SHAWE ROSENTHAL LLP

E-UPDATE

November 30, 2022

RECENT DEVELOPMENTS

What Employers Need to Know About the New "Speak Out Act's" Prohibitions on Nondisclosure and Nondisparagement Provisions

Congress has passed and President Biden is expected to sign the "Speak Out Act" into law, thereby prohibiting nondisclosure and nondisparagement provisions in pre-dispute employment agreements. While symbolic, the practical effect of this law for employers is quite limited. For more, click here.

What the Act Says. The Act is intended to enable survivors of sexual abuse and assault to speak out about their experiences and prevent the shielding of perpetrators. Specifically, it sets forth the following definitions:

- "Nondisclosure clause" means a provision in a contract or agreement that requires the parties to the contract or agreement not to disclose or discuss conduct, the existence of a settlement involving conduct, or information covered by the terms and conditions of the contract or agreement.
- "Nondisparagement clause" means a provision in a contract or agreement that requires at least one party to the contract or agreement not to make a negative statement about another party that relates to the contract, agreement, claim, or case.
- "Sexual harassment dispute" means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law.

The Act then provides that, in the context of a sexual harassment dispute, nondisclosure or nondisparagement clauses with employees and independent contractors are unenforceable in a court of law. However, the Act is narrow in scope, applying only to those agreements that were entered into before a sexual harassment dispute arises (e.g. an employment agreement at the time of hire). It does not apply to post-dispute agreements, such as those in settlement of a claim of sexual harassment. And it does not apply to any kind of dispute other than sexual harassment.

Other Protections. Notably, a number of states have enacted provisions that apply to a broader range of agreements, including post-dispute settlement agreements. And the federal Tax Cuts and Jobs Act of 2018 contained a provision prohibiting the deduction, as an ordinary and necessary business expense, of any settlements of payments related to sexual harassment or sexual abuse, or associated attorneys' fees, if the settlement or payment is subject to a nondisclosure agreement, as we discussed in our December 2017 E-Update.

What Employers Should Do Now. Employers should understand that, once the Act is signed into law, currently-existing clauses will not be enforced going forward. And to the extent that employers continue to include nondisparagement or nondisclosure clauses in employment agreements, such as

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those pertaining to confidential business information and trade secrets, they should ensure that there is a carefully-crafted carve-out for sexual harassment disputes.

NLRB General Counsel Targets Employers' Use of Electronic Monitoring and Algorithmic Management Technologies

National Labor Relations Board ("NLRB") General Counsel ("GC") Jennifer Abruzzo announced that she will crack down on employers' increasing use of automated technologies and electronic management systems. In General Counsel Memorandum 23-02, the GC stated her belief that employers' use of these technologies can violate the National Labor Relations Act. Accordingly, the GC urges the five-member Board to utilize existing doctrine to address such violations, *and* adopt a new framework to protect employees "from intrusive or abusive forms of electronic monitoring and automated management that interfere with" employees' rights under the NLRA. This memo portends significant implications for both unionized and non-union employers who rely upon such technologies to increase efficiencies and support operations.

Use of Artificial Intelligence in Employment Decision-Making. Many employers rely on artificial intelligence ("AI") to screen applicants. The GC indicated that an employer's reliance on applicant-screening technologies could violate Section 8(a)(3) of the NLRA if the underlying algorithm makes decisions based on employees' protected activities. For example, if the algorithm devalues applicants who use the word "union" on a resume or job application, bypassing these applicants on the basis of previous union membership would likely violate the NLRA. Not only would an employer be liable for this unfair labor practice, the GC added that the third-party provider of the algorithmic tool may also be liable on the theory that the third party is acting as the employer's agent in making the alleged unlawful decision.

Additionally, employers are increasingly using interviewing technologies to evaluate applicants or existing employees who may be seeking a new position within the company. Similarly, the GC notes that employers may violate Section 8(a)(1) if they coercively question employees or applicants regarding their propensity to seek union representation.

