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Working Wise - Volume 5

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Labor, Employment, and Workplace Safety

1. I Can See (More) Clearly Now: Illinois Clarifies Employer Protections in Recreational Cannabis Law

Beginning on January 1, 2020, recreational use of cannabis by adults in Illinois will be legal under state law. Of course, it continues to be a federal crime in all states. Questions abound, however, regarding the law's impact on an employer's ability to implement a reasonable non-discriminatory drug testing policy prohibiting applicants and employees from using the substance recreationally. Could an employer continue to implement such a policy? If an employer refused to hire an applicant who tested positive for the substance, would they be violating the law? And, could an employer fire an employee who was not actually impaired on the job? There appeared to be an inherent conflict between the Illinois Right to Privacy in the Workplace Act (as amended by the Cannabis Act) and an employer's capacity to perform cannabis-related drug testing.

The recently-passed SB1557, which amends the Cannabis Regulation and Tax Act passed last June, takes steps towards addressing these issues, albeit with some remaining ambiguity. Employers are now able to continue to implement "reasonable" workplace drug polices, including but not limited to subjecting an employee or applicant to "reasonable" drug and alcohol testing, "reasonable" and nondiscriminatory random drug testing, and discipline, termination of employment, or withdrawal of a job offer due to a failure of a drug test. However, questions remain regarding an employer's ability to effectively administer marijuana tests, especially those conducted randomly or based on reasonable suspicion, as marijuana may remain in a person's system well after impairment ceases.

Why It's Important: The use of recreational (as opposed to medicinal) cannabis brings with it a host of challenges, questions, and hazy areas for employers. While recreational consumers in Illinois will have the legal right under state law to use cannabis, Illinois employers will also retain the ability to implement reasonable drug testing policies to protect employees and the public. This is a good time for employers doing business in Illinois to review their drug testing policies and the business justifications behind them, while — at the same time — continuing to monitor developments clarifying the "reasonable" testing standard articulated in the Bill signed into law by Governor Pritzker.

2. DOL Published Proposed Rule on Fluctuating Workweek Method

As employers and HR professionals are well aware, the Fair Labor Standards Act ("FLSA") guarantees non-exempt workers a minimum wage for all hours worked and requires payment of

overtime for hours worked over 40 in a given week. The “fluctuating workweek method” offers employers a tool to satisfy FLSA obligations while offering (more) cost certainty. Under the methodology, salaried, non-exempt workers whose hours vary from week-to-week are paid a fixed salary — irrespective of how many hours are worked — so long as the effective hourly rate meets or exceeds minimum wage. By dividing the employee’s weekly salary by the number of hours actually worked in a workweek, employers establish an employee’s “regular rate” for a given weekly period, which, in turn, sets a base rate for overtime purposes (for example, a $600 salary paid on 45 hours for a given week results in a $13.33 base rate). For those hours worked over 40 in a given week, the overtime premium is one-half the calculated hourly rate, as opposed to the more traditional “time-and-a-half” rate. In our example above, the employer would simply owe $33.35 in additional overtime pay.

On November 5, 2019, the Department of Labor published a proposed rule clarifying the use of this method, enumerating five requirements for its application and adding language explicitly stating that bonuses, premium payments, and other additional pay are compatible with the fluctuating workweek method and must be included in the calculation of the regular rate unless otherwise excluded under the FLSA. Comments to the proposed rule were due by December 5.

Why It’s Important: Calculating overtime is an area wrought with complexities for employers and one that requires careful and consistent attention. The proposed change revisits the DOL’s 2011 Final Rule, and, by way of reiterating that employees eligible for bonuses and incentives are eligible to participate in the methodology, may have the effect of increasing employers’ use of the fluctuating workweek tool. The analysis will continue to be highly dependent on workplace circumstances — while fluctuating workweek may make sense for employers offering more modest incentives to its non-exempt workforce, those offering larger bonuses (such as weekly production bonuses) would want to closely evaluate the effect of the proposed rule on their pay structure. Employers will want to keep an eye out for the Final Rule as they consider implementing this potentially useful strategy, and should check with counsel to ensure the methodology is permissible in their state.

3. New Jersey Takes Aim at State’s Gig Economy and Independent Contractors

Following in California’s footsteps, a recent New Jersey bill would limit the ability of employers to characterize workers as independent contractors for purposes of certain wage and hour laws and unemployment compensation. Under S4204:

- any person who performs a service for remuneration would be deemed an employee under the state’s employment laws “unless and until it is shown to the satisfaction of the Commissioner of Labor and Workforce Development” that: (a) the individual has been and will continue to be free from control or direction over the performance of the service, (b) the individual’s service is outside the usual course of the business for which that service is performed, and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the work performed.

- the state’s existing ABC test for determining whether an individual is an employee or independent contractor would become more strict. By modifying the “B” prong, it would no longer be enough to show that the work is performed away from a company’s place of business; the sole consideration would be whether the work performed is outside the usual course of that company’s business. In short, app-based service providers couldn’t satisfy the test by virtue of work being performed away from the company’s offices.

As of December 5, the bill was recommitted to the NJ Senate Labor Committee.

Why It's Important: In targeting the "gig" economy, the proposed law would impact the viability and business model of many well-known, app-based services, but it would also affect more traditional freelancers across multiple industries. If passed, S4204 would make it much more difficult for employers to classify individuals as independent contractors. Stay tuned for further developments in this area.

4. New Jersey Seeks to Extend Benefits to Independent Contractors

New Jersey makes our summary twice this month, and again in the area of independent contractors. This time, the state's Legislature is focusing on providing benefits to independent contractors through the Portable Benefits Act for Independent Contractors (the "PBA"), a proposed law that would require an entity using 50 or more contractors in a 12-month period to contribute to a "Qualified Benefit Provider." Through the Qualified Benefit Provider, independent contractors would be eligible for benefits such as workers' compensation insurance, paid time off, and retirement benefits. Under the PBA, employers would contribute the lesser of 25% of the contractor's total fee or $6.00 per hour (prorated to the minute). The law would exempt four types of contractors: real estate agents, financial product salespersons, individuals subject to collective bargaining agreements, and individuals who solicit orders as sales representatives of a principal entity.

The Governor is expected to sign the bill by year-end.

Why It's Important: The bill, if passed, would meaningfully increase the cost of using independent contractors in New Jersey. Employers should watch this space for further updates.

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