CCIC FORUM 2022:

What You Need To Know In Labor and Employment Law in 2022 But Were Afraid to Ask

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Introduction

- As 2022 comes to an end, it is a good time to take a look back at some of the important employment issues that have come up and continue to evolve this year on both a state and national level
- In Connecticut, several significant updates were made to our family and medical leave laws, standards for discrimination claims, and what employers can and cannot say in the workplace, and new rules about cannabis went into effect
- Nationally, the National Labor Relations Board made noteworthy proposed changes to longstanding rules and standards, and the Department of Labor has taken up the issue of independent contractors . . . again

CT FMLA

- Updated CT FMLA Regulations Effective August 3, 2022
- Some of the updates and revisions include areas such as:
  - Telemedicine
  - Revision to the definition of serious health condition
  - Proof of relationship
  - Where an aggrieved employee may bring an actio against an employer

Telemedicine & Serious Health Condition

- The guidance now recognizes that an employee who visits a doctor through "telemedicine" is getting treatment from a healthcare provider
  - This acknowledges that big changes have occurred in medicine during the pandemic
- The new regulations delete this reference from the prior regulations:
  - *"Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not 'serious health conditions' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, earaches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave."*
  - The new regulations notes that "any condition" that otherwise meets the definition of a serious health condition is covered

Proof of Relationship

- What proof can an employer require to confirm a family relationship
  - Not much.
- For a direct family member:
  - simple statement verifying the relative is enough.
- How do you confirm that a person is an individual related to the employee by blood or affinity whose close association is equivalent to certain family relationships
  - you may require a written statement, signed by the employee, describing and verifying that
    - (1) the employee considers his or her relationship to the individual to be equivalent to the relationship that one would have with either a spouse, sibling, son, daughter, grandparent, grandchild or parent, and
    - (2) the relationship involves a significant personal bond.
      - Also keep in mind that the regulations add that an employer could question it at times, but
      - The employer cannot request the employee provide more information than just the written statement.
- Employer determination based on employee statement shall be
  1. situation specific, and
  2. governed by the circumstances of the individuals involved

Civil Action

- Pursuant to the updated regulations, an employee can now file directly in Court:
  - within 180 days of the alleged violation
    - without having to first file an administrative complaint with the CT DOL

- Previously, any employee who believed their right was violated had to file with the DOL first, before bringing action in court.
- What if employee chooses to file with DOL first
  - Aggrieved employee has 90 days after dismissal and release of jurisdiction to file civil action in court

Motivating Factor Test for Discrimination Claims Under CFEPA

- In CT, Employees can bring disability discrimination claims against an employer under:
  - the Americans with Disabilities Act ("ADA" – federal law), or
  - the Connecticut Fair Employment Practices Act ("CFEPA" – state law)
- Under CFEPA, an employer has committed illegal discrimination if it
  - takes an adverse employment action against an individual because of the individual's membership in a protected class
  - Remember – protected classes have also been expanded to include victims of domestic violence

Motivating Factor Test for Discrimination Claims Under CFEPA

- Recently, in Wallace v. Caring Solutions LLC, CT Appellate Court held that when claim is brought under CFEPA, Employee only needs to prove discrimination was *a* cause (i.e. "motivating factor")
- This is a big difference compared to claims brought under ADA
  - Under the ADA employee needs to show that discrimination was *the* cause (i.e., "but for cause")

Captive Audience

- Effective July 1, 2022 – Section 31-51q of the Connecticut General Statutes expands employees' First Amendment rights in the workplace.
- Employer cannot:
  - discharge,
  - discipline, or
  - Threaten to subject an employee to discharge or discipline if:
    - an employee refuses to attend the employer's sponsored meeting for which the purpose is to communicate the employer's opinion regarding religious or political matters (defined to include labor organizations); or
    - an employee refuses to listen to such speech or communication

- What happens if employer is found to have violated the law
  - Employee will be entitled to the full amount of their gross loss wages or compensation
  - Costs and reasonable attorney's fees