Application of Existing Board Law to Employer Use of New Technologies. The GC first intends to rely upon existing Board law in analyzing whether employer use of electronic management tools violate the NLRA. She notes that an employer's implementation of new monitoring technologies would violate Section 8(a)(1) of the Act if instituted in response to employee activity protected by the NLRA. Similarly, an employer's use of existing technologies for the purpose of discovering employee protected activity would also violate the Act. Finally, an employer may violate the NLRA if they dismantle the technology to preclude employees from engaging in protected activity, or otherwise isolate union supporters or discontented employees.

GC "Urges" Board to Adopt New Framework. The GC plans to soon take the issue to the Board and advocate that it establish a framework for addressing employers' use of these technologies.

First, the GC will ask the Board to *presume* that certain "management practice[s]" – whether it be pursuant to a written policy or unwritten practice – violate the NLRA. Specifically, where an employer's surveillance or management practices, viewed as a whole, "would tend to interfere with or prevent a reasonable employee from engaging in activity protected by the [NLRA]," these actions will violate Section 8(a)(1) of the Act. The GC provides examples of surveillance and management

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practices that the Board should presume are unlawful, including security cameras, dash-cam systems, and other tracking devices. This category also includes many technologies utilized by employers with remote workforces, including keylogging technology and software that takes screenshots, webcam photos, or audio recordings during the workday.

The burden would then fall on the employer to establish that its practice is "narrowly tailored to address a legitimate business need." More specifically, the GC will ask the Board to require that the employer's "need cannot be met through means less damaging to employee rights." In other words, even if the employer establishes that the surveillance or management practices is supported by a business need, an employer will not meet the GC's proposed burden if the Board deems there is *any* alternative means to accomplish the same goal that is less restrictive.

But even if an employer can establish there is no less restrictive means to meet its legitimate business need, the inquiry does not end there. The GC will ask the Board to then balance the employer's interests against those of the employee to determine if the surveillance or management practice is lawful. Thus, the Board could still find that the employer's practice violates the NLRA even if supported by a legitimate business need with no less restrictive alternative because, on balance, the Board finds that the employee's interests trump the employer's interests.

An employer can reasonably wonder whether it could win such a "balancing test." But even if it did, the GC will ask the Board to require the employer to disclose to employees (1) the technologies it uses to monitor and manage them, (2) its reasons for doing so, and (3) how it is using the information it obtains. An employer will be excused from such disclosures only if it can demonstrate "special circumstances," which is not defined by the GC in her memo.

Employer Takeaways. This memo does not constitute a change in the law. Rather, it sets forth the GC's view of the law, its application to employer use of emerging technologies in employment decision-making, and announces the standard(s) the GC will urge the Board to adopt in a future case. But change is likely coming. Employers should prepare to offer business justification for its electronic management tools, even for rules and practices that are otherwise neutral regarding employee conduct protected by the NLRA. Employers should also review existing surveillance and electronic monitoring practices to ensure they are narrowly tailored to a legitimate business need. Finally, employers considering instituting new electronic management tools should consult with legal counsel to reduce its legal exposure if – or, more likely, when – the Board adopts all or substantial elements of the GC's proposed standard.

As always, we will continue to update you when developments arise on this important issue.

Remote Work May Be a Reasonable Accommodation Where the Employee Has Been, Well, Working Remotely

In the context of the COVID-19 pandemic, many employees suddenly began working remotely – and as we move into a new normal, many employees would like to continue telecommuting. However, from a legal standpoint, employers need not agree to continued remote work unless it is required as a reasonable accommodation under the American with Disabilities Act or analogous state laws. But when can an employer argue that continued remote work is unreasonable? A recent case from the U.S. Court of Appeals for the Eighth Circuit provides some insight.

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Facts of the Case. In *Mobley v. St. Luke's Health System, Inc.*, the employee managed a team of approximately 20 customer service employees, most of whom telecommuted full time. Managers, like the employee, were permitted to telecommute two days a week, with additional days permitted on a case-by-case basis. The employee had progressive multiple sclerosis, and requested several times for advance permission to telecommute on those days when his MS flared up. His requests were denied, ostensibly because he needed to supervise (poor-performing) direct reports in the office and because his flare-ups were unpredictable. He was told he could ask his supervisor on a case-by-case basis when he had a flare-up, and could use paid time off and FMLA if his request was denied. He sued for, among other things, failure to accommodate under the ADA and state law.

