MEYER CAPEL
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Employment & Labor Law

VOLUME V, ISSUE I APRIL 11, 2018

SPECIAL POINT OF INTEREST

Telecommuting

According to a recent Eleventh Circuit Court of Appeals Decision, if you don't want to be required to allow, or at least strongly consider telecommuting as a reasonable accommodation under the American's with Disabilities Act, include a provision in the job description that employees may not telecommute in the position.

INSIDE THIS ISSUE:

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Attention Employers With Employees Doing Work in Cook County or the City of Chicago

If your employees perform at least 2 hours of work in Cook County or the City of Chicago and work at least 80 hours in a 120-day period for your company, the Earned Sick Leave Ordinance applies.

The Ordinance requires your company to provide for the accrual of sick leave at the rate of 1 hour for every 40 hours worked. Exempt employees are presumed to work 40 hours in each work week. Sick leave can be capped at 40 hours for each 12 month period and employees may carryover half of their unused sick leave pay, up to 20 hours, for the next 12 month period. If your company is subject to FMLA, you are required to allow employees to accrue up to 40 hours of their unused accrued earned sick leave, in addition to the carryover referenced for the exclusive use in FMLA situation. Sick leave begins accruing on the first calendar day of employment.

New employees can begin using their paid sick leave no later than the 180th day following the commencement of employment. Employees may use paid sick leave for their own illness, injuries or medical care or for the illness, injuries or medical care of a family member. Family members are defined as: child, legal guardian or ward, spouse, domestic partner, parent, parent of spouse or domestic partner, sibling, grandparent, grandchild or any other individual who is related by blood or whose close association with the employee is equivalent to a familial relationship. In essence, anybody the employee claims is a family member will likely be a family member for the purposes of this Ordinance.

You can restrict the use of the paid sick leave to increments of not to exceed 4 hours in a day. You can require 7 days' notice if reason for the sick leave is foreseeable, such as medical appointments. If it unforeseeable notice, like with most sick leaves, it is as soon as practicable. If an employee uses paid sick leave for 3 consecutive work days, you may require a certification that the leave was for a qualifying purpose.

As with all sick leave, you are not required to pay it out on separation.

If you have a facility in Cook County, there will be posting requirements. In addition, at the commencement of employment employers must provide each covered employee written notice advising them of their rights under the Earned Sick Leave Ordinance.

There are also anti-retaliation provisions prohibiting retaliation based on the use of sick leave.

The City of Chicago Ordinance is the same, but is obviously limited to the City of Chicago.

Transgender Policies

Sexual orientation is a protected class under the Illinois Human Rights Act, which prohibits an employer from making decisions based on an employee's or applicant's sexual orientation. Gender is protected both under the Illinois Human Rights Act and under federal law, Title VII. Gender traditionally meant male or female; however, as with many things in employment law, it has evolved over time. As a result, there is now transgender protection under Title VII. I encourage you to deal with this proactively by developing a transgender policy. In a recent case, *Tudor v. Southeastern Oklahoma State University*, a federal court in Alabama found that a transgender employee provided sufficient evidence to go to trial, when, during her transition, the employer restricted which restroom she could use, how she could dress, the makeup she could wear and often referred to her using improper pronouns. The employer claimed, and the employee did not dispute, that she had failed to present a grievance or complaint under the employer's harassment policy. The trial court found that since the harassment policy did not specifically address transgender persons, the employer was not allowed to rely upon the employee's failure to bring an internal complaint to address the situation.

Review Your Dress Code Policy

Effective August 11, 2017, Illinois passed a law which prevented the imposition, as a condition of employment, a requirement that an employee violate or forgo a sincerely held practice in their religion. As a result, employers can no longer control, regulate or prohibit certain attire, clothing, hair (including facial hair) worn or used in accordance with a religious requirement.

Effectively, this is an expansion of an existing protected class and is imposed through an amendment to the Illinois Human Rights Act. As a result, if the accommodation creates an undue burden, an employer need not provide the accommodation. Always remember, an employer is required to show and establish the undue burden/undue hardship defense.

Employers are still able to have and maintain a dress code that includes restrictions on attire or facial hair if an employer can establish the dress code provisions are necessary to maintain workplace safety or sanitation requirements.

