HARLOWE & FALK LLP

EMPLOYMENT LAW UPDATE

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★ NEW YEAR'S EDITION ★

WASHINGTON LAWMAKERS "LIKE" EMPLOYEE PRIVACY

Washington State lawmakers have recently passed a bill that severely limits the ability of employers to view the online profiles of employees on sites such Facebook, Twitter, and LinkedIn. In part, it is now unlawful for an employer to:

- ⊗ Request disclosure of an employee's login information;
- ⊗ Request an employee to access his or her account in the employer's presence; or
- ⊗ Require an employee to "friend" the employer.

An injured employee could recover a statutory penalty of $500, actual damages, an injunction, and attorneys' fees.

However, the law isn't completely one-sided. Employers can demand access to an account during certain investigations, such as those pertaining to violations of state or federal law, or allegations that an employee has improperly used confidential information. Also, the law does not apply to an online account or service that was paid for or supplied by an employer (like an employer's website, LinkedIn account, or Facebook site). Note that if you have such an arrangement with an employee you should clearly document your ownership and control of that account in a written acknowledgement with the employee.

Of course, nothing prohibits viewing a public profile, but an employee cannot be coerced into altering privacy settings to make specific content public. Also, an employer will not be liable for inadvertently learning an employee's login information, but the employer cannot use that information to later access the employee's account.

So, if you're an employer, and you're curious about the happenings on your employees' profiles, remember this: It is (usually) best to ignore the urge to pry. In light of this new law, you should consider revising your policies to avoid requesting such login information, unless of course your circumstances fall into one of the law's limited exceptions.

DRUG TESTING FOR RECREATIONAL MARIJUANA

Unless you've been hibernating this winter, you know that recreational marijuana will soon be available in dispensaries throughout Washington. Sure, voters might have legalized marijuana, but is it legal in the workplace? Many employers are understandably confused, wondering how to modify their existing policies. If you run a business, you can relax – the law will have little-to-no effect on your workplace policies.

As you probably know, marijuana is illegal under federal law. Accordingly, employers can still test for it, and they can still enforce a drug-free workplace. In fact, there is no requirement that employers accommodate even *medical* marijuana in the workplace. So, if you run a business and you want to prohibit the drug, we suggest that you make it clear. If your handbook prohibits the use of "illegal drugs," make sure that your definition of "illegal drugs" clearly includes marijuana. For example, have your definition read that it "includes all drugs that are illegal under state ***and/or federal law***."

Consider this: In many cases, marijuana can remain in one's system for several days, long after its influence has worn off. In fact, an employee might use the drug Friday after work and still test positive on Monday morning. To resolve this issue (and eliminate uncertainty), you may be interested in a zero-tolerance approach by prohibiting "any detectible amount" of the drug, rather than an "under the influence" requirement.

To sum it up, you should decide how aggressively you want (or need) to pursue a drug-free workplace. If jobsite safety is an issue, strict enforcement is a must. Regardless of your stance, it's crucial that you keep employees up-to-date on your policies, and keep records showing that they understand them.

SAME BENEFITS FOR SAME-SEX SPOUSES

The U.S. Supreme Court recently struck down a controversial section of the Defense of Marriage Act, which defined a "marriage" as the legal union between a man and a woman. Before this decision, same-sex spouses (married in a state like Washington) were treated much less favorably under federal law. Now, same-sex spouses are eligible for numerous federal benefits, such as those under the Family and Medical Leave Act ("FMLA"), and covered employers must act accordingly.

In part, the FMLA entitles an eligible employee up to 12 weeks of leave in a 12-month period to care for a seriously ill spouse. After the Court's decision, the Department of Labor made it clear that FMLA leave is now available to same-sex spouses who reside in a state that recognizes same-sex marriage. As you can see, *the employer's location does not matter*, which can create some confusion. For example, if

your business is located in Washington, but an employee resides in Idaho (or a similar non-same-sex marriage state), that employee is not legally entitled to FMLA leave.

