Hot Topics in Employment Law

2017 & 2018 Legislative Update

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LEGISLATIVE DEVELOPMENTS in 2017
New CT Laws

- **Pregnancy Discrimination**
  - Act takes effect on October 1, 2017
    - The Act defines “pregnancy” broadly to include “pregnancy, childbirth or a related condition, including, but not limited to, lactation.”
    - Under the Act, some discriminatory practices include:
      - Failing or refusing to make a reasonable accommodation for an employee or applicant.
      - Forcing an employee or applicant affected by pregnancy to accept a reasonable accommodation if the individual (i) does not have a known limitation related to her pregnancy or (ii) does not require a reasonable accommodation to perform the essential duties related to her employment.
      - Requiring the employee to take a leave of absence if a reasonable accommodation could be provided in lieu of such leave.
    - The Act also includes a list of reasonable accommodations, which include, but are not limited to:
      - Being permitted to sit while working
      - Longer breaks
      - Periodic rest
      - Assistance with manual labor
      - Light duty assignments
      - Time off to recover from childbirth
New CT Laws

• **Pregnancy Discrimination Cont.**
  
  • Employers must provide employees with written notice of the right to be free from discrimination related to pregnancy.
  
  • Employers can comply by updating workplace posters
    
    • Must be provided to existing employee within 120 days of 10/1/2017
    
    • New employees at commencement of employment
    
    • And within ten days of an employee notifying the employer of a pregnancy
Trending issues in workplace law

LESSONS FROM CASELAW
Pension Plans of Religious Organizations Exempt from ERISA. The Supreme Court ruled unanimously that ERISA’s “church plan” exemption applies to pension plans maintained by church-affiliated organizations such as healthcare facilities, even if the plans were not established by a church. *Advocate Health Care Network et al. v. Stapleton et al.* (June 2017).

Supreme Court Sends Transgender Student Case Back to Lower Court. Following revocation of the Obama Administration transgender guidance, the Court vacated a Circuit Court’s determination that a transgender student had shown a likelihood of success on the merits and the school district probably was violating Title IX by reserving boys’ restrooms for “biological males.” The case was remanded for consideration of the effect of the Trump Administration’s revocation of the Obama guidance. *Gloucester Cty. School Bd. v. G.G.* (March 2017).

Plaintiffs Cannot Use Voluntary-Dismissal Tactic to Appeal Adverse Ruling on Class Certification. In *Microsoft Corp. v. Baker* (June 2017), the Supreme Court ruled that plaintiffs may not voluntarily dismiss their class action lawsuit “with prejudice” in order to immediately appeal the denial of class certification, while simultaneously reserving the right to re-file their claim if the appellate court ruled in favor of certification.
U.S. Supreme Court Update

President’s Power to Make Temporary Appointments is Limited.

In a 6-2 decision, the Court held that President Obama’s nomination of former NLRB Acting General Counsel Lafe Solomon to that position violated the Federal Vacancies Reform Act of 1998. *National Labor Relations Board v. SW General, Inc., dba Southwest Ambulance* (March 2017). This calls into question the validity of any official action taken by Solomon or on his behalf during the period he served as Acting General Counsel — from January 5, 2011, to November 4, 2013.
Second Circuit Update

- **Stevens v. Rite Aid, 851 F.3d 224 (2017)**
  - Second Circuit held that administering immunizations was an essential function of a job and eliminating an essential function of the job is not a reasonable accommodation.

  - The single use of the "N" word by a supervisor to a subordinate employee could be sufficient to state a claim for a hostile environment claim.

- **Fernandez v. Zoni Language Centers, Inc., 858 F.3d 45 (2017)**
  - Court held that teachers of English as a second language working for a private, for-profit company are "bona-fide professionals" exempt from federal minimum wage and overtime rules.

  - Court rejected veterinarian plaintiff’s argument that she performed substantially equal work to her male colleagues who, unlike her, were specialists. Court rejected plaintiff’s argument that the district court should have considered “across-the-board discriminatory pay” among veterinarians.

- **NLRB v. Pier Sixty, LLC, No. 15-1841 (2d Cir. 2017)**
  - The Second Circuit found that an employee’s explicit social media post was protected, but cautioned the NLRB that it was on the outer bounds of protected speech.
Connecticut Case Law

  - Connecticut Appellate Court held that “indefinite leave” is not a reasonable accommodation.
    - The plaintiff informed her supervisor, prior to her departure, that she would be taking over 30 days leave and could not say when she would return. The employer fired plaintiff after she failed to submit information by a certain date and the court upheld the termination.

- **Amaral Brothers, Inc. v. Department of Labor,** 325 Conn. 72 (2017)
  - Tip credits
    - Directly employed delivery drivers are not subject to the minimum wage exemption because they can only earn tips for a small amount of their workday.

- **Southwest Appraisal Group v. Administrator, Unemployment Compensation Act,** 324 Conn. 822 (2017)
  - Connecticut Supreme Court held if an independent contractor only works for one company then the contractor can still be considered an independent contractor, but the court will still apply the ABC test to determine whether the person is an independent contractor or an employee.

- **Tomick v. United Parcel Services,** 324 Conn. 470 (2016)
  - Connecticut Supreme Court held that there are no punitive damages for employment discrimination claims in state court.
HOT TOPICS

Trending issues in workplace law
Medical Marijuana

  - Conditional offer of employment was rescinded when applicant tested positive for marijuana, despite the fact she had disclosed medical usage, legal under CT law.
  - Applicant claimed violation of anti-discrimination provision, “no employer may refuse to hire a person . . . solely on the basis of such person’s status as a qualifying patient.”
  - Court rejected the defendant’s arguments:
    - CT law is not preempted by federal law including the ADA
    - There is an implied private right of action
    - The law does not violate the Equal Protection Clause
Medical Marijuana

- An employee fired after she tested positive for marijuana on a test administered in the hiring process should be able to proceed with her “handicap discrimination” claim under Massachusetts’ anti-discrimination statute, the Massachusetts Supreme Judicial Court has ruled. *Barbuto v. Advantage Sales & Marketing, LLC, SJC -12226 (July 17, 2017)*. The Court’s ruling partially overturned the lower court’s decision to grant the employer’s motion to dismiss.

- Employers cannot refuse to hire a medical marijuana cardholder, even if the individual admittedly would not pass the employer’s pre-employment drug test required of all applicants, a Rhode Island state court has held under the state medical marijuana law. *Callaghan v. Darlington Fabrics Corp., et al., No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017)*. The court granted summary judgment to the plaintiff-applicant.
DACA

• Employers should be aware of the following:
  
  • Employees who currently have authorization under DACA will continue to be authorized to work based on a valid EAD.

  • Employees with DACA/EAD expiration dates before March 1, 2018 are encouraged to renew their status prior to October 5, 2017.

  • If an employer is sponsoring a DACA/EAD holder for employment-based permanent residency, they should act immediately. Be aware that employees with prior unlawful presence might require a waiver of inadmissibility.

  • Employees with DACA should be mindful of travel plans because while DHS state it will honor the validity period for previously approved applications, admitting officers at points of entry have broad discretion to deny admission.

  • DHS is only adjudicating DACA extensions and corresponding EAD requests that have been received by 10/5. Applications received between 9/5 and 10/5 will only be accepted if they are from applicants who already have valid, approved DACA/EAD status that expires between 9/5/2017 and 3/5/2018. They are rejecting DACA initial requests and associated applications for EADs.
Jury Verdict Trends

- Nationally, the highest awards from juries came when employers failed to follow their own policies and procedures
  - *Miller v. Bosman*: Verdict for $20 million in punitive damages when employer failed to follow its own internal policies regarding evaluations and complaints after an employee of 18 years received a negative performance review while on leave. (Mo. Cir. Ct., Dec. 9, 2016).

  - *Gonzalez-Bermudez v. Abbot Labs PR*: Verdict of $4.5 million when employer deviated from ordinary evaluation protocols to determine plaintiff was not meeting expectations. (D.P.R., Oct. 25, 2016).

  - *Gucker v. U.S. Steel Corp*: Verdict of $5.5 million when employer refused a medical accommodation plaintiff had received for over ten years and required plaintiff to pass a physical examination that was more strenuous than the job requirements. The $5 million in punitive damages was later reduced by statute. (W.D. Pa., Aug. 26, 2016).
Website Accessibility

Rise in lawsuits under Title III of the ADA concerning websites not being accessible to vision impaired users

- Title III requires a place of public accommodation to make “reasonable modifications” to its business policies and procedures to accommodate customers with disabilities
- How it applies to websites:
  - Courts are split on whether it only applies to businesses that have a brick-and-mortar presence or whether all websites must be compliant
  - Industries particularly at risk
    - Retail and Hospitality, including restaurants
    - Are you compliant?
2017 “Bad” Bills

SB 1/HB 6212: Paid FMLA
Would have created a costly new paid family and medical leave program in the state that would have applied to businesses with 2+ employees

SB 13/HB 6208: Minimum wage
Would have increased the minimum wage in steps to $15 per hour by 2022, then annual automatic increases thereafter
2017 “Bad” Bills

HB 6914: Minimum workweek for janitors
Would have required individuals performing janitorial service at businesses with an aggregate 100,000 square feet of office space be given a minimum 30 hour work week

HB 5210: Prohibition on salary inquiries
Would have prohibited questions about a prospective employee’s salary history until after a job offer, with salary, had been extended to the prospective employee
2017 “Bad” Bills

HB 6901: Tax on “low wage” employers
Would have imposed a $1 per hour tax on franchise businesses and businesses with 500+ employees for each employee paid less than $15 per hour

HB 6519: Prohibiting credit history checks
Would have eliminated the ability for certain nonfinancial businesses to use credit checks to screen prospective employees
2017 “Bad” Bills

HB 747: Prohibiting on-call shift scheduling
Would have required hourly employees’ schedules be posted 24 hours in advance. Any deviation from the posted schedule would have required “predictability pay”

HB 5591: Pay equity in the workforce
Initially would have required people to be paid the same for work performed under “comparable” rather than “similar” conditions?
2017 “Bad” Bills

Public Act 17-118: Makes it a discriminatory practice to fail to reasonably accommodate pregnant employees

- Beginning Oct. 1, employers must notify employees that it is a discriminatory practice to fail to make a reasonable accommodation requested by a pregnant employee unless such accommodation is an undue hardship to the company
- Can be accomplished by placing a poster in English & Spanish in the workplace
- Enforced by CHRO
Next Year “Bad” Bills?

- Expansion of FMLA (failed Democrat budget)
- Paid FMLA
- More aggressive pay equity/salary nondisclosure bill
- Modifications to pending retirement mandate
- Greater protections for employees that use medical marijuana
- Restrictions on employee scheduling
- Restrictions on use of criminal background checks
- Surcharge on unemployment taxes
2017 “Bad” Bills

2017 General Assembly
- Republicans
- Democrats
2017 “Bad” Bills

2017 Legislative Session

2018 Legislative Session
2017 “Bad” Bills

Red Ink: Connecticut’s Budget Outlook

As of 5.31.17

- Estimated spending
- Estimated revenues

Source: Office of Fiscal Analysis; Office of Policy and Management

FY 2017 $317M DEFICIT
FY 2016 $2.3B DEFICIT
FY 2019 $2.8B DEFICIT
QUESTIONS?