

HOT TOPICS IN EMPLOYMENT LAW 2017

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HOT TOPICS

- Status of DOL Overtime Rule and Misclassification Initiative
- IRCA and New Form I-9
- Safe and Sick Leave Ordinances
- Drug Testing and Medical Marijuana
- LGBTQ Enforcement

HOT TOPICS - continued

- Service Animals in the Workplace
- Wearable Devices
- Wellness Plans

DOL OVERTIME RULE - STATUS

- DOL Final Overtime Rule enjoined by Texas court in November
- DOL appealed ruling prior to new administration
- DOL now unlikely to defend rule in court
- Overtime rates could change in future
- Dilemma for employers who changed pay in anticipation of new rules

DOL MISCLASSIFICATION INITIATIVE

- Has not been withdrawn
- MOU with several states, so enforcement still possible on state level
- Prudent to continue to review exempt/non-exempt status and independent contractor relationships

Immigration Reform and Control Act of 1986

IRCA

EMPLOYERS ARE REQUIRED TO:

- Verify the **identity** and **employment authorization** documents of all employees hired after November 6, 1986
- **Complete** and **Retain** a Form I-9 for each employee hired after November 6, 1986
- **Refrain from discriminating** against individuals on the basis of actual or perceived national origin, citizenship or immigration status.

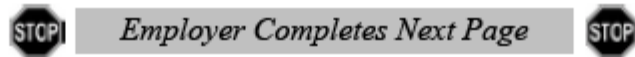
Form I-9

Employment Eligibility Verification

- Those who may legally work in the US are:
 - Citizens of the United States
 - Noncitizen nationals of the United States
 - Lawful Permanent Residents
 - Aliens authorized to work
- It is unlawful for an employer to hire any person, citizen or foreign national, without first verifying the person's authorization to work in the United States, and are subject to sanctions for failure to complete a Form I-9. INA §274a9A)(1)(B)

New Form I-9

- Must always use the most current version.
- Current Form I-9 has a revision date of Nov. 14, 2016
- Check the lower left corner of the form



Form I-9 11/14/2016 N

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- **AFTER 1/21/2017 ONLY THE NEW FORM I-9 MUST BE USED!**

What's New?

- The FORM expanded from 2-pages to 3-pages
- 15 pages of instructions (separate)
- Paper copy and an interactive PDF on computer
- Drop-down lists; additional instruction with the click of question mark symbol, drop-down lists, form will automatically populate certain fields, One click access to electronic instructions, printing or clearing populated fields.
- **Higher civil money penalties** of up to \$2,156 per I-9, and, in some cases, criminal penalties.

USCIS New Forms and Fees

- USCIS will no longer accept previous editions AFTER 2/21
- Download and submit the new versions, updated with the new fees and the revised edition date of "12/23/16."
- Complete list of the new fees is at uscis.gov/forms/our-fees. If correct fee is not included, the agency will reject and return the filing.
- Updated forms are available at uscis.gov/forms. Paper copies can be obtained through the forms request line (800-870-3676).

SICK and SAFE LEAVE ORDINANCES

- Effective July 2017
- Mandates paid sick leave accrual up to 48 hour cap
- Permits use for sick family members, domestic abuse or assault, daycare closures, etc.
- Requires employer recordkeeping
- Adopted in Minneapolis, St. Paul, explored in Duluth, Mankato, Rochester, Winona

SAFE AND SICK LEAVE – State law

- Minnesota SF580 (Companion bill HF600) would **prohibit** local regulation of businesses by setting statewide standards for the minimum wage, paid or unpaid leave, scheduling requirements, and benefit mandates.
- Would apply retroactively to local policies enacted on or after January 1, 2016.

MEDICAL MARIJUANA

- 28 States (including Minnesota) approve medical use of marijuana
- CA, MA, NV, ME legalized recreational use
- Off-duty protection?
 - Not yet
- ADA accommodation for medical use?
 - Not yet

MEDICAL MARIJUANA

- Minnesota Statutes 152.22-152.37
- Unless a failure to do so would violate federal law or regulations, an **employer may not discriminate** against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

MEDICAL MARIJUANA - Minnesota

- 1) the employee is enrolled in the registry program;
or
- (2) the employee tested positive for cannabis on a drug test, **unless the employee used, possessed, or was impaired by** medical cannabis on the premises of the place of employment or during the hours of employment.

MEDICAL MARIJUANA

- It is still permissible for an employer to have a zero-tolerance drug testing program in Minnesota
- It is still possible for an employer to discipline or discharge an employee for being under the influence of marijuana at work
- Federal law still considers marijuana an illegal controlled substance

LGBTQ Enforcement

- EEOC determined that gender identity was protected under Title VII and made it an enforcement priority in 2006
- Several Circuit courts disagreed.
- Under new attorney general will LGBTQ rights be an enforcement priority?

