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General Counsel Report

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Marijuana Is Open For Business

Alright, alright, alright, retail marijuana stores are now open for business in Massachusetts. In other words, recreational marijuana is now available to all adults over the age of 21 in the Commonwealth. The law does allow cities and towns to exercise local control to ban or limit marijuana dispensaries, but a number of dispensaries have opened in locations around the state.

As a reminder, Massachusetts law allows those who are 21 and older to possess, use, purchase, process, or manufacture one ounce or less of marijuana, and to possess up to 10 ounces of marijuana at home. A reasonable question for all employers in the state is how this is going to impact workplace regulations related to marijuana.

The good news is that built into the law are a number of protections for employers. The law does not require employers to permit or otherwise accommodate recreational marijuana use in the workplace, and it does not impact employers' ability to enforce workplace policies restricting the use of marijuana by employees.

The availability of marijuana throughout the state does, however, create a dilemma, particularly for those employers that conduct pre-employment marijuana testing. There is no test for marijuana intoxication, and marijuana drug tests may show a positive result in someone who used marijuana a week or more prior to the test. Continuing to conduct pre-employment testing may result in an increasing loss of otherwise qualified candidates.

Because marijuana remains illegal under federal law, those employers with DOT or other federal contracts may have no choice but to continue to test for marijuana, but other employers may consider testing only for safety sensitive positions.

Finally, we cannot forget the Massachusetts Supreme Court's 2017 decision in Barbuto v. Advantage Sales and Marketing, LLC where the Supreme Judicial Court held that medical marijuana users can assert claims for handicap discrimination under the Massachusetts Fair Employment Practices Act.

Therefore, any time an employee approaches an employer regarding marijuana as an accommodation for a medical condition, the employer has an obligation to engage with the employee or applicant in an interactive dialogue to determine whether marijuana is an appropriate accommodation. Terminating an employee or outright refusing to hire an applicant because of medicinal marijuana use without looking into possible accommodations can lead to a discrimination lawsuit.

If you have not already, now is the perfect time to update your Substance Abuse or Drug and Alcohol Policy.

Non-Competes Just Got A Lot More Expensive In Massachusetts

Governor Baker signed into law significant changes to the Massachusetts trade secrets and non-compete laws.

The new trade secrets law will largely bring Massachusetts in line the majority of states by tracking the Uniform Trade Secrets Act (UTSA), and should not be overlooked, although it is overshadowed by the significant changes to Massachusetts law on non-competes.

Up to this point, Massachusetts did not have a statute addressing non-competes. The new law changes that in a big way, but addresses only non-competition agreements, leaving other types of restrictive covenants like non-disclosure agreements and non-solicitation agreements untouched.

Importantly, it will not impact non-compete clauses within separation agreements only if the employee is given seven (7) days to revoke the agreement.

Below are some highlights of what we are looking at this October:

- The law will cover non-competition agreements with employees and independent contractors.
- Non-competes are limited to twelve months, unless the employee steals information or breaches fiduciary duties.
- The agreement must be reasonable in scope and geographic reach.
- If the agreement is entered into at the time of hire, it must be signed by both the employer and employee and state that the employee has the right to consult an attorney prior to signing.
- The agreement must be provided to the employee at the time of offer or ten business days before commencement of employment, whichever is earlier.
- Continued employment alone is not sufficient consideration for a non-compete entered into after employment.
- The agreement must include a garden leave clause or other mutually-agreed upon consideration between the employer and the employee. In other words, if the agreement does not include consideration, the employer will be paying for garden leave (see below).

A garden leave provision requires the employer to pay the employee during the period that they are restricted by the non-compete. The Garden leave provision in the new Massachusetts law requires 50% of the employee's annualized base salary to be paid on a pro rata basis during the non-compete period. However, the language of the bill requires Garden leave or "other mutually-agreed upon consideration." "Other mutually-agreed upon consideration" is not defined by the bill, but must be specified in the agreement.

Finally, non-competes are banned for the following groups:

- Nonexempt employees under the Fair Labor Standards Act (FLSA).
- Undergraduate and graduate students who are not working full time.
- Employees who are terminated without cause or laid off.
- Anyone 18 or younger.

The law will apply to agreements entered into on or after October 1, 2018.

Next Steps:

Review existing non-competes, and determine whether there are updates that should be made prior to the new law taking effect. Existing policies do not have to align with the new law, but if they don't they could be vulnerable to a legal challenge down the road.

Yep, I'm saying it. Employers should plan to pull existing non-competes in line with this new law.

We highly recommend that all business using non-competes in Massachusetts review these agreements with employment attorneys ASAP. This is a tricky area to begin with, and this law just took things to a whole new level.

As always we are ready and willing to help.

Another Expensive ADA Lesson Learned

The EEOC issued a **press release** indicating that it had settled with Murphy Oil USA, Inc., an employer who operates gas stations in over 20 states. As part of the settlement, the Company will pay $100,000, implement written ADA policies, provide ADA training, and post a notice to its employees. The suit serves to highlight and remind employers of important steps that can be taken to achieve compliance with the ADA and avoid a situation like the one described in the EEOC's complaint.