The Court's Ruling. The Eighth Circuit found that the employee could possibly show that "he was able to perform the essential functions of his job through his proposed accommodation of teleworking while he experienced a flare-up of his condition." Moreover, "by allowing [the employee] to consistently work remotely aside from his medical condition, [the employer] implicitly demonstrated a belief that he could perform his essential job functions without being in the office all the time." The Eighth Circuit further observed that the employee consistently received positive performance reviews, which reflected his ability to remotely supervise his employees, contrary to the employer's argument regarding the need for in-person supervision. As the Eighth Circuit noted, "nothing in the record indicates that had [the employee] been permitted to telework for an additional unquantified number of days during flare-ups, his job performance would have been inadequate."

Lessons for Employers. The virtual workplace has undergone a radical transformation over the past two years. People have had to become familiar with new technologies that have greatly facilitated remote work capabilities in ways that were unimaginable prior to the pandemic. While clearly a great number of jobs still require an onsite presence, many white-collar positions – even management positions – may now be effectively performed remotely. But many employees who were forced to work from home during the pandemic were not, in fact, performing all of the essential functions of the job – and this is a critical point to explore when faced with an accommodations request for telecommuting. If an employer wishes to assert that in-person presence is a mandatory requirement of the job, it is important that the employer first review the position in light of the available new and evolving technologies – and if the employee has already been performing the position either partly or fully remotely, the employer must objectively assess whether the employee has, in fact, been performing all of the essential functions of the job and whether that performance has been adequate.

TAKE NOTE

Federal Agencies Partner on New Anti-Discrimination Resources for Veterans. In connection with Veterans' Day, the Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and Veteran's Employment and Training Service (VETS), and the Department of Justice Civil Rights Division have issued an omnibus resource, "Protections Against Employment Discrimination for Service Members and Veterans," to help veterans and service members determine which laws and federal agencies are responsible for enforcing their workplace rights and where to seek assistance if they believe those rights have been violated.

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The resource identifies the following antidiscrimination laws as potentially applicable to veterans and service members, and further explains when they apply, what protections they offer, and which agency is responsible for enforcement:

- The Uniformed Services Employment and Reemployment Rights Act, which prohibits discrimination based on military service and provides extensive reemployment rights.
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974, which prohibits federal contractors and subcontractors from employment discrimination against veterans and requires affirmative action to recruit, hire, promote and retain them.
- The Americans with Disabilities Act prohibits discrimination against qualified individuals based on disability and requires reasonable accommodation.
- Section 503 of the Rehabilitation Act prohibits federal contractors and subcontractors from discrimination against qualified individuals based on disability and requires reasonable accommodation.
- Title VII prohibits discrimination based on race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity), and religion.
- The Equal Pay Act requires equal pay for men and women for equal work.
- The Age Discrimination in Employment Act prohibits discrimination against those age 40 or older.
- The Genetic Information Nondiscrimination Act prohibits discrimination based on genetic information (including family medical history).
- The Immigration and Nationality Act's Anti-discrimination Provision prohibits discrimination based on citizenship., immigration status, and national origin.
- Executive Order 11246 prohibits federal contractors and subcontractors from discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and requires affirmative action to promote equal opportunity. It also provides pay transparency protections.

The resource notes that employees, including veterans and service members, are also protected from retaliation for asserting rights under these laws – such as by filing a complaint or participating in an investigation.

The resource further provides links to each agency's website with additional resources for service members and veterans.

FMLA Notice Requirements for Employees. Employers may require employees to comply with both the Family and Medical Leave Act's regulatory notice requirements and the company's policy notice requirements, and a recent case from the U.S. Court of Appeals for the Sixth Circuit provides guidance on both.

