer to violate federal law. Separate and distinct from policies which maintain a zero tolerance for drugs <sup>5</sup> in the workplace (including testing positive for drugs)

---

# MEDICAL MARIJUANA AND THE WORKPLACE: WHAT EMPLOYERS NEED TO KNOW NOW

- State statutes in this area are generally very new, most have not yet had opportunity for judicial interpretation
  - Practical Implication: There is little (if any) guidance about what the statutes mean, much less any clear direction for employers that are trying to grapple with how their employment policies and practices should be modified to take into account the new statutes
- Compounding the uncertainty for employers is that federal law continues to prohibit marijuana use, distribution, and possession for any reason

---

# MEDICAL MARIJUANA AND THE WORKPLACE: EMPLOYER BEST PRACTICES

Employers should:

- As more states trend towards legalization, keep a close watch on legal developments in this area in your state. Michigan – Sixth Circuit Case involving Walmart – *Casias v Walmart*
- Review any substance abuse testing policies
- Update employee handbooks to include an explicit statement on medical marijuana
- Before disciplining an employee for a positive drug test arising from marijuana use outside of work, consult with experienced employment legal counsel
- If the employee in question has sought (or expresses a plan to seek) accommodation, Employers (e.g., in Michigan) must ensure compliance with reasonable accommodation obligations

# SOCIAL MEDIA AND § 7 OF THE NATIONAL LABOR RELATIONS ACT (NLRA)

CLARK HILL



---

## **SOCIAL MEDIA AND SECTION 7 RIGHTS (NLRA): BACKGROUND**

- Who does the NLRA apply to? Both union and non union employers!
- Why develop a social media policy?
  - Protect trade secrets
  - Prevent employees from tarnishing an employer's brand or reputation with clients or customers
  - Prevent unlawful harassment between co-workers
- The NLRB has long held that employers usually may not discipline employees for engaging in certain collective or concerted activity, including comments regarding terms and conditions of employment, unless the employee's behavior is so outrageous that it loses the protection of the Act

---

## SOCIAL MEDIA AND SECTION 7 RIGHTS (NLRA): NLRB DRAWS A FINE LINE

- How far can employees push the boundaries before their conduct will be found indefensible?
- Recently, the National Labor Relations Board (Board) has become active in drawing fine distinctions between lawful and unlawful policies
- Social Media Policies
  - *Landry's Inc.*: Board validated employer's social media policy urging employees not to post on social media any company or job-related information that "could lead to morale issues in the workplace or detrimentally affect the company's business" after concluding that no employee could reasonably read the policy, in context, to unreasonably infringe on employees' rights
  - *Pier Sixty, LLC and Hernan Perez*. Board reinstated employee after calling boss "Nasty Mother F\*\*\*\*\*" on personal Facebook profile after finding that such comments directed towards the overall environment of the workplace constituted protected, concerted activity and union activity

---

## SOCIAL MEDIA AND SECTION 7 RIGHTS (NLRA): NLRB DRAWS A FINE LINE

Other notable NLRB decisions:

- *Durham School Services, L.P.*
- *Professional Electric Contractors of Connecticut, Inc.*
- *Triple Play Sports Bar and Grille*
- For additional information on notable NLRB issues, reference Tom Brady and Kurt Miller's *2016 Employment Outlook* webinar available at: [clarkhill.com/uploads/medium/resource/1378/2016\\_Employment\\_Outlook\\_Webinar\\_12.9.15.pdf](http://clarkhill.com/uploads/medium/resource/1378/2016_Employment_Outlook_Webinar_12.9.15.pdf)

---

# SOCIAL MEDIA AND SECTION 7 RIGHTS (NLRA): WHAT EMPLOYERS NEED TO KNOW

- Social media issues are an enforcement priority for the NLRB
- The Board has actively scrutinized and struck down many Employers' social media policies
  - Social media policies that are unlawfully broad leading employees to "reasonably construe" them as restricting an employees' rights to communicate with each other or third parties regarding wages, hours, and working conditions will be invalidated
- Although the Board permits employer developed social media policies that monitor and analyze employees' social media use, it does not clarify when an employer can act on social media information

---

## **SOCIAL MEDIA AND SECTION 7 RIGHTS (NLRA): THE GOOD NEWS FOR EMPLOYERS**

- Section 7 does not protect all employee speech, and a well-crafted social media policy can still prohibit unprotected speech that may damage an employer
- Whether an employer's social media policy violates Section 7 protections is determined on a case-by-case basis

---

# SOCIAL MEDIA AND SECTION 7 RIGHTS (NLRA): EMPLOYER BEST PRACTICES

Steps employers can take to draft acceptable social media policies:

- Review and rethink existing policies and prohibitions to ensure that they properly take account of Section 7 concerns
- Preserve confidentiality and privacy by crafting carefully written policies that specifically delineates which posts are prohibited
- Provide examples in employee handbooks that explicitly describe which communications are allowed
- Review the GC Memo: [www.nlr.gov](http://www.nlr.gov)

\*\*Make clear that the policy is not intended to prohibit protected speech or interfere with employee rights recognized under the NLRA

# DISTRACTED DRIVING ON COMPANY BUSINESS

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# **DISTRACTED DRIVING ON COMPANY BUSINESS: BACKGROUND**

- Distracted driving is a leading cause of motor vehicle accidents
- While we experience fewer fatalities in the workplace today, the leading cause of worker fatalities are motor vehicle crashes
- Distracted driving includes any activity that takes one or both of a driver's hands off the steering wheel, eyes off the road or mind off the primary task of driving



---

# **DISTRACTED DRIVING ON COMPANY BUSINESS: WHAT EMPLOYERS NEED TO KNOW**

- The Occupational Safety and Health Administration's (OSHA) top priority is keeping workers safe, and the Department of Labor (DOL) through OSHA is partnering with the Department of Transportation to combat distracted driving
- OSHA's focus on texting while driving
  - OSHA calls upon employers to prohibit any work policy or practice that requires or encourages workers to text while driving.
- Employers who require their employees to text while driving—or who organize work so that doing so is a practical necessity even if not a formal requirement—violate the Occupational Safety and Health Act (OSH Act) and Michigan law

---

# DISTRACTED DRIVING ON COMPANY BUSINESS: YOUNG WORKERS

- When it comes to distracted driving, young people are among the most likely to text and talk behind the wheel
  - The fatal crash rate per mile driven for 16-19 year-olds is nearly three times the rate for drivers ages 20 and over
    - Risk is highest at ages 16-17
    - 10% of all drivers under the age of 20 involved in fatal crashes were reported as distracted at the time of the crash
- Driving Restrictions for Workers Younger than 18
  - The Fair Labor Standards Act (FLSA) prohibits workers under 18 years of age from working as a motor-vehicle driver or outside helper on any public road or highway except that 17 year-olds may drive automobiles and trucks on an incidental and occasional basis if certain criteria are met

---

# DISTRACTED DRIVING ON COMPANY BUSINESS: EMPLOYER BEST PRACTICES

Employers should:

- Work with their trusted insurance broker to design risk reduction efforts that put safety first and help identify any loopholes in policies and coverage
- Draft a clear, comprehensive and enforceable traffic safety policy that does not violate varying state laws, and communicate the policy to all employees
  - Require hands free calls and/or that the driver pull over before taking a company or employment related call

# "BAN THE BOX" LEGISLATION

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

## **“BAN THE BOX” LEGISLATION: BACKGROUND**

- “Ban the Box:” An initiative that calls upon employers to remove the criminal history check box from job applications
- Proponents of “Ban the Box” legislation are most concerned about the disproportionate effect of criminal background checks on individuals of certain races and national origins
- “Ban the Box” initiatives ensure people with convictions have a fair chance to work because employers consider a job candidate’s qualifications first, without the stigma of a conviction record

---

## **“BAN THE BOX” LEGISLATION: GAINS VARIOUS STATES’ APPROVAL**

- As of December 1, 2015, 19 states have adopted ban-the-box policies:
  - California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Vermont, and Virginia
- Seven states have completely removed the conviction history question on job applications for private employers:
  - Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island

\*\*Michigan: No “Ban the Box” legislation as of yet

---

## **“BAN THE BOX” LEGISLATION: IMPLICATION OF STATE APPROVAL**

- In the jurisdictions that have implemented Ban-the-Box laws, specific procedures are laid out
  - Typically, the question regarding an applicant’s past criminal history is prohibited on the application itself
  - If an applicant is considered or referred for employment, the question may be asked at a later stage in the process such as during the job interview
  - The laws vary about requirements from that point forward, but the common idea is that an individualized approach is required

---

# “BAN THE BOX” LEGISLATION: WHAT EMPLOYERS NEED TO KNOW

- Employers in most Ban-the-Box states must consider a job candidate’s qualifications first before conducting a targeted screening process and an individualized assessment of the candidate’s criminal history
- Even if an employer is not in a Ban-the-Box state (*e.g.*, Michigan employers), it is still subject to Title VII of the Civil Rights Act of 1964 and state discrimination laws (*e.g.*, Michigan Elliot-Larsen Civil Rights Act)
- What does this mean?
  - Even though individuals with a criminal record are not part of a protected class, an applicant can still claim illegal discrimination based upon a policy’s disparate impact (*i.e.*, neutral policy that disproportionately impacts based on a protected category)



---

# “BAN THE BOX” LEGISLATION: EMPLOYER BEST PRACTICES

Employers Should:

- Avoid stigmatizing application language such as “ex-offenders” or “ex-felons”
- Avoid blanket exclusions and instead include an equal opportunity statement on applications
  - It is beneficial to indicate that a record will not automatically disqualify a job candidate, unless there is a specific legal exclusion
- Ensure that any rejection is based on legitimate and relevant results
- If an applicant is rejected because of a criminal record, provide the applicant with written notice and, due to discrepancies in reporting, offer the applicant the chance to verify or challenge the information

# PREGNANCY IN THE WORKPLACE

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# PREGNANCY IN THE WORKPLACE: DISCRIMINATION

- Pregnancy discrimination involves treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth
- The Pregnancy Discrimination Act (PDA) of 1978 amended Title VII of the Civil Rights Act of 1964 to make employment discrimination on the basis of pregnancy, childbirth or related medical conditions constitute sex discrimination under Title VII
  - Practical Implication: (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment
- State Level protections are also in place regarding pregnancy discrimination
- See [www.dol.gov/wb/maps/2.htm](http://www.dol.gov/wb/maps/2.htm)

---

# PREGNANCY IN THE WORKPLACE: HARASSMENT

- It is unlawful to harass a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth
- Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer

---

# **PREGNANCY IN THE WORKPLACE: WHAT EMPLOYERS NEED TO KNOW**

Pregnancy, Maternity & Parental Leave

- Equal Treatment for all health reasons
- An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work
- Further, under the Family and Medical Leave Act (FMLA) of 1993, a new parent (including foster and adoptive parents) may be eligible for 12 weeks of leave (unpaid or paid if the employee has earned or accrued it) that may be used for care of the new child

---

## **PREGNANCY IN THE WORKPLACE: ADDITIONAL CONSIDERATIONS**

- Pregnant employees may have additional rights under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor
- Nursing mothers may also have the right to express milk in the workplace under a relatively new provision of the Fair Labor Standards Act enforced by the U.S. Department of Labor's Wage and Hour Division
- See <http://www.dol.gov/whd/regs/compliance/whdfs73.htm>

# EMPLOYEE VS. INDEPENDENT CONTRACTOR

CLARK HILL

---

# EMPLOYEE VS. INDEPENDENT CONTRACTOR: EMPLOYEE CLASSIFICATION

- The key element of an employer-employee relationship is the employer's right to control the details of how a service is performed
- Tax Implications of employer-employee relationship:
  - Employers must pay taxes to cover employees under workers' compensation insurance & unemployment insurance from the employer's own funds
  - Employers are also required to pay payroll taxes
  - Employers must withhold the federal income tax from employee's wages, as well as part of Social Security and Medicare taxes and the employer is then responsible for paying the taxes on the employee's wages from the employer's own funds



---

# EMPLOYEE VS. INDEPENDENT CONTRACTOR: INDEPENDENT CONTRACTOR CLASSIFICATION

- An independent contractor is an individual who is in an independent trade, business, or profession in which they can offer services to the general public
  - Independent contractors can include doctors, dentists, veterinarians, lawyers, accountants, artists, etc.
- Key distinction from an “employee:”
  - Independent contractors are not considered employees when hired to perform a service by an employer—rather they are self-employed and enter into contractual agreements with employers to perform a designated service in exchange for payment
  - Oftentimes independent contractors are called upon in a consulting capacity, to contribute their expertise on a certain project that the employer alone may not have

---

# EMPLOYEE VS. INDEPENDENT CONTRACTOR: THE DOL'S EMPHASIS ON WORKER MISCLASSIFICATION

\* DOL Strategic Plan 2011-2016

- Partnerships: DOL is working with the IRS and many states to combat employee misclassification and to ensure that workers get the wages, benefits, and protections to which they are entitled
  - Currently, 26 states (not yet including Michigan) have partnered with the DOL
- Performance Goal: To ensure that vulnerable workers are employed in compliance and to secure sustained and verifiable employer compliance, particularly among the most persistent violators
- Targeted Industries: Wage and Hour Division's directed investigations will be concentrated in high-risk fissured industries that employ vulnerable workers or in program areas in which workers are at a higher risk of exploitation (i.e. agricultural, janitorial, construction, and hotel/motel industries)

---

# EMPLOYEE VS. INDEPENDENT CONTRACTOR: WHAT EMPLOYERS NEED TO KNOW

- On July 15, 2015, at the request of interested employers, the Administrator of the Labor Department's Wage and Hour Division published a 15-page memorandum of guidance addressing the proper classification of workers. The memo can be found on the DOL's website: [www.dol.gov](http://www.dol.gov)
- The memorandum clarified that under the Fair Labor Standards Act, the definition of employee is much broader than what some employers believe and what some court rulings have determined
  - Practical Implication: Implementation of the DOL's guidance will make it much more difficult for employers to classify workers as independent contractors