According to the EEOC's press release, Murphy Oil: 1) failed to engage in an interactive process; 2) required the employee "to perform duties that violated work restrictions imposed by his treating physician;" and 3) "fired the employee in retaliation for complaining to management about the failure to accommodate his medical restrictions." What steps could the employer have taken to achieve compliance and avoid an EEOC complaint? Read on!

The employer could have…

1. Engaged in the interactive process

Engaging in the interactive process is the best thing an employer can do when an employee requests an accommodation. Talk to the employee! Understand where they face challenges in the workplace and what their ideas are for addressing those challenges. If the employer has ideas for accommodations that it could provide, let the employee know and ask for his/her thoughts on whether those ideas would be effective. Remember, an employer is obligated to provide an accommodation that is effective and does not pose an undue hardship. An employer is not obligated to provide the accommodation the employee prefers.

Medical providers don't have to be involved in the interactive process, but it is legally permissible for the employer to seek documentation of the disability and suggested accommodation from a medical provider. But, don't work with the doctor at the exclusion of the employee. Open up an honest conversation with the employee and bring the doctor in, as needed, to verify or provide additional guidance. Once an accommodation is provided, don't stop the interactive process. Follow-up with the employee to see how the accommodation is working and whether any different accommodations should be considered.

2. Created and maintained well-written job descriptions

The ADA requires that employers provide reasonable accommodations that will allow an employee to perform the essential functions of his/her position. If an employee cannot perform the essential functions, even with an accommodation, the employee is not qualified for the position. Therefore, when assessing an accommodation request, the first question that needs to be answered is: "what are the essential functions of the position?" If there is a well-written, up-to-date job description for the position, it should be pretty easy to answer this threshold question. A job description that specifically identifies the essential functions of the position can be used as the basis for an accommodation discussion with the employee and can be shared with the medical provider for his/her input. And, if an employer ultimately has to deny a request or end an employment relationship because the employee is unable to perform the essential functions of the position, the job description serves as strong evidence in support of the employer's position.

3. Trained managers and involved HR

Managers should be provided training on the ADA so they understand when the employer may have an obligation to take action. But, even when managers have an understanding of the ADA, it's critically important that managers know when to involve HR. Different employers have different policies and different staffing models that dictate or impact when and how HR gets involved. Employers should ensure that managers always involve HR before an accommodation is denied (it's best to involve HR with *any* accommodation request, as this helps avoid disparate treatment claims). And, employers should mandate that HR be involved any time disciplinary action or termination is contemplated.

Unsure of how to engage in the interactive process? Does your organization need to create or update job descriptions? Is ADA training needed? **We can help.**

If You Have Employees Working in Hazardous Jobs, Opioids Should Be On Your Radar

Marijuana is the drug most employers are struggling to address right now. However, as the **Boston Globe highlighted last week**, for employers in high hazard industries like construction, maintenance, and manufacturing, opioids are an overlooked danger to employees.

The Globe focused on a **report** by the Massachusetts Department of Public Health finding that nearly a quarter of overdose deaths in a five-year period occurred among those who work in construction. In fact, according to the report, construction workers were found to be *six times* more likely to die from an opioid overdose than other workers in Massachusetts.

Those working in farming, forestry and fisherman make up a small percentage of workers in Massachusetts, but their rate of overdose deaths was *five times* the average for Massachusetts workers. In states where these workers make up a bigger percentage of the workforce, it is reasonable to expect this threat is magnified.

The common factor among these industries: the frequency of workplace injuries.

Other occupations with significantly higher than average rates of opioid-related deaths among Massachusetts workers: material moving occupations (59.1); installation, maintenance, and repair occupations (54.0); transportation occupations (42.6); production occupations (42.1); food preparation and serving related occupations (39.5); building and grounds cleaning and maintenance occupations (38.3); and healthcare support occupations (31.8).

There are steps that employers can take to help address this troubling problem:

- Ensure that jobs are safe, that the risk of injury is low.
- Ensure that workers have the time for rehabilitation and are not self-medicating to keep working.
- Educate employees regarding workplace hazards that cause injuries for which opioids are prescribed, as well as appropriate pain management following injury. Employees should understand not just the risk of injury, but the risks associated with treating the injury (e.g. the addictive nature of painkillers) and attempting to work injured.

Sick leave is mandated in Massachusetts, and thanks to the **Grand Bargain**, paid medical leave will be close behind. If you have questions about complying with these laws, or setting up an hazard education plan for your workplace, reach out to us, we are here to help.

General Counsel Office Hours

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Attorney Michael E. Foley's bio.

As General Counsel, Mike will be available within his virtual and gratis office hours for all SCHRC members in good standing from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help SCHRC members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his SCHRC General Counsel Office Hours at 508-548-4888.

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