Employment Law Matters

November 2014

A Newsletter from the Law Firm of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

Hot Topics

New York's Medical Marijuana Law Complicates Enforcement of Drug Policies

Earlier this year, Governor Cuomo signed New York's Compassionate Care Act, which permits limited use of medical marijuana by individuals suffering from certain covered medical conditions. This new law will likely present challenges for employers seeking to enforce their drug-testing and prohibition policies, as they may inadvertently result in disability discrimination claims. Employers seeking to avoid such complications should work closely with their employment law attorneys to review any applicable policies and practices for potential disputes, and revise them accordingly.

Specifically, the new law allows marijuana use by individuals who suffer from a "serious condition," defined in the law as having one of the following "severe debilitating or life-threatening conditions":

- Cancer
- HIV/AIDS
- Amyotrophic Lateral Sclerosis (ALS)
- Parkinson's Disease
- Multiple Sclerosis
- Damage to the Nervous Tissue of the Spinal Cord
- Epilepsy
- Inflammatory Bowel Disease
- Neuropathies
- Huntington's Disease

Any of the following conditions where it is clinically associated with, or a complication of, a condition listed above or its treatment:

- Cachexia or Wasting Syndrome;
- Severe or Chronic Pain;
- Severe Nausea;
- Seizures;
- Severe or Persistent Muscle Spasms
- Such other conditions as may be added by the Commissioner of Health in the future.

> ***This new law will likely present challenges for employers seeking to enforce their drug-testing and prohibition policies, as they may inadvertently result in disability discrimination claims.***

In a provision that sets New York's law apart from the 22 other medical marijuana state laws in this country, the covered individuals are automatically considered to be "disabled" under the State Human Rights Law (HRL). As most employers know, the HRL requires an employer to provide such an employee with a reasonable accommodation and otherwise avoid discrimination against him/her for being disabled. That being said, the law does not prevent an employer from creating and/or enforcing a drug-testing or drug-impairment prohibition policy. It simply means that greater care will need to be taken with respect to employees who are covered individuals (or "certified patients") under this law to avoid potential discrimination claims.

First and foremost, employers should work with their employment law attorneys to review and revise their policies, if necessary, to address this new reality. Generally speaking, medical marijuana should be treated like any other prescription drug that might cause impairment. The policy should inform employees that they are not permitted to report to work impaired by any lawfully-obtained prescription drugs (including medical marijuana), as well as unlawfully-obtained drugs or alcohol. The policy should also address other important issues like requiring employ-

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Hot Topics

NY Medical Marijuana Law Complicates Enforcement of Drug Policies (cont'd)

ees to come forward if they are taking such prescription drugs, how the company will keep that information confidential, and disciplinary consequences for violating the rules.

Second, when enforcing such a policy, employers will likely need to do more in-depth investigations when dealing with these certified patients. For example, if one of these employees tests positive for marijuana use in a post-accident test, the employer may not simply discipline the employee for having marijuana in his/her system. Evidence of marijuana use remains in a person's body long after the individual is impaired. In other words, an employee may test positive for marijuana and not have been impaired at the time of an accident. Doctors (especially those working at drug-testing labs) will likely need to be consulted to determine if the employee's drug test revealed whether the drug concentration was high enough at the time of the test that he/she would have been impaired at the time of the accident. However, even relying on that information, employers can expect that employees terminated under such circumstances will likely claim disability discrimination under the HRL. All the more reason to carefully document all information related to any employment decision arising from such a situation.

Finally, employers will need to bear in mind that if an employee reveals that he/she is a certified patient taking medical marijuana, he/she is disabled and, therefore, entitled to reasonable accommodation. The HRL (like the Americans with Disabilities Act) requires employers to engage in an "interactive process" with such employees to discuss potential accommodations. Such accommodation, for example, may require an employer to adjust an employee's schedule to accommodate use of medical marijuana.

While the law became effective on July 5, the New York State Department of Health must still establish regulations implementing the law's requirements. In particular, the Department has up to 18 months to make and issue registry identification cards for certified patients, which will be necessary for obtaining medical marijuana. In the meantime, employers should work closely with their attorneys to monitor any additional guidance issued by the State and modify their policies/practices accordingly.

If you have any questions regarding the new law or its implications for your company, please feel free to contact us.

Non-Compete Agreements

PA Court Rules Non-Compete Agreements Unenforceable Unless Added Benefit Given

A recent decision by a Pennsylvania appeals court has altered what employers in that state must do to be able to enforce an agreement with an existing employee whereby the employee agrees not to compete with that employer in the future when their employment relationship ends. *Socko v. Mid-Atlantic Systems of CPA, Inc*., 2014 WL 1898584. As explained in detail below, employers will need to give the employee some added benefit beyond continuing his/her employment in order to support the agreement.

