HOT TOPICS

Delaware Valley Labor & Employment Conference

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MARIJUANA AND WORKPLACE DRUG TESTING

- There are four states, Alaska, Colorado, Oregon and Washington, and a few cities in Maine and Michigan as well as the District of Columbia where recreational and/or medical marijuana have been entirely legalized
- 12 states have medical marijuana and decriminalization laws, 10 states have legalized medical marijuana, and three states have decriminalized possession laws
- Medical marijuana is legalized in Delaware and New Jersey but not in Pennsylvania
- Some medical marijuana laws provide accommodation requirements as well as limitations on adverse actions for employees using medical marijuana (Delaware and New Jersey have employee protection laws)

MARIJUANA AND THE WORKPLACE

- 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

- 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 upon state law!

- State statutes are very new and 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 who are trying to grapple with how their employment policies and practices should be modified (if at all – federal law still prohibits marijuana use, distribution and possession)

MARIJUANA AND THE WORKPLACE – BEST PRACTICES

Employers Should:

- As more states trend towards legalization, keep a close watch on legal developments in this area in your state
- Review substance abuse testing policies
- Update employee handbook 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 (in NJ and DE) must ensure compliance with reasonable accommodation obligations

WAGE AND HOUR LAW: WHITE-COLLAR REGULATIONS

- 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

- The 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 to weekly earnings for full-time salaried workers

- Proposed Regulations will require overtime for employees earning less than $910.00/week ($50,440/year)

  Biweekly: $1,820.00

  Semimonthly: $2,101.67

  Monthly: $4,203.33

WAGE AND HOUR LAW: WHITE-COLLAR 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: WHITE-COLLAR 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: WHITE-COLLAR CHANGES

- DOL considering whether to allow a portion of non-discretionary bonus to supplement the salary level test
- DOL also considering redefining the definition of "Primary Duty" for purposes of classifying workers 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 a quantitative ration of exempt to non-exempt work (i.e. 10%-90% or 25%-75%)

WAGE AND HOUR LAW: WHITE-COLLAR CHANGES

What Employers Need to Know:

- Regulations will increase the number of employees nationwide who will qualify for overtime
- The proposed rule containing changes was 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

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 and unemployment insurance from the employer's own funds
  - Employers are also required to pay payroll taxes
  - Employers must withhold federal income tax from employee's wages, as well as part of Social Security and Medicare taxes. 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: 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

- 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

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 and scope of work to be performed before engaging the services of any non-employee
- Contract to avoid 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

MANDATORY PTO

- A number of states and municipalities have enacted or are in the process of enacting mandatory Paid Time Off legislation
- The City of Philadelphia's Mandatory PTO law became effective on May 13, 2015
- New Jersey Bill for Mandatory PTO, if passed as it presently is written, would obligate eligible employers to provide up to 80 hours of PTO per year to eligible employees
- The PTO laws not only mandate the amount of PTO eligible employers must provide but dictate how the PTO shall accrue
- Many PTO laws have privacy protections built in
- Best Practices: Evaluate PTO policies to ensure compliance with state and local laws

NLRB – UPDATE – SPEEDY ELECTIONS

Speedy Election Rule – Effective as of April 14, 2015

- Purpose is to cut the time it takes to hold a union representation election. Prior to the enactment of the new rule, the time between the filing of the petition and the election was 38 days. Under the new rules, a Regional Director could hold elections between 10 and 20 days of the filing of a petition for an election. This will seriously hamper the employer's ability to campaign against the union.
- Employers must be prepared for union organizational efforts
  - Train all supervisors and managers on the benefits of remaining union free, warning signs of union organizational activity, and how supervisors and managers are to respond to potential activity
  - Develop a corporate strategy on how to remain union free
  - Train all supervisors and managers on managing in a union free environment, including fair application of policies, communication and issue resolution

NLRB – UPDATE – SPEEDY ELECTIONS

More To Do's:

- Review of all policies and procedures to make sure they are compliant with the NLRB's new rulings on social media and courtesy policies
- Communicate the company's union free message to all employees
- Proactively review your union free strategy and consult with a labor relations expert if necessary
- One thing is for certain: waiting until the petition for election is filed will not provide your company sufficient time to prepare for an election

NLRB – UPDATE – GC MEMO EMPLOYEE HANDBOOKS

On March 18, 2015, NLRB General Counsel Richard Griffin, Jr. issued Memo GC 15-04, intending to bring some clarity to the NLRB's sweeping enforcement against employee handbook policies his office has deemed to be overly broad and infringing on workers' section 7 rights. GC Griffin identified eight categories of rules that have frequently come before the Board, and provides examples of lawful and unlawful wording:

- Confidentiality Policies
- Employee-Management Conduct Policies
- Employee-Employee Conduct Policies
- Employee Interaction with Third-Party Policies
- Policies on the use of Company Logos, Copyrights and Trademarks
- Policies that Limit Photography and Recording
- Policies that Restrict Employees from Leaving Work
- Conflict of Interest Policies

NLRB – UPDATE – GC MEMO EMPLOYEE HANDBOOKS

Take-A-Ways:

- This Guidance affects not only union but also non-union employers
- Employers should compare their handbook policies to those addressed by the GC
- If any policies appear to be unlawful or questionable, contact labor and employment counsel to address the deficiencies and to prepare workable policies that are likely to survive GC's scrutiny

NLRB UPDATE – JOINT EMPLOYER & PERSUADER RULE

- Joint Employer – Definition is in flux. NLRB focused on changing employment landscape as reason to change the definition (staffing companies/temp agencies). Questions to ask when determining joint employer status include (1) whether both entities are employers within the meaning of common law and (2) whether they share or co-determine those matters governing the essential terms and conditions of employment. Factors to examine include whether an employer has exercised control over terms and conditions of employment indirectly through an intermediary or whether it has reserved authority to do so. Joint employers are jointly and severally liable for employment issues including FLSA claims. McDonalds joint employer litigation underway now.