What Can The Employer Say

- Employer is not prohibited from
  - communicating information to employees that the employer is required by law to communicate
  - communicating information to employees that is necessary for employees to perform their job duties
  - engaging in communications from higher education agents or representatives to employees that is a part of coursework or other academic programming; and
  - allowing casual conversations between employees or between an employee and the employer or its agent

What Should You Do

- Consider updating your employee handbook
- Review policies regarding mandatory meetings and content
- Be cognizant of conversations with employees on topics that may be deemed "political" or "religious" in nature
- Train supervisors and other managerial personnel on these changes

The State of Cannabis Law

- Federal Law
  - Cannabis remains illegal under federal law
  - Cannabis (aka marijuana) vs. Hemp
  - Crossing state lines with cannabis is illegal
- Connecticut Law
  - Medical use legalized in 2012 under the Palliative Use of Marijuana Act ("PUMA")
    - *"No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient…"*
  - Adult-use legalized in 2021 ("RERACA")

New Rules Effective July 1, 2022

- Two sets of rules: Exempt vs. Non-Exempt
- **Exempt Employers** = those whose primary activity is:
  - ✓ Mining
  - ✓ Utilities
  - ✓ Construction
  - ✓ Manufacturing
  - ✓ Transportation or Delivery
  - ✓ Educational Services
  - ✓ Healthcare or Social Services
  - ✓ Justice, Public Order and Safety
  - ✓ National Security and International Affairs

Exempt Employers and Positions

What employers can do	What employers cannot do
Prohibit or punish use of any type of marijuana (medical or recreational) in the workplace or intoxication in the workplace	Prohibit or punish possession of medical marijuana by a qualifying patient
Prohibit or punish possession of recreational marijuana in the workplace	Refuse to hire or take adverse action against an employee based solely on the employee's status as a medical marijuana patient*
Take disciplinary action against employees for possession, use, or consumption of recreational marijuana outside the workplace, with or without a policy in place	
Refuse to hire or take disciplinary action against an employee for possession or use of recreational marijuana inside or outside of the workplace before employment, with or without a policy in place	
Refuse to hire or take disciplinary action against an employee solely on the basis of a failed marijuana test	

Smoking in the Workplace

- RERACA includes heightened restrictions on smoking in the workplace
- Employers must ban smoking and e-cigarette use of tobacco and cannabis in any area of the workplace (smoke rooms previously allowed)
- Employers must ban smoking both inside the workplace and outside within 25 feet of a doorway, operable window or air intake vent
- Employers may ban smoking entirely on the property. Previously, employers could just ban it in their "facility."

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NLRB – Joint Employer Status

- Under the proposed NLRB standard:
- one employer may be deemed a joint employer of a second company's employees if:
  - it exercises – or reserves – control (direct *or indirect)*
    - over the employees' essential terms and conditions of employment

NLRB – Joint Employer Status

- Proposed rule provides that two or more employers will be considered joint employers where either employer share(s) or codetermine(s) those matters governing employees' essential terms and conditions of employment
  - "share or codetermine" is defined as "possess[ing] the authority to control (whether directly, indirectly, or both)" or
  - "to exercise the power of control (whether directly, indirectly, or both) of one or more of the employees' essential terms and conditions of employment"

What Happens if Board Finds Joint Employment

- If the Board determines that two employers are in fact joint employers under the NLRA, then:
  - Those employers both must participate in bargaining with a union representing workers
  - One joint employer may be subject to liability for unfair labor practices committed by the other joint employer

NLRB Rules on Dues Checkoff

- On October 3, 2022, the NLRB ruled in *Valley Hospital Medical Center, Inc.*, that:
  - "employers may not unilaterally stop union dues checkoff after a collective bargaining agreement expires"
    - A dues checkoff is an arrangement where an employer is required, if authorized by an employee, to deduct the employee's union dues from the employee's wages and submit to the union
- Before this decision, an employer was free to end this practice upon contract expiration. This was based on a 1962 decision (*Bethlehem Steel*).
- Notably, this process has faced criticism and litigation before this 2022 decision
- In sum, following contract expiration, the employer:
  - "must continue to honor a dues checkoff arrangement established in that contract until either the parties have reached a successor collective-bargaining agreement or a valid overall bargaining impasse permits unilateral action by the employer."

