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TAFT-HARTLEY REPORT

Illinois' New Marijuana Law Leaves Employers Feeling Dazed and Confused

On June 25, 2019, Illinois became the 11th state to legalize recreational marijuana. The Cannabis Regulation and Tax Act ("CRTA") provides in relevant part that effective January 1, 2020, Illinois residents age 21 years or older may legally possess up to 30 grams of cannabis flower, up to 500 milligrams of THC contained in cannabis-infused products, and up to 5 grams of cannabis concentrate.

In addition to legalizing recreational marijuana, the CRTA protects employees' right to use marijuana during off-duty hours. Specifically, the law amends the Illinois Right to Privacy in the Workplace Act, which prevents employers from disciplining or discharging employees for using "lawful products" during nonworking hours. The amendment defines "lawful products" to mean products that are legal under state law, which, beginning January 1, 2020, will include marijuana. This means that an employee who lawfully uses cannabis outside of work and is not impaired by or under the influence of cannabis during working hours, should not be subject to adverse employment action. But this is where things get a little . . . hazy.

The new law provides that employers may still enforce reasonable zero tolerance or drug-free workplace policies or employment policies concerning drug testing, smoking, consumption, storage or use of cannabis in the workplace or while on call, provided that the policy is applied in a non-discriminatory manner. The use of the terms "zero tolerance" and "drug free" suggest that employers are still permitted to prohibit any use of cannabis – whether on or off duty. During the legislative debate on CRTA, the bill's sponsor acknowledged that employers would still be permitted to terminate an employee who failed a random drug test for cannabis.

Another issue that has left employers feeling a little . . . fuzzy, is how to police jobsites and workforces to ensure employees are sober on the job. Current drug tests are not accurate enough to determine if someone is actually under the influence of cannabis during working hours as opposed to having used cannabis the day or night before. Indeed, it's often cited that marijuana can appear on a drug screen up to 30 days after it has been used, depending upon different factors such as how much body fat a person has, how often it is consumed, etc. Accordingly, an employee who fails a drug test on a Monday, could easily claim that he had used marijuana the weekend before and there is really no way for employers to disprove this claim.

The law does give employers the right to consider an employee to be under the influence of cannabis if the employer has a "good-faith belief" that the employee has manifested specific, articulable symptoms that decrease or lessen the employee's job performance.

Such symptoms may include: (1) impairment of speech, physical dexterity, agility, coordination, and demeanor; (2) unusual behavior or demeanor; (3) negligence or carelessness in operating equipment or machinery; (4) disregard of the employee's own safety or the safety of others; (5) involvement in an accident that results in serious damage to equipment or property; (6) disruption of a production or manufacturing process; or (7) carelessness that results in any injury to the employee or others. If any of these symptoms are present, an employee must be given a reasonable opportunity to contest the basis of the employer's good-faith belief of impairment prior to any adverse job action.

With so much uncertainty surrounding the new law, employers and unions should consult their legal counsel to ensure their drug test policy is up-to-date and compliant with the new state law. Employers and unions may also want to consider removing marijuana from the prohibited drug list.

New Proposed Rule Scales Back Nondiscrimination Protections

On May 24, 2019, the U.S. Department of Health and Human Services ("HHS") issued a new proposed rule to revise the agency's prior interpretation of Section 1557 of the Patient Protection and Affordable Care Act ("ACA").[1] The purpose of this proposed rule is to loosen some of the nondiscrimination rules imposed on health plans by the Obama administration.

As background, Section 1557 of the ACA, adopted in 2016, generally prohibits covered entities from discriminating on the basis of race, color, national origin, age, disability or sex. Notably, the regulation also expanded the definition of discrimination on the basis of sex to include discrimination based on gender identity and termination of pregnancy.[2] In addition to expanding the definition of discrimination, the regulation also put in place new notification rules. Specifically, it requires covered entities to inform participants of its compliance with Section 1557 through notices containing general statements that the entity provides auxiliary aids and language assistance to help individuals with disabilities or limited English. Covered entities must also provide "taglines" or short statements translated in the top 15 languages spoken in the relevant state on its significant plan notifications.[3] Critics of this rule have stated that it is unduly burdensome for health plans to maintain compliance.

The proposed rule, which if finalized, would scale back many of the requirements of the 2016 rule. First, the new proposal notes that the 2016 rule exceeded HHS's authority by expanding the definition of discrimination based on sex to include gender identity and termination of pregnancy. HHS states that Section 1557 adopted erroneous interpretations of civil rights laws which led to confusion and unjustified litigation costs. The proposed rule would eliminate specific nondiscrimination protections based on sex, gender identity and termination of pregnancy.

Second, the proposed rules would revise the scope of HHS's enforcement of Section 1557. The 2016 rule currently states that it applies to all operations of an entity, even if it is not principally engaged in healthcare. The proposed rule would, instead, apply Section 1557 to the healthcare activities of entities not principally engaged in healthcare only to the extent they are funded by HHS.[4] As a result, the proposed rules would be inapplicable to most self-insured plans.[5]

Finally, the proposed rule would also remove costly and unnecessary regulatory burdens by eliminated the 2016 rule's notification requirements. According to HHS, these communications have cost the healthcare industry billions of dollars, a cost which it claims is ultimately passed on to consumers and patients.

HHS is accepting comments on the proposed rule until August 13, 2019. HHS then must consider and respond to those comments and issue a final rule. In the meantime, the 2016 regulation remains in effect. If you have questions about the 2016 rule or new proposed rule, please contact our office.

Revisiting the Expanding Apprenticeships in America Initiative: Impact on the Construction Industry

President Trump's *Expanding Apprenticeships in America* initiative, which was first announced on June 15, 2017, continues to move forward. On June 24, 2019, the U.S. Department of Labor ("DOL")

[1] Keith, Katie. *HHS Proposes to Strip Gender Identity, Language Access Protections from ACA Anti-Discrimination Rule*. Health Affairs. May 25, 2019.

[2] Bulot Malerie and Damian Myers. *HHS Proposes to Narrow Scope of Nondiscrimination Regulations under Affordable Care Act. Proskauer*. June 14, 2019.

[3] *Id.*

[4] Fact Sheet: HHS Proposed to Revise ACA Section 1557 Rule. HHS.gov. May 24, 2019.

[5] Bulot at 1.

issued a Notice of Proposed Rulemaking ("NPRM") and announced that it is awarding grants totaling $183.8 million to support Industry-Recognized Apprenticeship Programs ("IRAPs"). The DOL also announced that it will make an additional $100 million in grant funds available through the Apprenticeships: Closing the Skills Gap program.

According to the DOL, the NPRM[6] reflects key recommendations contained in the final report of the Task Force on Apprenticeship Expansion. The proposed rule provides that entities such as trade, industry, employer groups or associations, educational institutions, state and local government entities, non-profits, and labor unions or groups comprised of these entities would be eligible to become a Standards Recognition Entity ("SRE"). As an SRE, the entity or group would be recognized by the DOL and set the standards for curricula, training and structure for IRAPs in their industry. The SREs, which would be subject to DOL oversight, would be required to show that they have both the ability and quality-assurance processes and procedures necessary to monitor IRAPs.

The proposed rule also addresses an important issue for the construction industry, which is currently served by Registered Apprenticeship programs. The DOL proposes to only recognize SREs that seek to recognize Industry Programs in sectors without significant registered apprenticeship opportunities. Registered Apprenticeship opportunities would be deemed significant in sectors that have more than twenty-five percent (25%) of all federal registered apprentices per year on average over the prior 5-year period, or that have had more than 100,000 federal registered apprentices per year on average over the prior 5-year period. The calculations would be based on the North American Industry Classification System ("NAICS") codes assigned to each registered program. Under the proposed rule, the construction industry would be exempt, at least initially, from participating in IRAPs.[7]

This exemption, while temporary, should alleviate a serious concern of the building trades unions, who would like to see the exemption from IRAP made permanent for the construction sector. The National Electrical Contractors Association, the Sheet Metal & Air Conditioning Contractors' National Association, and the Association of Union Constructors also support the exemption.[8] On the other hand, some contractor groups, such as the Associated General Contractors of American and Associated Builders and Contractors, want to see the construction industry included in the program. The legislative director for the Associated Builders and Contractors previously stated, "[w]e are advocating for all industries to be included."[9] The president and CEO of the Associated General Contractors of America stated, "[w]hile there are multiple paths into the industry, the fact is that it remains too difficult for many firms and their partners to establish apprenticeship programs for construction workers."[10]

The DOL previously stated that both construction and the U.S. Military would be excluded from IRAP; yet, whether the IRAP exemption for the construction industry will be made permanent remains up in the air. The departure of Secretary Alexander Acosta may impact this decision, as Acosta was said to have sided with the building trades unions on this issue.[11]

The 60-day public comment period on the proposed rule closes on August 26, 2019.

National Labor Relations Board Revisits "Concerted Activity"

The National Labor Relations Act ("NLRA") was enacted by Congress in 1935 in an effort to protect the rights of workers and encourage collective bargaining, while also providing for certain restrictions on employer and management practices, which can harm the general welfare of workers, businesses, and the general U.S. economy. Specifically, one of the protections the NLRA provides to employees is the right to engage in concerted activities for the purpose of mutual aid and protection.[12] Simply put, employees have the right to act in collaboration with co-workers to address labor-related issues,

[6] 84 FR 29970.

[7] According to DOL's calculations, the Construction Industry has had approximately 48% of all federally registered apprentices on average over the prior 5-year period and averaged roughly 144,000 federally registered apprentices per year. Construction had 166,629 active apprentices in 2018.

[8] Tom Ichniowski. *Contractors, Unions Split Over Proposed New Apprenticeship Rule.* Engineering News-Record. June 26, 2019. https://www.enr.com/articles/47139-contractors-unions-split-over-proposed-rule-for-apprenticeship-programs.

[9] *Id.*

[10] *Id.*

[11] Penn, Ben and Diaz, Jaclyn. *Industry Would Govern Apprenticeships in Labor Department Plan*. May 31, 2019. Bloomberg Law. https://news.bloomberglaw.com/construction-labor/industry-would-govern-apprenticeships-in-labor-department-plan.

[12] NLRA Section 7.

including discussing work conditions and wages and benefits with your co-workers, circulating petitions for various ends, participating in a concerted refusal to work in unsafe conditions, or even speaking directly to the media about labor-related problems in the workplace.

Prior to 2016, the National Labor Relations Board ("Board") expanded the scope of protected concerted activity to include most complaints an individual employee made about labor-related activities. The reasoning behind the expansion being that those comments could be in preparation for or induce co-workers to take part in concerted group action. However, in a recent decision, the Board revisited its determinations and narrowed the circumstances under which a complaint made by a single employee is considered protected concerted activity. In *Alstate Maintenance*[13], the Board held that an employee's complaint about the possibility of not receiving a tip from a customer was not protected. In the decision, the Board questioned previous decisions that provide protection to "inherently concerted" individual comments, even if those comments are simply concerning every-day workplace encounters and not job conditions. Effectively, the Board reversed its stance that employee complaints about a customer made in public is not considered protected under the NLRA.

The decision in *Alstate Maintenance* was followed shortly thereafter by another decision that peeled back the Board's previously expansive definition of protected concerted activity. In *Quicken Loans*, the Board was presented with a situation in which an employee who, after listening to his coworker complain about a customer in a public restroom and empathized with him by stating "I understand why you're frustrated," was terminated by his employer.[14] The Board held the conduct (i.e. empathizing with his co-worker's complaints and frustrations) was not protected concerted activity and dismissed the complaint against the employer. The Board reasoned that because the employee did nothing other than listen to a co-worker's personal complaints and express empathy, and the employee's conduct was not aimed at or directed to any of the employer's labor policies, the conduct was not concerted.

The rulings in *Alstate Maintenance* and *Quicken Loans* demonstrate the Board's willingness to peel back the expansive reading of Section 7 of the NLRA. Specifically, the Board appears to have a desire to return to a more "literal" reading of the NLRA and differentiate between comments actually connected to labor activity – such as "I cannot believe our boss is making us work late" – and comments that are simple complaints related to the workplace – such as "I hate that customer – he never tips me."

Although certain activities will always remain protected, individual workers and employees should be aware that comments or complaints made in public concerning an encounter with a customer may no longer be afforded protection. Employers should note that these decisions will have little effect on your daily operations. If you have any questions on protected concerted activity or the effects these rulings may have, please contact our office.

Associated Health Plans are Struck Down by District Court

As discussed in detail in J&K's October 2018 newsletter, the U.S. Department of Labor ("DOL") released its Final Rule on Associated Health Plans ("AHPs") in June 2018. As a quick reminder, the Final Rule expands access to affordable health coverage options for small businesses and their employees by allowing small businesses to group together by geography or industry to obtain coverage as if they were a single employer. The Final Rule broadened the definition of "employer" under the Employee Retirement Income Security Act of 1974 ("ERISA") by widening the pool of employers who are permitted to come together and sponsor group health coverage.

As discussed in J&K's January 2019 newsletter, the DOL's Final Rule on AHPs is facing opposition, which was made clear when eleven (11) state attorneys general and the District of Columbia filed a lawsuit challenging the DOL's Final Rule in the U.S. District Court for the District of Columbia. The lawsuit argues that the Final Rule is nothing more than an attempt to undermine and dismantle the Affordable Care Act ("ACA") by manipulating ERISA to shift a larger number of small employers into the large group insurance market where the ACA's core protections do not apply. And it appears the U.S. District Court for the District Court of Columbia agrees.

On March 28, 2019, U.S. District Judge John Bates of the District of Columbia ruled against President Trump's newly established AHPs. Judge Bates concluded that President Trump's newly established AHPs are in violation of both ERISA and the ACA.[15]

[13] *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019).

[14] *Quicken Loans, Inc.*, 367 NLRB No. 112 (Apr. 10, 2019).

[15] *New York, et al. v. U.S. Department of Labor, et al*, (D.D.C. Mar. 28, 2019).

As to ERISA, Judge Bates explained that "the Final Rule scraps ERISA's careful statutory scheme and its focus on employee benefit plans arising from employment relationships" by redefining the definition of "employer" to form unlawful relationships under ERISA "between unrelated parties."[16]

As to the ACA, Judge Bates' opined that "the Final Rule is clearly an end-run around the ACA."[17] He explained that "indeed, as the President directed, and the Secretary of Labor confirmed, the Final Rule was designed to expand access to AHPs in order to avoid the most stringiest requirements of the ACA."[18]

At the time of Judge Bates decision in March, the Justice Department provided that it "was considering all available options" before responding to the ruling.[19] Subsequently, on April 26, 2019, the Justice Department filed its notice to appeal Judge Bates' ruling. Accordingly, the appeal is pending.

As to the AHPs already created pursuant to the Final Rule, the DOL announced on April 29, 2019 that it will not enforce "potential violations stemming from actions taken before the district court's decision in good faith reliance on the AHP rule's validity, as long as parties meet their responsibilities … to pay health benefit claims as promised."[20] The DOL will also not take "action against existing AHPs for continuing to provide benefits to members who enrolled in good faith reliance on the AHP rule's validity before the district court's order, through the remainder of the applicable plan year or contract term."[21] In short, it appears that existing AHPs before Judge Bates' opinion will be able to continue through the applicable year or contract term without facing any violations from the DOL.

Our office will continue to monitor this matter and its outcome. If you have any questions, please feel free to contact our office.

Johnson & Krol Obtains $2.5 Million Dollar Judgment After Employer's Attorney Commits Fraud

In July 2019, Johnson & Krol ("J&K") obtained a Judgment in the amount of $2,547,720.44 against Commercial Cooling and Heating, Inc. and its owner Jeannie Anderson (the "Defendants") after their attorney's fraud lead to the Court entering an Order of Default against them. By way of background, J&K filed a Complaint against the Defendants for owed contributions, liquidated damages, interest and attorneys' fees. The Court set August 16, 2018 as the date Defendants' Answer or responsive pleading was due. The Defendants failed to file an Answer or responsive pleading by the deadline. As a result, J&K filed a Motion for Default Judgment. Thereafter, the Defendants' attorney filed an Answer and Response to the Motion for Default Judgment alleging that his office did in fact file an Answer by the deadline, which included a screenshot that allegedly supported this fact. J&K noticed some abnormalities concerning the alleged screenshot, which suggested it was fraudulently manipulated to make it appear that the Defendants' complied with the deadline.

J&K raised these concerns with the Court, and the Court held a day-long hearing on whether or not the screenshot was authentic. During the hearing, the Court heard testimony from the Administrator of the Federal Court electronic filing system. He testified that it was impossible Defendants' attorney actually filed the Defendants' Answer by the deadline. In addition, he stated that he believed the screenshot which Defendants' attorney alleged proved that his office filed the Answer by the deadline was doctored. In May 2019, the Court entered a Memorandum, Opinion and Order in which it agreed with J&K. Specifically, the Court held there was absolutely no doubt that Defendants' attorney and his staff fraudulently doctored the alleged screenshot to make it appear as if they had filed the Answer on a date they actually didn't. As a result, the Court sanctioned the Defendants' attorney as well as entered an Order of Default against the Defendants. The Court specifically held that a client can be held responsible for their lawyer's misconduct.

After an additional hearing, the Court entered a Judgment against the Defendants in the amount of $2,547,720.44 for all amounts sought by J&K. In addition, the Indiana State Bar Association is currently investigating the attorney's actions in this matter.

[16] *Id*. at 2-3.

[17] *Id*. at 2.

[18] *Id*. at 2.

[19] Erik Larsen and John Tozzi, *Trump's Group Health Plan Rules stuck Down as ACA "End-Run*," Bloomberg Law, March 28, 2019, updated March 29, 2019, https://www.bloomberg.com/news/articles/2019-03-28/trump-s-group-health-plan-rules-struck-down-as-aca-end-run.

[20] *U.S. Department of Labor Statement Relating to the U.S. District Court Ruling in State of New York v. United States Department of Labor*, DOL.gov, Aug. 23, 2019.

[21] *Id*.

Supreme Court to Decide Whether Plan Participants Can Sue Fiduciaries Absent Financial Harm

The Supreme Court accepted an Employee Retirement Income Security Act ("ERISA") case at the end of the June term that will determine whether pension plan participants can sue plan fiduciaries for mismanagement if they have not experienced financial harm. In *Thole v. U.S. Bank*, the U.S. Bancorp Pension Plan participants filed suit in 2013 claiming that plan fiduciaries breached their fiduciary duties, which caused $750 million in losses to the Plan. In response to the lawsuit, U.S. Bank replaced all of the claimed losses, which caused the plan to be overfunded. This replenishment caused a district court to dismiss the case, which was subsequently affirmed by the 8th U.S. Circuit Court of Appeals. The court's reasoning was that participants did not have standing to assert a breach of fiduciary duty because the participants had not suffered any individual financial harm after the plan assets were replenished.

Following the dismissal, the plaintiffs asked the Supreme Court to review the 8th Circuit's decision, and the U.S. solicitor general's office urged taking the case on the question of whether plaintiffs have standing to sue without a monetary loss and to resolve disagreement on that question in the federal circuit courts. In its petition for Writ of Certiorari to the Supreme Court, Plaintiff states that the plan had $2.8 billion in assets as of 2007, but that changed when plan fiduciaries invested all plan assets in high-risk equities, including 40% of plan assets in a proprietary mutual fund, in violation of prohibited-transaction rules. The market crash of 2008 caused the plan to lose $1.1 billion, which the plaintiffs claim was $748 million more than a diversified portfolio would have lost and caused a once-overfunded plan to drop to 84% funded. In its response to the court, U.S. Bank countered that as a result of its replenishment of the losses the plan is 115.3% funded, with enough liquid assets to meet pension obligations "many times over."

It remains to be seen whether U.S. Bank's "no harm no foul" approach prevails. But either way, the result could redefine the way fiduciaries handle plan assets and deal with breaches of fiduciary duty.

Johnson & Krol Welcomes New Paralegal

Rory M. Koenig

Paralegal

Education

Bachelor of Science (Economics) (2019)
University of Wisconsin-Madison

Rory joined Johnson & Krol in August of 2019 and is an aspiring attorney. Rory interned with the Brent Community Law Centre, while studying abroad in London. Rory was the Executive Social Chairman of the Theta Chi Fraternity, Psi Chapter, Madison, WI and a Member of Phi Alpha Delta Pre-Law Chapter, Madison, WI.

William P. Callinan Presents on Harassment in the Workplace

William P. Callinan

Member

Education

Juris Doctor (2007)
Michigan State College of Law, Magna Cum Laude

Bachelor of Arts (Political Science) (2003)
Minnesota State University, Magna Cum Laude

Over the past few years, serious issues and allegations have arisen regarding harassment in the workplace and improper management of these complaints by employers and supervisors. Complaints of harassment in the workplace should not be taken lightly. Employers, unions, and funds should ensure that adequate training is available to their employees and apprentices so that they understand the nature of harassment in the workplace and how to address it.

William P. Callinan, Member of J&K, has presented to a majority of J&K's clients and associations. Mr. Callinan's presentation focuses on understanding the state and federal regulations against harassment. If you would like for Mr. Callinan to present on this topic, please contact our office.

International Foundation of Employee Benefit Plans

65th Annual Employee Benefits Conference
San Diego, CA
October 20 – 23, 2019

Guest Speaker
Dennis R. Johnson, Managing Partner

TMP Advanced Leadership Summit

Sunday, October 20th
8:00 AM-3:00 PM

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Dennis R. Johnson

Managing Member
Johnson & Krol, LLC
Chicago, IL

Guest Speaker

IFEBP Construction Benefits Conference

September 23-24, 2019
Boston, MA

Fund Mergers – Nuts and Bolts(Part 1)

Given the trend of consolidations that have occurred in recent years, it is important to understand the basics of fund mergers. Look at the challenges of combining funds and how to move beyond the internal politics in a session that will provide information on how to implement smooth merger process should you face one in the future.

Tuesday, September 24
9:30am – 10:45am

Fund Mergers – Case Study (Part 2)

Knowing the basics of fund mergers is one thing, seeing how they work in action is another. In this session, we will dive into the specifics of fund mergers with a case study that serves as a lesson in what happens when basic knowledge is put to the test.

Tuesday, September 24
11:00am – 12:15pm

We encourage you to contact
JOHNSON & KROL, LLC
If you have any questions regarding the content within this newsletter.
(312) 372-8587 johnsonkrol.com