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By: Frank J. Del Barto

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SALARIED NON-EXEMPT EMPLOYEES CAN CREATE RISK

By Frank Del Barto

Recently, the U.S. Department of Labor's ("DOL") Wage and Hour Division announced that it reached a settlement agreement with the owners of six gas stations.

As part of the settlement, the two owners agreed to pay almost $500,000 in back wages and damages to 27 employees. The DOL's investigation concluded that the owners violated the Fair Labor Standards Act's overtime, minimum wage, and recordkeeping requirements. In this case, although the affected employees worked about 70 hours per week, the owners paid these non-exempt employees a flat monthly salary of between $2,200 and $2,400 per week without regard to minimum wage and overtime requirements.

Although it is permissible for employers to pay non-exempt employees a salary, it is very important for such employers to ensure that salaried non-exempt employees are still (1) tracking and reporting their hours worked on a weekly basis, and (2) receiving overtime pay if they work more than 40 hours per workweek. Unfortunately, many employers still believe that simply by paying non-exempt employees a salary, they can avoid the "inconveniences" associated with the required recordkeeping and overtime pay requirements.

To reduce exposure, employers should review each position on their organizational chart to ensure that the position is properly classified as "exempt" or "non-exempt" from the FLSA's overtime pay requirements and that all hours worked are being recorded for every non-exempt position regardless of whether the employee is paid based on an hourly rate of pay or salary basis. As you might imagine, when employees allege that they are owed overtime pay for working more than 40 hours per workweek, they often allege having worked 50, 60 or 70 hours per workweek.

Should you have questions about minimum wage, overtime or record-keeping requirements, please call your relationship attorney.

IS YOUR COMPANY OPEN TO A DISCRIMINATION LAWSUIT FOR ENFORCING ITS DRUG-FREE WORKPLACE POLICY?

By Yulia Chembulatova

Pre-employment drug tests have become the norm in the modern day hiring process. But what if a prospective hire tells you he uses medical marijuana? What if it is one of your long-term employees?

With conflicting state and federal laws, deciding how to address an employee's reported use of medical marijuana may be a tricky landscape. Marijuana use is still illegal at the federal level. However, a total of 29 states, District of Columbia, Puerto Rico and Guam have enacted comprehensive medical marijuana programs, and 17 other states allow for the use of low THC products in limited circumstances. While the majority of states merely decriminalized the use of medical marijuana, some states, including Illinois, offer additional protections against discrimination based on the use of medical marijuana. As the cases are making their way through the court system, the legal landscape continues to change. Unfortunately, there is no uniformity among the courts in addressing this issue.

Several states, including California (Shepherd v. Kohl's Dep't Stores), Colorado (Brandon Coats v. Dish Network LLC), Montana (Johnson v. Columbia Falls Aluminum Co.), New Mexico (Garcia v. Tractor Supply Co.), Oregon (Emerald Steel Fabricators, Inc, v. Bureau of Labor & Indus.), and Washington (Roe v. TeleTech Customer Care Mgmt.), declined to extend protections for claims of wrongful termination and discrimination. The courts concluded that the law did not allow additional protections in an employment context. Particular emphasis was placed on the at-will nature of the employment relationship. It is important to note here that the termination in these cases was based on a failed drug test and not on an underlying medical condition.

A different outcome was reached in states with specific anti-discrimination provisions for medical marijuana. These states, which include Connecticut (Noffsinger v. SSC Niantic Operating Co. LLC), Massachusetts (Barbuto v. Advantage Sales and Marketing, LLC), Michigan (EEOC v. Pines of Clarkston, Inc.), and Rhode Island (Callaghan v. Darlington Fabrics Corp.), now allow private cause of action for discrimination and failure to identify a reasonable accommodation for the use of medical marijuana. The courts in these states equated medical marijuana to the use of medication, which requires a reasonable accommodation from the employer.

Illinois courts have yet to address the issue. However, the Illinois Compassionate Use of Medical Cannabis Pilot Program Act explicitly allows employers to enforce a zero-tolerance policy, provided such policy is applied in a nondiscriminatory manner. The Act further allows employers to take action based on a good faith belief that the employee used marijuana on the premises or during work hours or the employee was impaired during work hours. Until Illinois courts interpret this new law, however, employers should be aware of the potential for discrimination lawsuits.

As the law continues to evolve, employers should be mindful of potential legal ramifications for enforcing zero-tolerance and drug-free workplace policy. With varying outcomes among the states, termination for the use of medical marijuana needs to be a case specific inquiry. When deciding on the best course of action, employers should never make a decision based on the protected medical condition, but rather should consider company policies, employee's job duties, and possible reasonable accommodations. However, employers are generally not required to provide accommodation where it would cause undue hardship, especially if continued use of medical marijuana would impair employee's performance on the job or pose safety risks.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at fdelbarto@masudafunai.com.