WORKING WISE - VOLUME 8

Date: 13 April 2020

Labor, Employment and Workplace Safety Alert

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CORONAVIRUS

The coronavirus pandemic ("COVID-19") is top of mind for all employers, regardless of location, size, and industry. The federal government, as well as multiple state governments, have issued sweeping guidelines and, in some cases, directives to "flatten the curve" relative to the spread of the virus, restricting international travel, closing schools and businesses, and mandating that employees work from home. The effects of these restrictions have already been far-reaching and it remains to be seen how long they continue and whether they will be expanded. K&L Gates has assembled a multi-disciplinary task force to provide guidance and updated information to clients, as well as a comprehensive resource bank of COVID-19 materials. These materials can be accessed here.

THE "HITS" JUST KEEP ON COMING: PENNSYLVANIA COURT FINDS PRIVATE RIGHT OF ACTION UNDER STATE'S MEDICAL MARIJUANA LAW

Can employees terminated because of their status as certified medical marijuana users sue their employers under the state's Medical Marijuana Act ("MMA")? According to one Pennsylvania state court, the answer is "yes."

The MMA, enacted in 2016, permits qualifying patients to obtain and use medical marijuana and also protects certified medical marijuana users from adverse employment actions, including discharge, threats, refusal to hire, or other forms of discrimination. The MMA is silent, however, regarding whether certified users can bring discrimination claims against their employers or prospective employers in connection with those actions.

In *Palmiter v. Commonwealth Health Systems, Inc.*, 19-CV-1315 (Lackawanna County Nov. 22, 2019), the Court of Common Pleas of Lackawanna County held that the MMA does, in fact, authorize such claims. The plaintiff in *Palmiter* filed suit against her employer after she was terminated for testing positive for marijuana in an employer-administered drug test. While her employer filed objections to her complaint on grounds that the MMA did not provide a private right of action, the court rejected that position. According to the court, "[w]ithout the availability of an implied private right of action for an employee who is fired solely for being certified as a medical marijuana user, the anti-discrimination directive in [the MMA] would be rendered impotent."

Why It's Important: The Pennsylvania court's decision follows those from other courts around the country, extending protections to employees terminated or discriminated against on account of their status as certified medical marijuana users. While the decision — issued by a trial court — is not binding on other courts in Pennsylvania, other Pennsylvania courts may nevertheless follow suit.

Notwithstanding the court's decision, the MMA does include a number of significant protections for employers, including allowing employers to take action against certified users if the employee's conduct falls below the

standard of care normally accepted for that position, where employment is subject to federal regulation, or where the task is life-threatening or could result in a public health or safety risk.

NO NOTICE [OF FLSA COLLECTIVE ACTIONS] REQUIRED: SEVENTH CIRCUIT HOLDS THAT COURT MAY NOT AUTHORIZE NOTICE TO INDIVIDUALS WITH ARBITRATION AGREEMENTS WAIVING THEIR RIGHT TO JOIN ACTION

The Seventh Circuit Court of Appeals recently decided that notice of a collective action under the Fair Labor Standards Act ("FLSA") need not be sent to individuals who have entered into mutual arbitration agreements waiving their right to join such actions.

The plaintiff in *Bigger v. Facebook, Inc.*, No. 19-1944 (7th Cir. 2013) filed suit against Facebook alleging that she and certain other employees were misclassified as exempt employees. Following discovery, the plaintiff moved to conditionally certify a putative collective and requested that the court notify members of that collective action. Facebook countered, arguing that 78% of the putative collective had entered into binding arbitration agreements waiving their right to join such actions.

The Seventh Circuit Court of Appeals agreed with Facebook. According to the court, "a court may not authorize notice to individuals whom the court has been shown entered mutual arbitration agreements waiving their right to join the action." The court made clear, however, that it was the burden of the employer/defendant to show that such agreements did exist and did, in fact, waive the employee's right to join a collective action.

Why It's Important: The Seventh Circuit joins the Fifth Circuit's decision on this issue in *In re JPMorgan Chase & Co.*, No. 18-20825 (5th Cir. 2019), in which the Fifth Circuit held that district courts do not have discretion to send or require notice of a pending FLSA collective action to employees who are unable to join the action because of binding arbitration agreements. While the court's decision is a victory for employers, it does leave open several important issues, namely the type and form of evidence that a defendant must submit to establish the existence of a valid arbitration agreement.

Because collective actions can result in significant liability to employers, it's a good time to review arbitration agreements to ensure that they are enforceable and sufficiently broad in scope to cover FLSA collective actions.

Employers should also note that employees who have binding arbitration agreements waiving their right to join FLSA collective actions can still bring their own claims against their employer, albeit in the context of an arbitration proceeding.