Union v. Non-Union Employees

- Under the NLRA , an employer and any union chosen to represent a group of employees must bargain in good faith over wages, hours, and other terms and conditions of employment.
  - This means that an employer in this context cannot make unilateral changes.
- That said, neither the union nor the employer can be compelled to agree to a proposal made by the other.
- Also under the NLRA, employers may not interfere with, restrain or coerce employees in the exercise of their rights under that law, including the right to unionize.

Union v. Non-Union Employees

- An employer has a right to treat represented and unrepresented employees differently, so long as the different treatment is not discriminatorily motivated.
- In order to determine whether an employer had an unlawful motive, the NLRB general counsel must show protected activity, the employer's knowledge of the protected activity and the employer's anti-union animus.

Distinction Between Employees and Independent Contractors

- DOL issued new proposed rules to distinguish between independent contractors and employees under the FLSA
- This matters because
  - Employees are entitled to overtime pay, minimum wage, and benefits under the FLSA
  - Independent contractors are not entitled to these benefits
- Proposed rule would replace the January 2021 test
- Proposed factors for making the determination includes:
  - Opportunity for profit or loss
  - Investments by the worker and the employer
  - Degree of permanence of the working relationship
  - Nature and degree of control
  - Extent to which work performed is an integral part of employer's business
  - Skill and initiative
    - These are proposed rules – the deadline to submit public comments is December 13, 2022

Questions?

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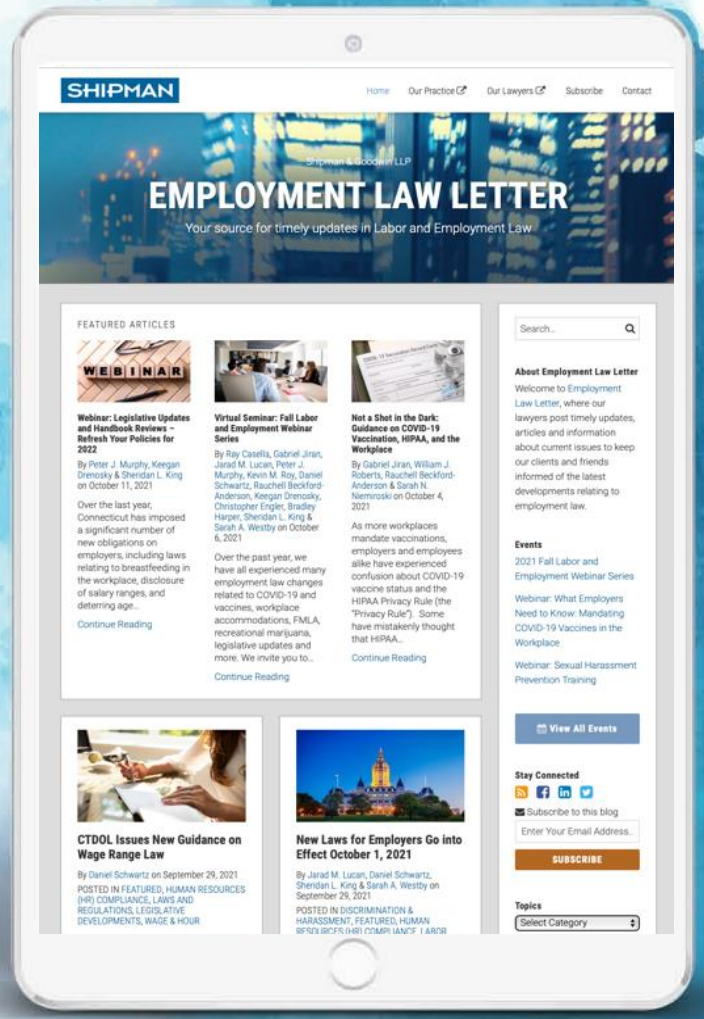
Employment LawLetter.com



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