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Employment Law 2015 Colorado – Two Key Developments

By: Michael J. Gates

Employment law is a fluid thing. While there were a number of significant changes in 2015 like there is every year, there are two that have a number of employers and employees talking.

A. A Supreme Buzzkill

As many employers here know, Colorado has some unique laws. For example, Colorado is one of the last remaining states to maintain a general policy against non-compete agreements. In the last decade, though, Colorado's stance on marijuana has been particularly challenging and confusing for Colorado employers.

It all began 25 years ago when the General Assembly passed the Lawful Activities Act, or what many refer to affectionately or flippantly as the "Smoker's Rights Act." The Act made it an unfair employment practice in Colorado to terminate an employee for engaging in legal activities outside work. There are some exceptions to this rule, most notably where the prohibition on legal activities by the employer is related to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees. There is also an exemption where there is conflict of interest created by the employee's legal activities. The Act does not apply to employers with 15 or fewer employees at the time of the termination and only prohibits terminations. It does not apply to other employee discipline.

Flash forward a decade and the voters of Colorado approved Amendment 20 to the Colorado Constitution, codified in Article XVIII, Section 14. Effectively, it legalized limited amounts of medical marijuana for patients and their primary caregivers.

By the summer of 2010, Colorado enacted the Colorado Medical Marijuana Code creating a dual licensing scheme that regulates medical marijuana businesses at both the state and local level.

Of course, the running joke in Colorado was the surprise at the number chronically ill or injured 18-35 year olds. By 2012, the voters passed Amendment 64 to the State Constitution making Colorado one of the first two states to practically "legalize" recreational marijuana. This was followed by more new laws to regulate the recreational use and sale of marijuana.

Enter Brandon Coats. Mr. Coats has been a quadriplegic since his teens. Dish Network hired him in 2007 as a telephone customer service representative. In 2009, Mr. Coats's painkiller he was using to control muscle spasms trigger by his condition was becoming less effective. A physician recommended medical marijuana (contrary to popular belief, physicians cannot "prescribe" marijuana because it is on Schedule I). Mr. Coats obtained his Medical Marijuana Identification Card and began taking marijuana at home after work.

However, Dish Network had a zero tolerance policy for drug use. In May 2010, Dish Network conducted a random drug test. Mr. Coats informed the tester that he would fail but that he had a valid Medical Marijuana Identification Card. He failed the test. Even though Dish Network admitted it had no evidence that Mr. Coats was ever impaired while working or that his use affected his job performance, it terminated Mr. Coats in June 2010 for violating the company's drug policy. He sued under the Lawful Activities Act, claiming that he was fired for engaging in a "lawful" activity outside of work. Dish Network countered that: (1) Colorado's medical marijuana laws simply provided an affirmative defense if someone were criminally charged; and (2) Colorado's laws did not change the fact that possession of marijuana was and is still illegal under federal law. Therefore, Dish Network argued, Mr. Coats' use was not "lawful" for purposes of the Act.

The trial court agreed with Dish Network on all of its arguments, though the Colorado Court of Appeals affirmed the decision only on the grounds that federal law made marijuana use illegal without exception. It left for another day whether marijuana use is truly "legal" under Colorado law.

Since then, Colorado employers have been waiting impatiently for a decision by the Colorado Supreme Court, which has final authority to interpret the laws of the State of Colorado. The outcome could have had wide ranging implications for federal contractors, government employers, transportation contractors, employers whose employees travel across state lines, and others where a requirement to keep marijuana users employed could conflict with other legal requirements.

In June 2015, the final decision came down. The Colorado Supreme Court affirmed. Colorado may have "legalized" marijuana, but that does not make it legal under federal law. The Lawful Activities Act does not distinguish between state and federal law; it only refers to legal activities. As of now, a Colorado employer may terminate an employee for using marijuana outside of work even if that use otherwise complies with marijuana laws and regulations. Unless the General Assembly changes the Lawful Activities Act or until marijuana is removed as a Schedule I substance by Congress, Colorado employees use marijuana at their own risk!

B. Salaried Employees Unite! The Sneaky Minimum Wage Boost for Managers…Maybe

In 2015, the United States Department of Labor announced new rule changes to overtime exemption requirements. Under the current rules, certain types of employees are exempt from hourly and overtime requirements and may be paid on a salaried basis. This includes administrative, executive, management, and professional employees. In order for employees to fall within one of these so-called "white collar exemptions," they must perform executive, administrative, or professional duties (the "duties" test) and make a certain weekly salary (the "salary level" requirement).

In March 2014, President Obama asked the Department to review the exemptions. While a proposed change was expected for some time, most employers were not prepared for the shock. The feature change in the Department's proposed new rules announced on June 30, 2015 is an increase in the salary level test. Currently, the minimum weekly salary to qualify for the exemption is $455 per week, or $23,600 per year. Many, if not most, small business employers have relied on this exemption in setting management salaries and controlling costs.

However, the Department announced that it would be changing the way the salary level test is calculated. Instead of a set amount, once the new regulations are enacted, the minimum weekly salary will be the 40th percentile of weekly earnings for full-time salaried workers, based on Bureau of Labor Statistics (BLS) data nationwide and set annually. In other words, salaries from Chicago, New York, and Los Angeles will help set the minimum salary requirement for exempt employees in Colorado Springs, Pueblo, and Alamosa. Perhaps more shocking was the realization of the practical significance. In 2013, that number would have equaled $921 per week (or just under $48,000 per year), more than double the current threshold. Actually, the Department projects that the 2016 level will increase to $970 per week, or $50,440 per year. Further, the salary and compensation levels will be indexed to the BLS data and updated annually, without the need to go through further rulemaking. Employers can be almost assured that it will increase every year, even where the local economy has decreased.

It is important to note that, for the moment, these are "proposed" changes and no date has been set just yet. However, the changes are almost inevitable and will likely take effect in mid-to-late 2016. Once they take effect, though, employers may not get more than 120 days' notice to make any changes.

So, what does this mean? For employers whose salaried employees make at least $970 per week, there is no immediate change, though they will need to monitor the amount every year and increase salaries accordingly as the threshold increases. They may also need to renegotiate any affected employment contracts. However, for employers with salaried employees making less than the projected new threshold, they will have to make some changes quickly. They will either have to start paying those employees on an hourly basis subject to overtime requirements or they will, in some cases, need to more than double those salaries. It is highly recommended that such employers contact an employment attorney to discuss the options and modify policies.

For salaried employees making less than the new projected threshold, do not count on a doubled salary next year. More than likely, these provisions will result in consolidation of job duties and job eliminations or forcing currently salaried employees to lower hourly rates to account for projected overtime. For employees who will be moved to an hourly rate, this likely means a decrease in vacation pay or paid time off, job restructuring, and/or terminations. For employees affected by these changes, it is also recommended that they discuss their individual situations, including any employment contracts, with an employment attorney.

Here is looking forward to the excitement 2016 will bring!

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