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Key employment issues facing employers in the automotive industry

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As we begin a new decade, automotive companies continue to face complicated employment law issues.

These include the changing landscape of marijuana laws and their impact on employment, the implications of new minimum wage laws, and finally, National Labor Relations Board (NLRB) changes that affect both unionized and non-unionized employers.

Anticipating changes and embracing proactive leadership will help employers minimize risks of becoming caught up in time-consuming and expensive litigation.

1. MARIJUANA IN THE WORKPLACE — A CHANGING AND COMPLICATED LEGAL LANDSCAPE

Simply put, legislation legalizing recreational marijuana is everywhere — and more and more states are heading in that direction. In the automotive industry, where many jobs involve operating heavy equipment and manufacturing safety-related products, drug use in the workplace is a serious concern for employers.

The legal landscape of marijuana use is complicated and frequently changing. Although marijuana has become legal for medical purposes and/or recreational use in many states, it remains a Schedule 1 substance under the federal Controlled Substances Act.[1]

Such substances, at least from the federal perspective, have no currently accepted medical use, and a high potential for abuse.

The conflict between state and federal law with respect to marijuana leads to a host of legal and practical implications for employers as marijuana use becomes more common in states that have legalized it in some form.

The first and most important complicating factor for multi-state automotive employers is that state laws differ and are changing frequently. Many states permit marijuana usage for medical purposes.[2]

More recently, several states, including Michigan, have legalized marijuana for recreational use as well as medical use. However, guidelines for how employers must deal with these laws are less clear.

A few states, such as Connecticut, have medical marijuana laws that include an anti-retaliation provision, which prohibits employers from terminating an employee for their status as a medical marijuana cardholder or for using marijuana in compliance with the state law.[3]

Each year, more states are added to the list that permit marijuana use in some capacity and each state law is unique. Employers must determine the parameters of marijuana-related laws in the states in which they operate.

Disconnects exist between what medical marijuana patients and recreational marijuana users believe regarding their rights and the actual scope of employees' rights with respect to marijuana use inside and outside of the work environment.

Additionally, employers must understand the intersection between the Americans with Disabilities Act (ADA) and medical marijuana usage.

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While employers are never required to permit on-the-job marijuana usage, they are required to reasonably accommodate an employee's qualifying disability under the ADA and must still engage an employee in the usual interactive process under the ADA.

When adverse employment decisions appear too closely related to the disability itself, rather than marijuana usage, courts have reacted negatively.[4] In addition, mainstream attitudes toward marijuana usage are changing.

Moral opposition to marijuana use will not be a good defense for an employer if a disabled individual seeks relief from legally using marijuana under state law.

A complicating factor that overlays the issue of marijuana usage in the workplace is the lack of any scientifically proven real-time test for impairment.

There are a myriad of methods for testing marijuana usage but the most commonly used methods, urinalysis and blood testing, do not indicate whether the testing subject is impaired at the time of the test.

New technology for breath testing claims to be able to show impairment but has a much shorter window of time by which the test must be taken and has yet to be proven reliable in detecting impairment.[5]

As a result, a positive drug test does not necessarily demonstrate than an employee is impaired at work or has used marijuana while working.

Additional considerations include the new laws' intersection with the Drug Free Workplace Act, as well as the practicality of a zero-tolerance policy for off-duty marijuana use in a tight labor market where employees and applicants are more and more likely to engage in some level of marijuana usage.

While we can only do so much to increase starting wages, automotive employers must do all they can to make work in a plant setting as attractive as possible.

In this complicated and changing environment, employers should ensure that their policies regarding drug testing comply with the laws of the states in which they operate, are clear and enforced consistently.

Additional consideration is obviously needed for unionized facilities, including looking closely at applicable collective bargaining agreements, and understanding that labor arbitrators often view off-duty conduct differently than workplace misconduct.

In states that require accommodation, if an employer wishes to maintain a zero-tolerance drug free workplace policy, it should consider identifying and developing a legally defensible business justification for why it is unreasonable to accommodate off-duty marijuana use.

This will require the employer study the science of medical marijuana usage. If no such legally defensible business justification exists for the business, the employer may consider modifying its policy.

The bottom line is that employers should focus on workplace conduct — because they can always deal with specific instances of job impairment related to an employee's drug or alcohol use.

Safety and productivity should remain the overarching goals to dictate decisions regarding employee marijuana and drug use.