It is Contract Law 101 that in order for any contract to be enforceable in court, it must have three elements: 1) an offer; 2) an acceptance; and 3) adequate consideration. In a very simple transaction, such as a purchase of a house, the buyer either makes an offer (which the seller accepts) or accepts the seller's offer and the buyer pays the seller the agreed upon purchase price (i.e., consideration). When all three elements are present, there is an enforceable contract. In other words, if, for example, the buyer pays the purchase price and seller refuses to give up the house, the buyer may take the seller to court and recover the money paid, or possibly, force the seller to give up the house. Likewise, if the buyer does not pay the purchase price, it could not force the seller, through court action, to give up the house, because adequate consideration was not given.

The same basic principles apply to any agreement between an employer and an employee which is intended to restrict the employee's right to leave his/her job and go to work for another employer that competes with the former employer. Generally speaking, if an employer requires a job candidate to sign a non-compete agreement as a condition of being hired, all three essential contract elements are present. The agreement is the employer's offer and the employee can either accept or reject the offer. If he/she accepts it, getting the job is the consideration supporting the agreement. This is because if he/she rejects the offer, the candidate will not get the job.

The existence of these essential elements becomes less clear if an

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Non-Compete Agreements

PA Court Rules Non-Compete Agreements Unenforceable (cont'd)

employer offers a non-compete agreement to an existing employee. There is still an offer and possibility of acceptance, but what is the consideration? Some state courts have held that "continued employment" is adequate consideration making the non-compete agreement enforceable in court. Others do not. For those courts, an employer must offer some additional consideration such as a bonus payment or other benefit to make the agreement enforceable.

For the last 10 years or so, the case law in Pennsylvania has suggested a unique solution to the lack of consideration problem associated with a non-compete agreement offered by an employer to an existing employee. Specifically, certain courts in the Commonwealth cited a 1927 statute known as the Uniform Written Obligations Act ("UWOA") which provides that a written agreement will not be unenforceable for lack of consideration, if it contains an express statement that the individual signing it "intends to be legally bound."

However, earlier this year, a Pennsylvania Superior Court overruled using the UWOA as a substitution for actual consideration. Specifically, the Court in Socko ruled that a non-competition agreement even with a statement indicating that the employee intended to be legally bound was unenforceable because it was not supported by sufficient consideration. The Court noted in more general terms that:

… with regard to restrictive covenants in employment contracts, our Supreme Court has repeatedly inquired into the adequacy of consideration required to support them. The reasons for this differing approach are clear, as restrictive covenants are disfavored in Pennsylvania because they are in restraint of trade and may work significant hardships on employees agreeing to them. For these reasons, our Supreme Court, as reviewed hereinabove, has held that only valuable consideration will support their enforcement, and has rejected as inadequate various forms of consideration that would support the enforcement of other types of contracts, including the benefit of the continuation of at-will employment, contracts under seal, and nominal consideration. (Emphasis added.)

While the Court acknowledged that non-compete agreements entered into with new employees remain enforceable (because getting the job is the consideration, such agreements with existing employees must be supported by some other corresponding benefit/bonus or a change in job status.

It should be noted that the employer in this case is seeking a possible appeal of this decision. Thus, it may be several months before the decision is finalized. Nonetheless, unless and until the decision is reversed, it is the current state of Pennsylvania law and must be followed.

If you have any questions regarding the foregoing, please do not hesitate to call our offices.

Pre-Employment Questions

New Jersey Becomes Latest State to "Ban the Box" Prohibiting Criminal Conviction Questions on Application Forms

On August 11, New Jersey Governor Christie signed the "Opportunity to Compete Act" which, in pertinent part, prohibits employers in that state from requiring a job applicant to complete an employment application that makes any inquiries about the applicant's criminal record during the "initial employment application process." The "initial employment application process" is defined as "the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview, whether in person or by any other means, of an applicant for employment." In other words, after this initial employment application process is completed, an employer may inquire into the applicant's criminal history. Penalties for violating the new law include the following fines: $1,000 for the first violation, $3,000 for the second, and $10,000 for each violation thereafter. The new law becomes effective in March 2015.

EMPLOYMENT LAW MATTERS is published by **Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com.**

Minimum Wage

Next Phase of New York's Minimum Wage Order to Take Effect in December

Employers located in New York should begin preparing for the next phase in the State's minimum wage order. On December 31, 2014, the hourly minimum wage for non-exempt employees will rise from $8.00 to $8.75 (and then to $9.00 on December 31, 2015). Often overlooked but just as significant, the minimum weekly salary for exempt employees – in the executive and administrative categories – will also increase on December 31 from $600.00 to $656.25 (and then to $675.00 on December 31, 2015).

If you have any questions regarding these changes and their impact on your company, please call us.

Employment Discrimination

Unpaid Interns Can Now Sue for Harassment/Discrimination in New York

On July 22, Governor Cuomo signed legislation giving unpaid interns in New York State the right to sue companies for discrimination in the workplace. This new law was designed to overrule existing case law in both New York State and federal courts that held that unpaid volunteers are not protected by Title VII of the Civil Rights Act or the New York Human Rights Law.

Questions about the new law? Call us at either 315-437-7600 or 585-441-0345;