NEW "BAN THE BOX" LAWS TAKE EFFECT

Maryland, St. Louis, Missouri, and Grand Rapids, Michigan have joined the growing number of states and municipalities to enact "ban the box" laws, which generally prohibit employers from asking about or using an individual's criminal history in hiring and employment decisions. Highlights of the new laws are as follows:

Maryland

- Employers with 15 or more full-time employees are prohibited from asking applicants about their criminal history on job applications or during a phone screening (but may do so during an in-person interview);

- Covered employers may ask about criminal history at any time if the employer provides services or care to minors or vulnerable adults, or if another federal or state law permits inquiry into the applicant's criminal history;
- The law became effective on February 29, 2020.

St. Louis, Missouri:

- Employers with 10 or more employees are prohibited from asking about criminal history on applications and hiring forms, posting job advertisements that exclude applicants with a criminal history and using exclusionary language in applications and other hiring documents;
- Employers are prohibited from asking about or investigating an applicant's criminal background until after the applicant has been interviewed and deemed qualified for the position;
- Employers are permitted to make hiring or promotion decisions based on lawfully-obtained criminal history information when they can show that the “decision is based on all information available including the frequency, recentness and severity of the criminal history and the history is reasonably related to or bears upon the duties and responsibilities of the job position.”
- The ordinance takes effect on January 1, 2021.

Grand Rapids, Michigan:

- Employers may not consider arrests that have not led to a conviction;
- Employers may not refuse to hire an individual on the basis of his/her criminal record without first considering the nature and severity of the crime, the age of the individual at the time of the crime, whether the individual has engaged in repeat offenses, whether the applicant maintained a good employment history before or after the conviction, and evidence of rehabilitation efforts;
- Employers may be subject to fines for violation as well as civil actions for injunctive relief and damages; and
- The law took effect on December 1, 2019.

Why It's Important: Ban the box laws continue to be an emerging trend in employment law, with more and more states and municipalities enacting such measures. Employers should ensure that they review, understand and ensure compliance with this myriad of laws — by reviewing and, as necessary, updating job postings, policies, handbooks, and interview and hiring practices.

ILLINOIS DEPARTMENT OF HUMAN RIGHTS ISSUES GUIDANCE ON STATE'S SEXUAL HARASSMENT PREVENTION AND TRAINING REQUIREMENTS

In mid-2019, the Illinois Legislature enacted the Workplace Transparency Act (“WTA”), which amended the Illinois Human Rights Act (“IHRA”). In relevant part, the amendments require all Illinois employers to provide sexual harassment prevention training to employees on an annual basis and mandate that restaurants and bars implement supplemental training programs.

Answering the call for clarity as to the type and content of training required, the Illinois Department of Human Rights ("IDHR") recently issued guidance on that issue in the form of electronic handouts detailing the minimum standards for training, in addition to frequently asked questions (available here). The IDHR also clarified the following:

- All employees, including short-term, part-time, and interns, must be trained;
- While independent contractors are not required to be trained, employers are strongly advised to train those who work on-site or interact with the employer's staff;
- Employees who work or regularly interact with the employer's employees in Illinois should be trained, even if based in another state; and
- Employers must retain records of training and provide them to the IDHR upon request.

Why It's Important: The IDHR's guidance provides Illinois employers with a roadmap to navigate the state's new training requirements. Employers should familiarize themselves with the requirements and utilize the IDHR's training materials to help ensure compliance.

PHILADELPHIA'S SALARY HISTORY ORDINANCE UPHELD

On February 6, 2020, the Third Circuit Court of Appeals gave Philadelphia's salary history ordinance the green light for implementation, reversing a district court decision that deemed one of the ordinance's provisions unconstitutional[1].

Philadelphia enacted the ordinance in 2017 with the aim of reducing the City's wage gap by prohibiting employers from: (i) inquiring into a prospective employee's wage history (the "Inquiry Provision"); and (ii) relying on a prospective employee's wage history in determining what salary or wages to offer him/her (the "Reliance Provision"). Shortly after the ordinance was passed, the Greater Philadelphia Chamber of Commerce challenged the law as violating an employer's First Amendment right to free speech.

A federal district court determined that the Inquiry Provision was unconstitutional, but that the Reliance Provision was not. On appeal, the Third Circuit concluded that both provisions were constitutional. According to the Third Circuit, and based on "substantial evidence in the form of testimony and meta-analysis of relevant research" presented by the City, the "City Council made a reasonable judgment that a wage history ban would further the City's goal of closing the [wage] gap and ameliorating the discrimination inherent in . . . disparate wages."

Why It's Important: Following the Third Circuit's decision, Philadelphia can move forward with implementing the salary history ordinance. Philadelphia employers should ensure that they are complying with the ordinance by reviewing applications, hiring practices, procedures, and related documents, as well as training hiring managers and recruiters on the ordinance's prohibitions.

FOOTNOTES

[1] *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 2020 WL 579733 (3d Cir. Feb. 6, 2020).

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