2. IMPLICATIONS OF INCREASES IN MINIMUM WAGE

Minimum wage changes are also on the horizon. On March 29, 2020, Michigan's minimum wage will increase from $9.25 to $9.45 per hour.[6] In that state, and others subject to an increase in minimum wage, the implications reach beyond pure compliance with the law.

It goes without saying that employers should research possible minimum wage increases in the states where they operate (if they pay employees at the current minimum wage) in order to stay compliant with the law.

However, these wage increases have implications for employers in the automotive industry, even if the increase does not directly impact their workforce.

Retention and hiring of workers in an already tight labor market may prove increasingly difficult given that the gap between minimum wage and the wages paid to automotive industry production workers is shrinking in some places.

Employees, who can get nearly the same wages for less physically demanding work, or positions with more attractive schedules, may choose to leave the demands of the automotive industry for other employment options.

As a result, employers should analyze their competition for labor and determine whether any minimum wage increase may make retention and recruiting more difficult.

The challenge is that automotive employers need to retain employees to decrease the burden on hiring and training, and to improve productivity in the plant setting.

While we can only do so much to increase starting wages, automotive employers must do all they can to make work in a plant setting as attractive as possible.

This means that employers should look at their health and welfare benefits programs and highlight to employees, temporary workers, and potential candidates what those benefits are.

Focusing on the on-boarding process and developing a team approach to selection and retention of the best workers is also a sound approach.

There is no magic formula here, but employers that are more successful seem to foster a sense of belonging and commitment that results in a more cohesive employee team.

3. CHANGES TO NLRB STANDARDS AND PRIORITIES

Finally, this year has seen many changes in the governmental oversight of union workplaces that have continuing implications for all employers. Changes to NLRB standards and priorities will continue to affect unionized and non-unionized employers through 2020.

On December 23, 2019, the Board issued a new opinion that lowers the bar for deferring cases to the grievance procedure, returning the standard to one that was in effect prior to an Obama-era opinion that made the deferral standard more onerous for employers.

As a result, it is now easier for employers to request that an NLRB charge that is related to a grievance be stayed during the course of the grievance procedure.

In addition, the Board will be more likely to defer to the outcome of the grievance procedure rather than engaging in its own investigation and determination of the merits of the charge and the change will apply retroactively to any charges currently pending.

This is a good development for automotive employers because they can more easily defend employee claims in the private arbitration context rather than before a more public governmental agency.

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Also, in August 2019, the NLRB provided guidance regarding employers' ability to require employees to sign arbitration agreements in the context of a class action lawsuit.

The NLRB concluded that (1) employers can require employees to sign modified arbitration agreements in response to employees opting into a collective action under the Fair Labor Standards Act (FLSA) or corresponding state wage laws; and (2) employers can require that the employees sign the modified agreement or face termination.

However, the NLRB emphasized that employers are still not permitted to take adverse action against employees purely for participating in a class action.

Both changes continue the NLRB's trend of opinions that tend to strengthen employer's rights and undo union-friendly changes that took place during the Obama era.

SUMMARY

Automotive employers will continue to face an evolving legislative landscape in 2020 that will impact workforces.

Employee lawsuits, governmental charges and labor grievances are not going away any time soon. Employers will still must deal with regulatory issues to make sure their operations comply with federal and state laws, all with the backdrop of more liberal drug laws permitting recreational drug use.

At the same time, wages are increasing and retaining the best and brightest will remain challenging unless wage rates are competitive, and employees understand and appreciate the value of their contributions.

And while the NLRB and other governmental agencies may be recognizing more employer-friendly enforcement protocols, enforcement agencies like the NLRB, the EEOC, the U.S. Department of Labor, and state agencies are still very active in enforcing the statutes with which they are charged.

The examples in this paper highlight just some of the challenges facing employers in the automotive industry in 2020, where vastly differing state laws, frequently changing standards, and a heightened awareness of employment related issues make practicing employment law anything but routine.

Be sure to analyze decisions and policies and involve legal counsel and human resources professionals as you navigate the rugged terrain this decade.

Notes

[1] https://bit.ly/2xwF9in; https://bit.ly/2xwF8Ll

[2] All states with the exception of Idaho, South Dakota, Nebraska, and Kansas have some form of cannabis access program.

[3] Connecticut General Statutes, Chapter 420f, Section 21a-408p,

[4] *See e.g. EEOC v The Pines of Clarkston*, No. 13-CV-14076, 2015 WL 1951945 (E.D. Mich. April 29, 2015).

[5] https://n.pr/2R67til

[6] https://bit.ly/2ID9Lkm

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