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Labor & Employment Practice Group

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Medical Marijuana Ruling Favors Employees

In the first substantive court decision involving Connecticut's Palliative Use of Marijuana Act (PUMA), a federal judge has ruled that an employer cannot refuse to hire a medical marijuana user simply because he or she fails a drug test. The employer's arguments to the effect that federal law prohibiting pot preempted PUMA, and that state law only protected one's status as a medical marijuana user, not actual use of pot, were rejected.

The lawsuit was filed when an employer withdrew a job offer after an applicant failed a drug test, even though she had previously provided documentation of medical marijuana use for post-traumatic stress disorder. The employer argued that PUMA did not provide for a private right to sue, but earlier this year the judge rejected that claim, pointing out that, if there were no private right of action, the statute would have no effect. (Ironically, at about the same time, a state court judge dismissed a similar lawsuit by an applicant for state employment based on the doctrine of sovereign immunity.)

PUMA provides that no employer can take negative action against an applicant or employee based solely on his or her palliative use of marijuana. An employer may, however, prohibit the use of intoxicating substances during work hours, or discipline an employee for being under the influence of drugs during work hours. Obviously, these provisions may sometimes seem to be in conflict, since the whole purpose of medical marijuana is to provide some relief from physical pain or psychological stress. If it has that effect on a person while at work, isn't he or she "under the influence"? The answer depends on the facts involved, especially whether the employee is impaired in a way that adversely affects job performance, or is in a safety-sensitive position, or is in a position where federal standards apply.

Our advice to employers is to avoid making employment decisions based solely on a positive drug test result. PUMA requires a more sophisticated analysis that may result in a judgment call based on the potential risks of a decision either way. A knowledgeable employment lawyer should be able to assist in that process.

Save the Date:

Sexual Harassment Prevention Training - Hartford
December 6

Webinars:

HR Policies in Review: Essential Guide to Employee Handbooks
November 13, 2018

Dealing With Mental Health Issues in the Workplace
December 12, 2018

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HealthBridge Loses Long Battle with NLRB

The operator of five nursing homes in various Connecticut communities has lost its federal court appeal of a sweeping decision of the National Labor Relations Board to the effect that its conduct going back almost ten years violated labor law in several respects.

The central issue in the case involved a management company that HealthBridge initially brought in to oversee the operation of its nursing homes. But then it subcontracted its housekeeping operations to that company, which took over its employees and their union contracts. Fifteen months later, HealthBridge took back the same functions, and rehired all but two of those workers, but treated them as new hires with no seniority. The union charged the transactions were a sham and the NLRB agreed.

The Court of Appeals for the Second Circuit found that the "subcontracting" was never intended to be a permanent arrangement, and was merely a "technical change in operations" that amounted to a disguised continuance. While an employer that relinquishes and later reacquires ownership of an operation for legitimate business reasons may be free to negotiate a new union contract, the court said this was not such a case.

Because HealthBridge was not free to disregard the seniority of the employees involved, it was required to rehire the two it initially passed over. It was also found to have acted illegally when it threatened to call the police on employees who protested HealthBridge's failure to honor their seniority. Additional violations included unilateral discontinuation of the practice of paying part-timers premium wages when they worked on holidays, and the policy of counting a paid lunch period as hours worked for the purpose of computing overtime.

The court upheld the NLRB's decision in all respects. Although the court's opinion does not detail the financial consequences of its findings, given the nature of violations and the duration of the litigation, it seems likely that the damages are very substantial.

Our opinion is that sometimes business decisions that may make sense from an operational perspective may not be seen the same way under the applicable labor laws. Therefore, employers must be careful to consider all angles of a decision to avoid an adverse result.

"Perceived Pregnancy" Is a Protected Status

Almost any employer knows that pregnancy is a protected status under Connecticut's Fair Employment Practices Act. But what about a situation where an employee or job applicant may not actually be pregnant, but the employer thinks she is?

At least one Superior Court judge has held that the law covers that situation too. That opinion was issued in the context of a claim by a litigation paralegal in a law firm that she was fired in part because her supervisor thought she was pregnant. The law firm moved to dismiss the case because FEPA only protects employees who are actually pregnant. The judge disagreed, stating that if the adverse action was motivated by the employee's perceived pregnancy, the law applied.

The lawsuit had another interesting aspect. The plaintiff claimed that another motivating factor was that she refused to notarize a statement that she believed to be false, and said that taking action against her for that reason was a violation of public policy. The law firm moved to dismiss that claim too, and the court agreed. Its reasoning was that it is not the job of a notary to attest to the truth of an affiant's statement, but only to attest that the person is who he says he is, and that he swears under oath that his statement is truthful. Therefore, at least in theory, a notary can be punished for refusal to perform his/her function.

Our opinion is that the law in this area is still developing, in part because this case is not over. The plaintiff still has to prove that her supervisor did in fact think she was pregnant, and that this perception played a role in her termination. However, employers now have to consider whether there may be a perception of pregnancy (or disability, sexual orientation, or any other protected status) on the part of a supervisor that could be a risk factor in any adverse decision about an employee or applicant.

Waterbury Wins Two Kinds of Arbitration

In the world of public sector labor relations, there are two kinds of arbitration. One is used to resolve disputes over the interpretation or application of provisions in a collective bargaining agreement, and the other is used (at least in Connecticut) to end an impasse in negotiations between labor and management by deciding what the terms of a new or successor collective bargaining agreement will be. The Board of Education in Waterbury recently prevailed in court decisions involving both types of arbitration.

The first case involved the Board's challenge to an arbitrator's decision upholding a teacher union's grievance over the fact that teachers in a particular school were not receiving five preparation periods per week, as provided in their union contract. The arbitrator imposed a remedy of payment of amounts totaling $3,090 to affected teachers, plus compensatory damages for each preparation period not provided after the date of the award.

The court said that the award impermissibly modified the compensation of the teachers, which, by law, could only be changed through collective bargaining. It also created a difference between the compensation of teachers in one school and that of teachers in all other Waterbury schools, which it said was a violation of public policy. It is not clear how the alleged contract violation could be remedied, if not by some monetary penalty.

The other case involved the second type of arbitration, namely the process used in resolving an impasse in contract negotiations. The School Administrators of Waterbury challenged the award of a panel of arbitrators, which adopted a Board proposal limiting "bumping" by certain school administrators, and the court had to decide what standard to apply in deciding whether the award was valid. The statute governing impasse resolution contains certain specific grounds for overturning an award, but the union argued the court should also consider the grounds listed in a different statute governing arbitrations more generally. The court rejected that argument, and found that the statute governing this specific type of arbitration should be given preference over the broader arbitration law. Applying the standard set forth in that statute, it found there was no basis for overturning the award.

Our opinion is that while the standards in the two statutes may be different, neither is necessarily broader or more narrow than the other. For example, the grounds for overturning an award resolving an impasse in negotiations include "clear error in evaluating evidence" and "arbitrary or capricious exercise of discretion," two standards not listed in the law governing arbitrations generally. The lesson is, however, that in any legal proceeding, the rules governing that particular type of litigation take precedence over all others.

Legal Briefs
and Footnotes

Injured while digging out car: A health care worker sustained a back injury while shoveling snow away from her car in her employer's parking lot at the end of her shift. She applied for workers' compensation benefits, which were granted. The employer went to court, arguing that the employee was off the clock at the time of her injury, that snow shoveling was not part of her job, and that she was using a shovel reserved for maintenance employees. The judge affirmed the award of benefits, noting that the employer's agent had plowed in the employee's car, and that it was reasonable for her to use any tool available to dig out her car and return home after work.

A guide is just a guide: The state Department of Labor put out a "Restaurant Industry Guide" in 2015 which stated that it would allow use of a "tip credit" against an employer's minimum wage obligation in all situations where the employee spends no more than 20% of the total shift time on non-service duties. However, the applicable statute itself contains stricter requirements. A Superior Court judge recently ruled that an employer was not entitled to rely on the benefit of the looser standard in the Guide, and that the DOL had complete discretion to strictly apply the statute in any given enforcement action.

State employee liable for email: The first article in this newsletter mentions a case in which the state dodged responsibility for rejecting a job applicant who was a medical marijuana user by citing the doctrine of "sovereign immunity." That concept has its limits, however. This summer, a Superior Court judge refused to dismiss a claim by a Department of Labor employee that an EEO manager had distributed an email to co-workers falsely describing him as an organizer and participant in a hate group with strong anti-semitic views. The judge said the claim was sufficient to allege conduct outside the scope of the manager's official duties, and thereby defeat her sovereign immunity defense.

Persuader rule is dead: This summer the U.S. Department of Labor rescinded a proposed rule that would have required employers to disclose the identity of, and the compensation paid to, outside consultants (including lawyers) they hire to help counter union organizing efforts in their workforce. The rule would have raised issues involving attorney-client privilege, among other employer objections. The DOL announcement, however, noted that pre-existing rules regarding consultants (or lawyers) who actually communicate with workers remain in effect. Those rules do not affect communications with supervisors, and employers often bring in outside experts to educate management on the rules of the road in a union organizing campaign.

Background check rules are strict: The Fair Credit Reporting Act has a number of specific rules that employers must follow carefully. A recent case illustrates the potential for liability if that isn't done. An employee was offered a job contingent on passage of a background check, and the offer was withdrawn based on the results, including "non-conviction information." However, the employee was not given written notice of the background check that complied with the statute; was not given a copy of the report with a notice detailing his rights; and was not given an opportunity to explain the circumstances of the disqualifying event before a final decision was made. All these steps are required by the Act. Although it may be that the applicant would not have been hired even if all of the rules had been followed, the failure to follow them may itself lead to liability. All employers should learn those rules and make sure they are followed.

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