In *Render v. FCA US, LLC*, the employee sued for violations of the Family and Medical Leave Act following his termination for attendance violations. Although the employee was approved for intermittent FMLA leave, the employer argued that he had failed to provide adequate notice of his use of such leave in connection with certain tardy arrivals and absences, as required by the FMLA regulations. It also argued that he failed to comply with the company's own call-in procedure, as the FMLA regulations permit employers to require.

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The Sixth Circuit rejected the employer's arguments. With regard to the regulatory notice requirement, the FMLA mandates employees to notify their employer of their intent to take FMLA leave. In addition to the initial notice of a qualifying need for leave, the regulations also provide as follows: "When an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically reference the qualifying reason for leave or the need for FMLA leave." In this case, although the employee may not have specifically referenced the FMLA each time he called out, he did say that he had a "flare-up," which was the same term used in his FMLA medical certification. As the Sixth Circuit stated, "naming a symptom of the qualifying condition would be sufficient" to meet the regulatory notice requirement.

The regulations further provide that, "an employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances." If an employee fails to follow these requirements, FMLA leave may be denied. In this case, however, the employer provided inconsistent and confusing information about whether the employee needed to call both the leave administrator and the employer itself each time he took FMLA. Thus, the Sixth Circuit found he could not comply because of the confusion, but had made an effort to do so.

There are several lessons for employers here. One is that an employee calling out for pre-approved intermittent FMLA need not actually state "FMLA," as long as they provide sufficient information about their qualifying condition – such as referencing a symptom of the condition. The other lesson is that employers should ensure that any internal call-in policies are clear and consistent.

An Employee's Mental Health Condition Does Not Necessarily Prevent Their Release of Claims. The U.S. Court of Appeals for the Second Circuit rejected an employee's argument that she lacked the mental capacity to sign the separation agreement that contained a release of claims against her employer.

In *Pucilowski v. Spotify USA, Inc.*, the employer sought to have the plaintiff's federal lawsuit dismissed because the separation agreement that she had previously signed contained a release of claims. The employee argued that the release was not enforceable because she had signed it shortly after returning to work from a medical leave for an on-the-job head injury, and therefore she lacked the mental capacity to enter into a knowing and voluntary release.

The Second Circuit applied a "totality of the circumstances" standard to determine whether the release was voluntary. In a past case, the Second Circuit identified a non-exhaustive list of factors that could be helpful to the determination, including: 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law, and 7) whether an employer encourages or discourages an employee to consult an attorney and whether the employee had a fair opportunity to do so.

Here, the Second Circuit found that, given her role and performance (as alleged in the complaint), the plaintiff had the education and business experience to understand the release. She was given

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sufficient time to consider the agreement, to revoke it if she wished, and acknowledged that she had the opportunity to consult counsel. The language of the release was clear. The plaintiff received monies that she otherwise would not have received in exchange for her release. And finally, the plaintiff offered no evidence that she, in fact, lacked the mental capacity to enter into the release – in fact, her own doctor's assessment noted her good prognosis and anticipated return to her "usual potential" several weeks prior to her execution of the release.

When dealing with mental health issues, employers may sometimes be concerned about whether an employee truly has the mental capacity to enter into an enforceable release of claims. This case is useful in highlighting that there should be medical evidence to support such incapacity – an employee's conclusory assertions should not be enough to render the release unenforceable.

A Discrimination Complaint Does Not Protect the Employee from All Adverse Employment Actions. While employees are protected from retaliation for making a discrimination complaint, they are not automatically insulated from all adverse employment actions, and can be held accountable for separate misconduct, as the U.S. Court of Appeals for the Eighth Circuit recently held.

In *Thompson v. University of Arkansas Board of Trustees*, a campus police officer complained to his supervisor of race discrimination by the police chief. He was terminated shortly thereafter, and sued, alleging retaliation in violation of federal anti-discrimination law. However, the employer explained that the termination was because the officer, who was the first responder to a call reporting an intoxicated man who was passed out and foaming at the mouth, failed to provide first aid, check vital signs, reposition, or continually observe the man prior to the ambulance's arrival. As the Eighth Circuit stated, "Here, [the officer] failed to adhere to his responsibilities as a first responder, putting the intoxicated man at risk of death or severe injury. He need not have violated an enumerated ground or specific law-enforcement standard to be fired under the [disciplinary] policy."