LGBTQ Enforcement

- EEOC filed appeal in transgender bias case (*EEOC v. R.G. & G. R. Harris Funeral Homes Inc.*) of an adverse district court decision in a case that it had pursued on behalf of a transgender funeral home director who was fired because she would not conform to the employer's sex-specific dress code in Michigan.

LGBTQ Enforcement

- EEOC filed its opening appellate brief in the case on February 10, making it clear that the EEOC planned to pursue enforcement.
- Employer's defense rests on the Religious Freedom Restoration Act's exemption from Title VII

LGBTQ Enforcement

- Although the EEOC has filed a brief in this case, its position may change once the EEOC's new General Counsel is confirmed.
- In the hands of Attorney General Jeff Sessions to decide whether the government would ultimately pursue Supreme Court review.

SERVICE ANIMALS IN THE WORKPLACE

- “Service animal” is defined under Title III (Public Accommodations) of ADA as “**dog** that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual’s disability.”
- ADA protects right to have service animal in public place.
- No definition of service animal under Title I (Employment)

THERAPY AND COMPANION ANIMALS

- Not limited to working with people who have disabilities.
- Federal laws have no provisions for people to be accompanied by therapy animals in places of public accommodation that have "no pets" policies.
- Therapy animals usually are not service animals.
- Social/therapy animals have no legal definition. These animals might or might not meet the definition of service animals.

SERVICE ANIMAL IN WORKPLACE

- Title I of ADA does not require employers to automatically allow employees to bring their service animals to work. Allowing a service animal into the workplace is a form of reasonable accommodation.
- Employers must consider allowing an employee with a disability to use a service animal at work unless doing so would result in an undue hardship.
- The ADA allows employers to choose among effective accommodations, e.g. work from home.

BRING YOUR PET TO WORK?

- Because there is not a specific definition of service animal under Title I, employers may have to consider allowing an employee to bring in an animal that does not meet the Title III definition of service animal, such as a therapy or emotional support animal.
- Employers do not have to allow an employee to bring an animal into the workplace if it is not needed because of a disability or if it disrupts the workplace.

DOCUMENTATION OF NEED

- When an employee with a disability requests to use a service animal at work, the employer has the right to request documentation of the need for the service animal, that the service animal is trained, and that the service animal will not disrupt the workplace.
- Aversion or allergy to service animal not sufficient reason to deny use of service animal at work

WEARABLE DEVICES

- What are they?
 - Fitbits, Apple watches, iPhone Apps, GPS trackers
- Why do employers use them?
 - Measure productivity, working time
 - Monitor health and safety data

WEARABLE DEVICES

- Legal pitfalls
 - Privacy – ability of user to disconnect
 - Discrimination based on acquired data
 - Duty/obligation to share data with the subject
 - Opt in or mandatory
 - Ownership of device
 - Informed consent

WEARABLE DEVICES

- Benefits to employees
 - Health monitoring
 - Provide wellness incentives
 - Productivity bonuses
 - Improved working conditions based on biometric data

WELLNESS PLANS AND FEDERAL LAW

- Federal laws which directly address workplace wellness programs that prohibit discrimination based on health status.
 - ERISA
 - ADA
 - GINA

WELLNESS PLANS AND ERISA

- The Employee Retirement Income Security Act (ERISA) prohibits discrimination by group health plans based on an individual's health status.
- ERISA makes exceptions for wellness programs to offer premium or cost sharing discounts based on an individual's health status in certain circumstances.

WELLNESS PLANS AND ADA

- The Americans with Disabilities Act (ADA) prohibits employment discrimination based on health status and generally forbids employers from inquiring about workers' health status, but makes an exception for medical inquiries that are conducted as part of voluntary wellness programs.

WELLNESS PLANS AND GINA

- The Genetic Information Nondiscrimination Act (GINA) prohibits employment discrimination based on genetic information and forbids employers from asking about individuals' genetic information, including information about family members' health status, or family history. Like the ADA, GINA allows an exception for inquiries through voluntary wellness programs.

WELLNESS PLANS AND HIPAA

- The Health Insurance Portability and Accountability Act (HIPAA) establishes standards to protect the privacy of personal health information, including information that may be collected by some workplace wellness programs.

WELLNESS PLAN AND EEOC

- EEOC, which enforces ADA and GINA, issued new regulations for plans offered after January 1, 2017, to modify [ADA](#) requirements for workplace wellness programs “in a manner that reflects both the ADA’s goal of limiting employer access to medical information ... and the ACA’s provisions promoting wellness programs.” A new final rule made similar changes to [GINA](#) wellness program requirements.
- AARP challenge to new EEOC regulations unsuccessful, but stay tuned!