So, if you are a covered employer: *You must grant FMLA leave to an eligible employee who wants to care for a same-sex spouse if, at the time leave is sought, he or she resides in a state that recognizes same-sex marriage*. If you have out-of-state employees, you need to find out where they reside because if you improperly withhold (or grant) FMLA benefits, you could face issues under both the FMLA and common law. If applicable, revisit your policies and handbooks to make it clear when an employee is, and is not, eligible to take FMLA leave. Please don't hesitate to contact us if you're uncertain whether the FMLA applies to you or your employees.

Have You Ever Been Convicted?

November 1, 2013 marked the beginning of Seattle's new "Job Assistance Ordinance," which restricts how certain employers may consider an individual's criminal background when making employment decisions such as hiring, firing, demoting, etc. The purpose of this Ordinance is to help place those convicted, arrested, or charged with a crime back into the Seattle workforce to (hopefully) reduce repeat offenders.

Under the Ordinance, employers may no longer require applicants to disclose criminal records during the beginning stages of a job application. Further, it is also now unlawful to use "*have you ever been convicted*" or "*felons need not apply*" language in advertisements or applications. In fact, an employer may not even ask about one's criminal history until *after* an initial screening to eliminate unqualified applicants.

Most importantly, the Ordinance restricts the ways in which an employer may consider one's criminal record when making employment decisions. If an employer wishes to make a negative employment decision based on a criminal record, it must first inform the applicant or employee of the information it is relying upon and allow 2 days for an opportunity to correct or explain it. Then, with that correction or explanation in mind, the employer must have a "***legitimate business reason***" for taking the negative action. You might now be asking: What constitutes a *legitimate business reason*? In short, it's a "good-faith belief" that the criminal history will negatively affect either the individual's job-performance or the employer's reputation or assets (with a number of additional factors to consider). This requires an in-depth look into the specifics of the criminal record and the employer's business.

This Ordinance applies to positions and employees that perform at least 50% of their duties within Seattle ***regardless of the employer's actual location***. However, there are certain positions that are expressly excluded, such as law enforcement and positions with access to disabled persons, children, or vulnerable adults. Also, the Ordinance does not replace state or federal laws that already require background checks on certain positions. To enforce the Ordinance, the Seattle Office for Civil Rights can impose penalties ranging from a warning to a $1,000 fine per offense (plus attorneys' fees).

If you're an employer with eligible workers in Seattle, you should (**1**) remove "*have you ever been convicted*"-type language from advertisements and applications, (**2**) refrain from requiring disclosure of an applicant's criminal history until later in the hiring process, and (**3**) avoid making employment decisions based solely on one's conviction record unless you have a *legitimate business reason* for doing so. Again, please don't hesitate to contact us if you're uncertain whether this Ordinance applies to you or your employees.

Give Employees a Break!

As you may know, Washington employers are required by law to provide (non-exempt) employees with a 10-minute paid rest break for every 4 hours of work. So, what if an employee is too busy and misses a break? According to a recent decision by the Washington Supreme Court, he or she may be entitled to overtime. Indeed, that missed break counts as "hours worked," which can potentially trigger overtime pay.

Assume an employee who works 40 hours in a workweek misses his or her required 10-minute rest period. In effect, that employee was required to be on duty equivalent to an overtime shift of 10 minutes. That employee is now owed compensation at the overtime rate of 1½ times the regular rate for those 10 minutes. Stretch this occurrence over the course of several weeks and you can imagine the potential costs.

So, how can employers avoid this problem? Well, if an employee misses out on his or her rest break, he or she can make up that time intermittently during the 4-hour work period, so long as the employee is allowed to rest and relax for intervals of short duration adding up to 10 minutes. It's best to solve the problem by making it clear to your employees that they are required to take rest breaks. Have employees sign an acknowledgment that includes a requirement to report missed breaks, and if they fail to do so, an assumption that those breaks were taken. Your handbook may also instruct employees who miss breaks to inform their supervisors, who will then document such occurrences for tracking and pay adjustments, if necessary. The bottom line is this: Ensure that your eligible employees are taking their rest breaks because if you don't, you could be on the hook for unpaid overtime.

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If you would like to discuss anything in this Update or any other aspect of employment law, please call the attorney with whom you work or Laura Weselmann (253.284.4416) or Kalin Bornemann (253.284.4426) at Harlowe & Falk LLP. Also, please check our new-and-improved website to read more about our firm and the services that we provide.