This case emphasizes several helpful points for employers. Employees can and should be held accountable for their misconduct, even where they have engaged in protected activity under federal or state anti-discrimination law – but the employer must ensure that they are treating the employee consistently with how it has treated others engaged in similar misconduct. In addition, employers are not limited to disciplining only for misconduct that is listed in a disciplinary policy, although we suggest it is helpful if the policy, like the one at issue here, contains language granting the employer discretion to impose discipline for serious issues beyond those listed in the policy.

Do Not Retaliate for EEO Complaints Against a Former Employer. It might seem reasonable that an employer might not want to hire someone that they know has sued a prior employer. However, what seems reasonable, unfortunately, can be illegal under applicable antidiscrimination laws, as a recent Equal Employment Opportunity Commission press release makes clear.

The EEOC noted that the employer had withdrawn an offer of employment when it discovered that she had previously filed a pregnancy discrimination complaint and EEOC charge against a former employer. As the EEOC stated, this action violates Title VII, which not only protects individuals from discrimination in employment on the basis of race, sex, national origin, religion and color, but also from retaliation for exercising rights under the law – such as by making a discrimination complaint or filing a charge of discrimination, including against a prior employer.

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The employer's actions in this case resulted in a $60,000 settlement, as well as training and posting requirements, in addition to this negative press release. As such, it provides a striking warning to employers that they should not consider an applicant's (or employee's) prior EEO activity in making employment decisions.

When Transfer Is Not Required Under the ADA. Transfers to another job position may be a reasonable accommodation under the Americans with Disabilities Act, but a transfer is not required under all circumstances, as the U.S. Court of Appeals for the Eleventh Circuit recently explained.

As employers likely know, the ADA protects individuals with disabilities who are qualified to perform the essential functions of their job position, with or without a reasonable accommodation. In *Johnson v. Walt Disney Parks and Resorts U.S., Inc.*, the employee was terminated after being on medical leave for 12 months without providing a return-to-work date. She sued, alleging that she was qualified to perform the essential functions of a job to which she sought to be reassigned.

The Eleventh Circuit, however, rejected her claim for several reasons. First, the job in question was a seasonal position, and the relevant collective bargaining agreement prohibited the employer from placing the employee in a seasonal position. Second, the job required full-time availability during the season, whereas the employee was only available part-time. Third, the job required training that, under company policy, she could not complete while on medical leave. Thus, she was not qualified for the job.

This case reminds employers that the ADA does not require them to violate the terms of a collective bargaining agreement. And if a job truly requires full-time availability, part-time availability will not be sufficient to qualify. Finally, although in this case, the Eleventh Circuit credited the argument that the company's policy prohibited the required training for the job, we note that, depending on the circumstances, waiving a company policy may be required if it enables the employee to perform the job's essential functions.

When Is the Accommodation Duty Triggered? The U.S. Court of Appeals for the Eleventh Circuit addressed this question under the Rehabilitation Act (which applies to federal agencies, contractors and subcontractors, but applies the same standards of analysis as the Americans with Disabilities Act), stating, "The type and extent of information that an employee must provide will depend, of course, on the particulars of the case." But there are general rules that will apply.

In *Owens v. State of Georgia, Governor's Office of Student Achievement*, following a C-section, the employee told her supervisor that she was experiencing childbirth-related complications and provided a doctor's note that she "may" (but not "must") tele-work for several months. She was provided with reasonable accommodation paperwork for her and her physician to complete. She was fired when she failed to provide the paperwork or return to the office. She then sued, alleging, among other things, violation of the Rehab Act's accommodation obligations.

