

Three laws affecting employers in 2016

As 2016 approaches, now is as good a time as any to review three big legal developments affecting workplaces.

Recreational marijuana

No new law received more attention in 2015 than Measure 91, which legalized recreational marijuana in Oregon. Personal use and possession became legal on July 1, 2015, and medical marijuana dispensaries began selling recreational marijuana to adults 21 or older in October. On Jan. 4, 2016, the Oregon Liquor Control Commission regulations will go into effect and state taxation of recreational marijuana sales will begin. Many employers are left wondering how to respond to recreational marijuana use by employees.

Perhaps the most important fact to bear in mind is that the new law did nothing to change marijuana's classification as a



COMPLIANCE CORNER

Andrew Schpak

Schedule 1 drug in the Federal Controlled Substances Act. As a result, marijuana remains illegal under federal law and employers retain the right to prohibit marijuana use by employees.

Employers have discretion to establish drug and alcohol testing on the following grounds: 1, post-offer but pre-employment; 2, random; 3, reasonable suspicion; and/or 4, post-accident or near miss. If a company has federal contracts, the Drug-Free Workplace Act may require that it maintain a zero tolerance drug policy. Perhaps more importantly, if a company is subject to the Omnibus Transportation Employee Testing Act, it is required to not only have a policy, but also perform testing of its employees.

Some companies have adopted a more laid-back approach, opting not to test or perhaps not have a policy at all. As long as the employer is not subject to the Drug-Free Workplace Act or the Omnibus Transportation Employee Testing Act, such a choice is most likely legal, but companies must remember that failure to adopt and communicate a drug and alcohol testing policy limits their ability to require an employee to take a drug or alcohol test. In addition, an employer that knowingly allows an employee under the influence of drugs or alcohol to work may be liable for negligence and perhaps an OSHA violation if that employee injures a co-worker or customer.

Regardless of whether a company has a policy, communicating it to all employees is imperative, as is reminding employees that marijuana still qualifies as an illegal drug under federal law.

Ban the box

In 2015, Oregon passed a law that prohibits employers from screening job

applicants by asking on applications whether they have ever been arrested or convicted of a crime. Notably, this "ban the box" law does not prohibit companies from performing background checks or considering convictions when making hiring decisions. Instead, it simply prevents employers from requiring applicants to disclose criminal convictions prior to the initial interview. If the company does not perform initial interviews, it cannot require disclosure of criminal histories until a conditional offer of employment is made.

Not to be outdone, Portland passed its own "ban the box" law, which is far more restrictive. That law prohibits businesses with six or more Portland employees from inquiring about an applicant's criminal history before a conditional offer of employment is made. Whereas Oregon's law became effective on Jan. 1, 2015, Portland's will not go into effect until July 1, 2016. Portland's law also prohibits employers from considering arrests that do not lead to a conviction; expunged convictions; or, in some cases, charges that were dropped after an applicant went through a deferral program. Whereas applicants do not have a private right of action against prospective employers under the Oregon law, they do under the Portland ordinance (with a civil penalty of up to \$1,000 per violation).

Companies should review employment application forms and processes to ensure that questions regarding an applicant's criminal history are not asked until the appropriate point in the hiring process. Companies should also perform the necessary training so that the individuals responsible for application intake and interviews understand the laws regulating inquiries into criminal histories.

Paid sick leave

For requiring protected sick leave, Portland beat the state to the punch. -

Portland's law took effect on Jan. 1, 2014 and guarantees employees who work at least 240 hours in a year within the city limits at least one hour of sick time for ev-

ery 30 hours worked. For companies with six or more employees, the sick time must be paid time off.

Oregon's sick leave law will take effect on Jan. 1, 2016. The law applies to all employers who have one or more employees working anywhere in the state. It also calls for at least one hour of sick time for every 30 hours worked. Employers also are required to let employees carry over at least 40 hours of accrued but unused sick time from one year to the next. However, they can cap the accrual at 80 hours and/or not allow an employee to take more than 40 hours in a year. Also, the Oregon law requires the sick time to be paid if the company has 10 or more employees in the state.

What makes the Portland and Oregon sick leave laws so notable are the grounds on which employees can take protected leave. Qualifying grounds for protected leave under the new laws include not just any condition that would entitle an employee to protected leave under the Oregon Family Leave Act, but also: 1, time spent for diagnosis, care or treatment of a mental or physical illness, injury or health condition (including preventive medical care for oneself or a family member); 2, reasons related to domestic violence, harassment, sexual assault or stalking; or 3, a public health emergency. Companies should communicate with their human resources, benefits and payroll departments to confirm that sick leave is being tracked and accrued as required by applicable law. Companies also should ensure that managers understand the new law and the protections it affords to employees.

- Many other legal developments impact how companies must treat their employees, but these three stand out with respect to the amount of training and policy review necessary to ensure compliance.

Andrew Schpak, a partner with Barran Liebman LLP, represents and advises management in employment law matters. Contact him at 503-276-2156 or aschpak@barran.com.

O'Malley
BROTHERS
CORPORATION

503.407.3055

ATTENTION
CONTRACTORS!!!

We buy standing timber and logs from
your residential, commercial, industrial
clearing/construction projects

We also offer logging, land clearing
and hauling services