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Working Wise - Volume 1

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Labor, Employment, and Workplace Safety

1. The Apple Doesn't Fall Far From the Tree? Scalia for Secretary of Labor

In mid-July 2019, President Trump took to Twitter, announcing that he intends to nominate Eugene Scalia to lead the U.S. Department of Labor ("DOL"). Scalia is the son of the late U.S. Supreme Court Justice, Antonin Scalia, and has earned a reputation representing businesses challenging labor and financial regulations in Washington, D.C. — Scalia helped one of the nation's largest retailers overturn a Maryland law mandating minimum contributions by big employers for workers' healthcare, represented SeaWorld against alleged workplace safety allegations after a trainer was killed by an orca, and defended Boeing against a labor union lawsuit. He also brings prior DOL experience, having served as the agency's solicitor under the George W. Bush administration.

Scalia's nomination drew praise from Republicans and other "pro-business" groups, but Democrats and labor and consumer advocates weren't as pleased, quickly calling out Scalia's perceived hostility towards unions and willingness to challenge government regulations.

Why It's Important? While Scalia has a long confirmation process ahead of him, his confirmation could help to advance Trump's pro-business agenda at the expense of the pro-labor policies of the Obama administration.

2. Knowledge Is Power: NY Commission to Examine Artificial Intelligence, Robots, and Automation

New York Governor Andrew Cuomo recently announced the creation of the New York State Artificial Intelligence, Robotics and Automation Commission (the "Commission"), a new group charged with studying the potential economic impact of those technologies, reviewing how other states are handling them, and examining how New York can "best utilize and regulate them as necessary." Cuomo stated:

> Artificial intelligence and automation are already having a profound impact across many industries and their influence keeps growing, so it's critical that we do everything in our power to understand their capabilities and potential pitfalls. This new commission will look closely at how these rapidly evolving technologies are functioning and report back on how we can optimize use to benefit New Yorkers and our economy.The Commission will be comprised of

13 members — to be selected by the governor, state legislature, and the university systems of New York State and New York City — and is slated to report its findings and recommendations to the governor and legislative leaders at the end of 2020.

Why It's Important? Artificial intelligence ("AI"), robotics, and automation have created a brave – and, at present, largely law- and regulation-free new world. We can expect that the Commission's report will lead to legislation in this developing area and perhaps encourage other states to follow suit. This issue should be on employers' radar, as AI can have a significant effect on hiring decisions (and disparate impact claims), while there has already been friction between labor unions in the hotel and casino industries relative to the introduction of AI into the workplace.

3. Marijuana At Work: New Jersey Expands Employment Protections for Cannabis Users

The New Jersey medical marijuana program now includes explicit protections for employees and job applicants who use medical cannabis: (i) prohibiting employers from taking adverse employment actions — such as firing, not hiring, requiring retirement, or discriminating against an individual — solely because an individual is a registered qualifying medical cannabis patient; and (ii) outlining a process for employers to follow if an individual tests positive for cannabis.

This doesn't mean that employees can now use cannabis on the job. Employers are still able to fire an employee for use or possession of the drug during work hours, for example, and are not required to accommodate off-hours use if it would cause the employer to be in violation of federal law or lose a federal licensing-related benefit, federal contract, or federal funding (federal law continues to restrict the sale and use of marijuana in all forms).

Why It's Important? Employers in all states, not just in New Jersey, continue to grapple with the expanded use – and legality – of medical cannabis and its intersection with employment law. Unfortunately for employers, the legal landscape surrounding the use of this product in the workplace is less than clear and continues to be fodder for employment discrimination lawsuits, a trend that likely will continue as state legislatures refine statutory schemes and courts interpret them. Employers should remain abreast of these developments and ensure that their own policies and procedures comply with applicable state and federal laws.

4. Mandatory Arbitration? Not if the Agreement Is Buried in an Employee Handbook

Mandatory arbitration provisions have been a hot-button topic for some time. The U.S. Court of Appeals for the Eighth Circuit recently issued a warning to employers using or considering using mandatory arbitration programs to manage claims by their employees — the arbitration clause won't be enforceable if it is buried in an employee handbook or found online. Even more, this is true even if the employee was required to access the handbook containing the clause and acknowledge his/her review of the policy. Instead, the arbitration clause must be found in an individual contract and assented to by the employee.

Why It's Important? The Eighth Circuit's decision is a timely reminder to employers that boilerplate

arbitration language in handbooks may not be enforceable and that now may be the right time to review how mandatory arbitration programs are communicated to employees.

5. Friendly Competition: Maine, New Hampshire, and Rhode Island Say “No” to Non-Competes for Lower Wage Earners

Maine, New Hampshire, and Rhode Island have joined the growing list of states that have eliminated (Massachusetts, Illinois, and Washington) or are considering eliminating (Connecticut, Hawaii, Indiana, Maryland, New York, Pennsylvania, and Virginia) the use of non-compete agreements with lower wage earners. The definition of a lower-wage worker is fluid; in Maine, it is $48,560, while in New Hampshire, employees must earn in excess of $24,280 to be tied to a non-compete. In addition to these prohibitions, the laws also include specific notice and disclosure provisions for employers wanting to use non-competition agreements, generally.

Why It’s Important? Employers have relied on non-competes to protect confidential and proprietary information and trade secrets transferred during the course of employment. These laws underscore the need for employers to evaluate whether they can continue to use non-competes to protect valuable business assets and, if not, any viable alternatives.

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