The Eleventh Circuit addressed when an employer's duty to provide a reasonable accommodation is triggered, requiring an employee to (1) make a specific demand for accommodation and (2) demonstrate that the accommodation is reasonable. The second part of the test requires the employee to put the employer on notice of the disability requiring accommodation and provide enough information to allow the employer to understand how the accommodation would address the

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limitations imposed by the disability. Although an employee may not rely on "vague or conclusory statements revealing an unspecified incapacity," the informational burden is "modest," requiring only the identification of a statutory disability and a general explanation of how a particular accommodation would assist the employee.

In the present case, the employee failed to provide this information. Her identification of her C-section and blood transfusions is not a disability, but rather medical procedures and treatments, with no obvious limitations. The doctor's recommendation for telework, although qualifying as a request for accommodation, failed to explain how the accommodation would alleviate any physical or mental limitations. This was not enough to trigger the accommodation obligation.

This case reminds employers that, where the disability is not obvious, it is both advisable and necessary to require employees – and their doctors – to provide sufficient information to establish the existence of a disability and its limitations, and to explain how any proposed accommodation would address those. Moreover, as the Eleventh Circuit also noted, employers should further remember that they need not necessarily provide the requested or preferred accommodation – the law requires an employer to provide an effective one (and it need not even be the most effective one, as long as it enables the employee to perform their essential job functions).

NEWS AND EVENTS

Publication – On behalf of Lexology (a global resource of legal updates, analysis and insights), our firm authored the Maryland chapter of the "Employment: North America" Guide 2022 (Lexology PRO subscription required). A pdf of our chapter is available here.

Victory – Mark Swerdlin and Courtney Amelung won a motion to dismiss several claims against a healthcare employer in a federal lawsuit brought by a former employee. Mark and Courtney successfully argued that the employee had failed to meet the administrative prerequisite for his disability claims, since his EEOC charge alleged only age discrimination.

Victory – Teresa Teare and Veronica Yu Welsh won a motion to dismiss on behalf of a healthcare employer. The federal judge found unlawful an Equal Employment Opportunity Commission regulation that permitted the EEOC to issue a Notice of Right to Sue to the plaintiff before 180 days had passed after the plaintiff's filing of the required charge of discrimination. Consequently, the plaintiff's suit was premature.

Article – Fiona Ong and Parker Thoeni authored a Chambers Expert Focus article, "Marijuana in the US Workplace." Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients. It also publishes a number of guides and articles providing clients with expert legal commentary on the main practice areas in key jurisdictions around the world.

Presentation – Lindsey White was a panelist for "Strategic Considerations for Remote Proceedings in Labor and Employment Cases," presented at the American Bar Association 16th Annual Section of Labor and Employment Law Conference, held in Washington D.C. on November __, 2022.

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Presentation – Mark Swerdlin and Lindsey White presented "Employment Law Issues Arising from the Pandemic & Related to Managing a Remote Workforce" at the Maryland State Bar Association's Corporate Counsel Institute on November 16, 2022.

TOP TIP: Recreational Marijuana in Maryland? What Employers Need to Know

Voters in Maryland approved recreational marijuana (which Maryland refers to as "cannabis"). While many employees may be happy about this development, employers are perhaps not quite so excited – and may be confused about what that actually means for the workplace. While there are still many questions related to the actual implementation of this initiative, we provide some preliminary answers below.

Is Recreational Cannabis In Effect Now? First of all, recreational use is still not legal at this time. The voter-approved constitutional amendment permits recreational use by those age 21 or older starting July 1, 2023. Another cannabis law passed by the General Assembly this past session, taking effect only upon the passage of the constitutional amendment, allows individuals to grow up to two plants per household, and to share cannabis with other adults without payment or trade, also starting July 1, 2023. But those who are not cultivating their own source will need to wait until the State sets up its highly regulated recreational cultivation and distribution system – and until then, buying cannabis for recreational purposes in Maryland will still be illegal.

Will Employees Be Able to Use Recreational Cannabis (Once It's Permitted)? The new constitutional amendment, the new cannabis law and the current law do not directly address employee use of recreational cannabis. The new cannabis law referenced above establishes some rules that have a workplace connection:

- Cannabis or hemp products must be added to the existing ban on smoking in any indoor place of employment under the Clean Air Act. Employees who make complaints to or participate in Clean Air Act proceedings before the State are protected from adverse employment action.
- Smoking cannabis is prohibited in any vehicle on any public road, and drivers may not consume cannabis in any form. To the extent that employees drive as part of their job responsibilities, this would apply to them (in addition to the fact that they should not be smoking/imbibing while on the job).