- Persuader Rule – Will be effective April 25, 2016. Will be applicable to arrangements, agreements and payments made on or after July 1, 2016. Will require public disclosures of any consultants that employers hire to thwart union organizing. The rule will require them to report when they "plan, direct or coordinate managers to persuade workers; provide persuader materials to employers to disseminate to workers; conduct union avoidance seminars; and develop or implement personnel policies or actions to persuade workers" on union organizing. The rule won't require employers/consultants to disclose the content of the advice offered.

“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 APPROVAL IN VARIOUS STATES AND MUNICIPALITIES

- 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 (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island) have completely removed the conviction history question on job applications for private employers
- Pennsylvania: No "Ban the Box" legislation as of yet BUT Philadelphia and Pittsburgh have their own ordinances. Over 100 US cities have their own "Ban the Box" legislation

“BAN THE BOX” LEGISLATION: IMPLICATIONS 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

PHILADELPHIA AMENDMENTS TO BAN THE BOX/FAIR CRIMINAL RECORDS SCREENING STANDARDS ORDINANCE

- Amendments took effect in March, 2016
- Important Changes:
  - Applies to Philadelphia employers with one or more employees (was 10 or more employees)
  - There is now a posting requirement (information available on PCHR's website)
  - Employers must remove all questions on job application about criminal history
  - Background checks may only be conducted after a conditional offer of employment has been made
  - Employers can only look at an applicant's criminal history for the past seven years (instead of an unlimited time period)

PHILADELPHIA AMENDMENTS TO BAN THE BOX/FAIR CRIMINAL RECORDS SCREENING STANDARDS ORDINANCE

- Important Changes continued:
  - Employers cannot reject an applicant based on his/her criminal record unless:
    - The record includes conviction for an offense that bears such a relationship to the employment sought that the employer may reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers
    - Exclusion of the applicant is compelled by business necessity
  - Employers must notify applicant in writing if the applicant is rejected based on criminal history and the applicant then has ten days in which to explain

“BAN THE BOX” LEGISLATION: 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

EEOC: GENDER IDENTITY

- On April 9, 2015 the EEOC reached a settlement with Lakeland Eye Clinic in Tampa, FL in one of the first ever transgender discrimination lawsuits filed by the EEOC

- The EEOC is still pursuing other gender identity discrimination claims as part of its newest efforts in implementing its 2012 Strategic Enforcement Plan (SEP), and intending to prioritize enforcement of Title VII gender discrimination provisions for LGBT individuals

- Title VII suits focus upon theories of sex discrimination, including that based upon gender stereotyping

- Presently there is no federal law that specifically classifies gender identity as a protected status. But if the Employee Non-Discrimination Act (ENDA) or a version of it is ever signed into law, it would protect gay, lesbian, bisexual and transgender people

- A number of states, including NJ and DE as well as some municipalities including Philadelphia, prohibit discrimination against transgender people

EEOC: GENDER IDENTITY – BEST PRACTICES

Employers should:

- Set a tone of tolerance, sensitivity and mutual respect when dealing with transgender issues
- Consult with counsel, staff and the transgender employee to create an atmosphere that is acceptable to all when facing transgender issues (e.g. bathroom designations)

SUPREME COURT 2015-16 DOCKET

- *Friedrichs v. California Teachers Association* (Argument was January 11, 2016) – This case involves a challenge to the practices of public unions. The Supreme Court will determine whether requiring public school teachers to pay mandatory dues for union activities violates the First Amendment

- *Zubik v. Burwell* (Argument to be scheduled) – This case is the latest challenge to the Affordable Care Act and focuses on the Act's birth control mandate

- *Tyson Foods, Inc. v. Bouaphakeo* - On March 22, 2016, the United States Supreme Court ruled 6-2 that employees can potentially rely on admissible statistical sampling data to meet class certification requirements if each class member could have relied on the sample to establish liability if he or she had brought an individual action

SUPREME COURT 2015-16 DOCKET

- *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan* - Addresses a dispute between a health plan and a worker injured by a drunken driver. The case could have big consequences for pension recipients and people on disability — or not, depending on which lawyers manage to persuade the U.S. Supreme Court justices

- *Green v. Donahoe* – Question presented: Under federal employment discrimination law, does the filing period for a constructive discharge claim begin to run when an employee resigns, as five circuits have held, or at the time of an employee's last allegedly discriminatory act giving rise to the resignation, as three other circuits have held?

QUESTIONS?

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THANK YOU

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