---

# EMPLOYEE VS. INDEPENDENT CONTRACTOR: WHAT EMPLOYERS NEED TO KNOW

Michigan's Economic Reality Test—

1. Extent to which the worker's services are an integral part of the Employer's business
2. Permanency of the relationship
3. Amount of the worker's investment in facilities and equipment
4. Nature and degree of control by the principal
5. Worker's opportunities for profit and loss
6. Level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise

---

# EMPLOYEE VS. INDEPENDENT CONTRACTOR: EMPLOYER BEST PRACTICES

Employers should:

- Make clear which department within the organization is responsible to understand the law before hiring independent contractors
- Maintain basic records on the independent contractor determination process, and the facts used to make that determination
- Carefully review type & scope of work to be performed before engaging the services of any nonemployee
- Contract around potential employer liability by:
  - Obtaining appropriate indemnification provisions to protect the company from the wage and hour claims of the service provider's workers
  - Avoiding giving contractors rights or access that cut against the independent contractor

# WAGE AND HOUR LAW WHITE COLLAR REGULATIONS

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

## **WAGE AND HOUR LAW WHITE COLLAR CHANGES: *CURRENT SALARY LEVEL TEST***

- Current regulations require overtime for employees earning less than \$455/week (\$23,660/year)
  - Biweekly:           \$ 910.00
  - Semimonthly:     \$ 985.83
  - Monthly:           \$1,971.66
- Former regulations required overtime for employees earning less than \$155/week (\$8,060/year)

---

# WAGE AND HOUR LAW WHITE COLLAR CHANGES: *PROPOSED SALARY LEVEL TEST*

- Proposed regulations will automatically increase how the salary level is set from the current level (required overtime for employees earning less than \$455/week (\$23,660/year)) to an amount that is equal to the 40th percentile of weekly earnings for full-time salaried workers
- Proposed regulations will require overtime for employees earning less than \$910/week (\$50,440/year)
  - Biweekly: \$1,820.00
  - Semimonthly: \$2,101.67
  - Monthly: \$4,203.33



---

## **WAGE AND HOUR LAW CHANGES:** ***CURRENT* "HIGHLY PAID EMPLOYEES" SALARY**

- Separate test for those earning more than \$100,000/year who may still be entitled to overtime (was \$65,000/year)
- Employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

---

## **WAGE AND HOUR LAW CHANGES:** ***PROPOSED “HIGHLY PAID EMPLOYEES” SALARY***

- Proposed regulations will set the “Highly Paid Employee” annual salary at the 90th percentile of earnings for full time salaried workers, or an estimated \$122,148/year (currently \$100,000/year)
- Proposed regulations retain the requirement that employees must customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee

---

## WAGE AND HOUR LAW CHANGES: ADDITIONAL SALARY PROPOSALS IN CONSIDERATION

- DOL considering whether to allow a portion of a non-discretionary bonus to supplement the salary level test
- DOL also considering redefining the definition of “Primary Duty” for the purposes of classifying work as either exempt or non-exempt
- “Primary Duty” is currently defined as the job’s “principal, main, major, or most important function”
  - Current definition contains a qualitative component, but the DOL appears to want to a quantitative ratio of exempt to non-exempt work
    - o Example: 10% - 90% or 25% - 75%

---

# WAGE AND HOUR LAW CHANGES: WHAT EMPLOYERS NEED TO KNOW

- Regulations will increase the number of employees nationwide who will qualify for overtime
- The proposed rule containing changes published on July 6, 2015
- The 60-day notice and comment period ended on September 4, 2015
- The DOL expects final regulations to take effect in late 2016
  - The DOL will provide for an implementation period, but not expected to be long

---

# WAGE AND HOUR LAW CHANGES: EMPLOYER BEST PRACTICES

Employers should:

- Take a *proactive*, rather than retroactive, approach to implementing proposed exemption changes
- If you currently have salaried exempt employees who are making more than 23,660 per year, but are making less than \$50,440 per year, you should consider:
  - Consulting legal counsel for implementation strategies
  - Revisiting and revising job descriptions for effected employees to justify changing exempt/non-exempt status

# ACA HEALTH INSURANCE REPORTING DEADLINES

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

---

# ACA HEALTH INSURANCE REPORTING DEADLINES: UPDATE

- IRS recently announced a short extension for ACA reporting deadlines
- IRS Forms 1095-B and 1095-C (reports to full-time employees and others enrolled in coverage) now due March 31, 2016
- IRS Forms 1094-B and 1094-C (returns with the IRS) now due May 31, 2016, or June 30, 2016 if filing electronically

---

# QUESTIONS?



Maria Fracassa Dwyer

248.988.5899

[mdwyer@clarkhill.com](mailto:mdwyer@clarkhill.com)



Mikyia S. Aaron

313.965.8528

[maaron@clarkhill.com](mailto:maaron@clarkhill.com)



# THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL