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Is Your Company Ready for Your Employees Using Marijuana and Other New Illinois and Federal Laws for 2020?

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Executive Summary

On October 23, 2019, Masuda, Funai, Eifert & Mitchell, Ltd.'s Employment, Labor & Benefits Practice Group presented a webinar on the new regulations by the U. S. Department of Labor regarding the new salary level threshold for exempt employees and the new laws in Illinois regarding recreational marijuana and harassment. All employers are impacted and need to update their policies, practices and training programs to ensure compliance with these state laws and federal regulations. Masuda Funai provides training programs in compliance with these laws.

The year 2019 will end with human resource professionals very busy learning and implementing a number of new laws and regulations in Illinois as well as throughout the country. They should be planning training programs on harassment and drug use, revising their employment policies on harassment and drug testing, and making sure that they prevent employees from suing for unpaid overtime. In Illinois, the state legislature enacted and Governor JB Pritzker signed the Cannabis Regulations and Tax Act as well as the Workplace Transparency Act. The U.S. Department of Labor issued regulations increasing the threshold that salary exempt employees must earn.

1. Marijuana in the Workplace

First, Illinois has now legalized the use of recreational marijuana. Illinois's law states that employers may adopt a reasonable zero tolerance or drug free workplace policy and policies concerning drug testing, smoking, consumption, storage and use of marijuana in the workplace. In addition, Illinois's law allows employers to prohibit employees from being impaired by cannabis in the employer's workplace or while performing the employee's job duties. The law sets forth standards for determining if an employee is impaired by cannabis, requiring a good faith belief that an employee is under the influence by manifesting specific, articulable symptoms. Employees must have a reasonable opportunity to contest the basis of such a determination. Importantly, although the Illinois legislature amended the Workplace Privacy Act, the amendment creates

confusion and different opinions about whether employers may conduct pre-job and random testing for cannabis. The Illinois Right to Privacy in the Workplace Act protects employees who use lawful products, which are legal under state law, such as cannabis. However, the same Act states that employers may prohibit employees from using and being under the influence of cannabis during working time.

In response, we recommend that employers update their policies regarding the use and possession of marijuana during working time and on the employer's property. In addition, employers need to create and implement policies regarding the testing of employees who appear impaired. Supervisors need to be trained on how to determine whether an employee is impaired and when testing is proper. We also recommend that employers consider whether to continue testing applicants and conducting random testing for cannabis use.

2. New Sexual Harassment Training and Policies

Second, the Illinois Workplace Transparency Act defines harassment and discrimination as both actual and perceived, applies the Illinois Human Rights Act to conduct both at and away from the employer's facility, and protects both employees and non-employees such as contractors. Employment, arbitration and severance agreements including certain types of confidentiality provisions must include special language about employees' rights before agreeing to such provisions. Illinois also now requires every employer to provide annual training to all managers and employees, and all employers must report – annually – the number of adverse judgments and administrative rulings of sexual harassment and discrimination. The Illinois Department of Human Rights may fine employers who fail to provide training or file the reports.

In response, employers should update their anti-discrimination and anti-harassment policies and procedures, and review and revise their employment, arbitration and severance agreements. Employers must provide training once each year to every manager and employee. Although the statute states that the Department of Human Rights will publish a model training program, the Department has recently stated that it will not publish its model program until the middle of 2020. Therefore, we recommend that employers should include the statutory requirements as some, but not all, of the content of an anti-harassment program. For example, although the statute is focused on sexual harassment, a program that will satisfy the federal Equal Employment Opportunity Commission and other states' fair employment practices agencies will include content about other types of harassment, implicit bias and bullying. In addition, we recommend a separate program for supervisors, because they have special obligations to report, assist in investigations and create, decide and implement decisions to ensure that harassing behavior does not reoccur. Finally, all employers must prepare to report to the Department information about administrative rulings and adverse judgments by July 1. Practitioners are waiting for the Department to provide guidance on how and to whom these reports should be made.

3. Preventing Law Suits for Unpaid Overtime

Third, the U.S. Department of Labor issued new regulations under the federal Fair Labor Standards Act. Beginning on January 1, 2020, employers may classify certain employees as exempt and not entitled to overtime pay, if those employees earn a predetermined, weekly salary of $684.00, annualized to $35,568. This is an increase from the current salary level of $455/week or $23,660/year. The new regulation applies to executive, administrative and professional employees only. An employer may reach the threshold by paying a

salary less than $35,568, if the employer also pays the employee a non-discretionary bonus or an incentive payment of at least 10% of the threshold. Failure to meet the new threshold allows the employee to claim unpaid overtime compensation. In addition, highly compensated employees may be considered exempt if they perform one of the tasks under the Department's duties test and earn a certain threshold amount. In the new regulations, the Department raised that threshold from $100,000 to $107,432.

As a result, every employer needs to examine those employees who are earning a salary less than $684/week or $35,568/year. The examination should begin with collating and analyzing the employer's organizational chart and the employees' job descriptions. The examination continues with the employer determining if, in fact, these employees are performing the duties of a professional, executive or administrative employee. If they are not performing these duties, they are not exempt and entitled to overtime wages. These employers should keep track of the hours they work, pay them overtime wages for overtime hours, or do not assign them to work overtime hours. If these employees do perform the duties of a professional, executive or administrative employee, and if the employer wants to categorize them as exempt and not pay them overtime wages, the employer needs to increase their salaries to either $684/week or a lesser amount and make up the difference with a predetermined, guaranteed bonus or commission. When implementing these changes, employers need to consider and plan for the reactions of the employees and the impact of raising salaries will have on the employer's salary structure.

We recommend that every employer contact their relationship and employment lawyers to provide required training courses, to change policies and to analyze its employees' duties and salaries to prevent lawsuits for unpaid overtime. Since these laws go into effect on January 1, 2020, the time to act is now.