We anticipate that there will be a bill proposed in the next General Assembly session (which starts in January 2023) to provide workplace protections for the off-duty use of recreational cannabis. We also anticipate that the bill will state that employees will not be able to use or be under the influence of cannabis while on duty. In addition, we would hope and (through our work with the Maryland Chamber of Commerce) will advocate for exceptions to protected off-duty use of recreational marijuana by certain employees, similar to the laws in other states. These exceptions typically include where such off-duty use is prohibited by law, regulation, or federal contract, or where the employee performs a safety-sensitive position.

Can Employers Discipline for Off-Duty Recreational Use? Currently, the personal use of recreational cannabis is a civil offense (similar to a traffic ticket) – so it is still illegal, and employers may take disciplinary action based on an employee's recreational use, even off-duty, for now. And

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even after July 1, 2023, there is no statutory protection for off-duty recreational use – yet. Unlike other states, Maryland does not have any law protecting employees from adverse employment actions based on legal off-duty conduct, so Maryland employers can discipline, up to and including termination, for any off-duty conduct. But stay tuned for the next General Assembly session!

Is There Any Impact on Workplace Testing? No. Employers are permitted to test for the use of alcohol and controlled substances, as long as the testing is done in compliance with Maryland law. This includes testing for cannabis.

Can Employers Consider Marijuana-Related Convictions for Purposes of Hiring or Continued Employment? With regard to all convictions, we suggest that employers only consider those that are related to the job in question. The EEOC has stated that the use of convictions to disqualify applicants generally may have a disparate impact on certain minority populations. In order to limit that disparate impact, the EEOC's position is that an employer may use criminal history information to make employment decisions only when it is job related for the position in question and consistent with business necessity. To meet this standard, any criminal conduct must be recent enough and sufficiently job-related to be predictive of performance in the position in question. The EEOC's guidance identifies three factors to consider in making this assessment:

- The nature and gravity of the offense or offenses;
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.

We also note that the new cannabis law also allows for individuals to request that certain drug-related offenses be expunged (i.e. cleared) from their criminal background. If expunged, employers will not be able to ask about or use those convictions for employment purposes.

What About Medical Cannabis? At this time, while the use of medical cannabis is legal in Maryland, there is no law that protects medical cannabis users in the workplace. For the past several years, there have been bills that sought to provide workplace protections for the authorized off-duty use of medical marijuana – but these have all failed. At this time, the Maryland Medical Cannabis Commission offers this FAQ on its website:

> Q: My employer tests for drug use including cannabis. Can they test me if I am a medical cannabis patient? Can they fire me if I use medical cannabis?
>
> A: Maryland law does not prevent an employer from testing for use of cannabis (for any reason) or taking action against an employee who tests positive for use of cannabis (for any reason).

But whether off-duty use must be permitted as a reasonable accommodation under the Americans with Disabilities Act and state anti-discrimination law has not yet been litigated in Maryland. Some courts in other states have found such an obligation under the medical marijuana/cannabis laws in those states. Thus, any employer with an employee seeking to use medical cannabis off-duty as a reasonable accommodation for a disability should consult with employment counsel.

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Bottom Line. We expect further developments as the smoke clears on this new world of recreational cannabis and we will keep you updated. But for now, employers can still choose to prohibit (or permit – absent any applicable legal, contractual or safety requirements) the off-duty use of recreational cannabis by employees.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- Harvard Fumbled the Bag* – A Lesson for Employers! by Maya Foster, November 28, 2022
- An Employer's Guide to the World Cup by Fiona Ong, November 21, 2022
- NLRB Issues Proposed Rule Nixing Trump-Era Rule, Reinstating Protections for Union's Representation Status by Chad Horton, November 9, 2022

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