The Biometric Privacy Law

As you are likely aware, Illinois passed a Biometric Privacy Law which prohibits an employer and other entities from using biometrically stored information (think fingerprints) without obtaining a written consent and providing disclosure about the collection, storage, use and destruction of the biometric data. In the employment context it most often comes up when employers use fingerprints for clock-in/clock-out procedures. However, in a recent case, an Illinois court was asked to address a technical violation of the Biometric Privacy Act by the Great America Amusement Park (*Rosenbach v. Six Flags Entertainment Corp.*, 2017 IL App (2d) 170317.) In that case, season pass holders were required to be fingerprinted as a part of holding a season pass. It was uncontested that Great America did not give the appropriate disclosures and did not obtain written consent of the season pass holders. Great America challenged the lawsuit taking the position that the plaintiff did not suffer any actual harm or adverse effect, therefore, he did not have a cause of action under the statute. In other words, actual harm is an element of a claim under the Biometric Privacy Act. The Second District Court of Appeals found, "In order for any of the remedies to come into play, the Plaintiff must be 'any person aggrieved by a violation of this act'. If a person alleges only a technical violation of the Act without any injury or adverse effect, then he is not aggrieved and may not recover...". Since Mr. Rosenbach failed to allege any actual damage, pecuniary or otherwise, the Second District Court of Appeals found in favor of Great America.

Illinois Freedom to Work Act

Illinois has legislated yet more restrictions on employment related covenants not to compete. Already employers face an uphill battle in enforcing post-employment restrictive covenants. In the last several years, Illinois courts have tightened requirements for enforceability and find fewer and fewer work situations merit post-employment protection. By way of example, you may recall, in *Fifield v. Premier Dealer Services, Inc.*, 993 N.E.2d, 938 (2013), an Illinois court found that employment, or continued employment in and of itself is insufficient consideration to support any post-employment restrictive covenants, unless that employment lasts at least two years. As a result, post-employment confidentiality agreements, non-solicitation agreements and non-competition agreements all need some form of additional consideration to overcome the two year continued employment hurdle for those employees who terminate their employment prior to the completion of twenty-four months. The Illinois Freedom to Work Act is yet more chipping away at employers who attempt to protect their client base, confidential information and employees. The Illinois Freedom to Work Act makes unenforceable any covenant not to compete entered into after January 1, 2017 with a "low wage employee." A "low wage employee" is an employee who earns the greater of: 1) the hourly rate equal to the minimum wages required by the applicable federal, state or local minimum wage law; or 2) $13.00 per hour. For most Illinois employers that means any employee earning less than $13.01 per hour cannot be bound by a covenant not to compete. It is actually a statutory violation for an employer to require such an employee to enter into a covenant not to compete. This stemmed from the Jimmy John's litigation in which Jimmy John's was requiring its sandwich makers to enter into post-employment covenants not to compete. Effectively, these covenants prohibited Jimmy John's sandwich makers from working for any quick service or fast food business for a period of time after they left the employ of Jimmy John's. Instead of simply allowing a court to find a lack of a protectable interest and refusing to enforce these covenants, the Illinois Legislature determined a statute on point was necessary. As a result, the Illinois Freedom to Work Act was passed and is now in full force and effect. I encourage you to review those situations in which you feel a post-employment restrictive covenant is necessary and contact me. We can talk through how to best protect your interest as an employer in the individual situations.

Employment Applications

Traditional employment application requests have been a minefield in Illinois in the recent past. As you may recall, Illinois prohibits inquiry into criminal record until and offer has been extended. As a result, criminal record inquiries are now very similar to drug tests. They can't be required/considered until a contingent offer of employment has been made. Further limiting inquiry into criminal records, a new Illinois law prohibits an employer from considering expunged juvenile records. Indeed, expunged juvenile records can no longer be considered by a private or public entity in employment matters, certification, licensing, revocation of certification or licensure or registration. Applications for employment within this State must contain specific language that confirms the applicant is not obligated to disclose expunged juvenile records of adjudication or arrest. As a result, if you intend to ask about criminal convictions, ensure that your applications contains an appropriate disclaimer as to juvenile records.