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The Times They Are a-Changin': What Employers Need to Know Now About Legislative Developments, NLRB Activities and the EEOC's Current Focus

Prompted by many inquiries from employers about recent significant developments in workplace laws, Lane Powell provides the following overview on the Marriage Equality Act and the recreational marijuana initiative passed by Washington voters, NLRB activities relating to social media policies, investigations and at-will disclaimers, and EEOC guidance on workplace treatment of domestic violence victims.

We invite you to join us for a breakfast seminar and teleconference on Tuesday, December 4, 8 – 9:30 a.m. to discuss these new developments. Visit the event page to register and for more information.

Significant Changes to Washington Law

Beyond tight political races, the legalization of same-sex marriage and recreational marijuana use dominated the airwaves in Washington state this election season. What do employers need to know about these legislative changes?

How Will the Marriage Equality Act Affect Employers? Some may say that legalizing same-sex marriage in Washington does not dramatically change the landscape. Washington's anti-discrimination law already recognizes sexual orientation and marital status as protected classes. Similarly, the state's "Everything but Marriage" law has been in effect since 2009, requiring employers to provide state-law benefits to those in registered domestic partnerships. However, the newly adopted Marriage Equality Act will soon require employers to recognize four different types of legal relationships between couples when providing employees with state-law benefits:

1. Traditional marriages involving couples of the opposite sex who are legally married;
2. Marriages between persons of the same-sex, whether licensed under Washington law or authorized under the comparable law of another state or jurisdiction;
3. Domestic partnerships involving same-sex couples if the couple has a legal union other than marriage validly formed in another jurisdiction that is substantially equivalent to a domestic partnership; and
4. Registered domestic partnerships involving couples of the opposite sex where one is sixty-two years of age or older.

When the Marriage Equality Act becomes effective on December 6, partners who are currently in a state-

registered, domestic partnership may obtain a marriage license and marry in the normal course. However, even if they do not go through the license and ceremony process, on June 30, 2014, by operation of law, a state-registered, domestic partnership will automatically be merged into a marriage, with two exceptions. First, couples of the opposite sex, where one is sixty-two years of age or older, will remain registered domestic partners unless they choose to marry. Second, registered domestic partners who are in the process of seeking dissolution, annulment, or legal separation as of June 30, 2014, will not be automatically converted into a marriage relationship.

Regarding employee benefits, employers need to remember that federal law preempts state law. Due to broad preemption by the Employee Retirement Income Security Act of 1974 ("ERISA"), ERISA-governed self-insured health and welfare plans and retirement plans are not subject to state regulation. Relatedly, another federal law, the Defense of Marriage Act ("DOMA") does not recognize same-sex marriage for the purposes of interpreting federal law, so federally mandated benefits and protections for spouses do not automatically apply to same-sex spouses even if they are considered married under state law. However, DOMA does not prohibit employers from providing comparable benefits or protections to same-sex spouses, and employers who want to do so can amend their plans accordingly.

For example, employers may grant same-sex spouses Consolidated Omnibus Budget Reconciliation Act ("COBRA") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") rights. Employers who decide to provide health benefits to same-sex spouses should be aware that, because DOMA applies to the tax code as well, the value of same-sex spousal benefits will be taxable to the employee unless the employee's spouse is also a tax dependent of the employee. Many employers are already familiar with this tax treatment because they offer benefits to domestic partners. Because of the application of DOMA, same-sex spouses are not treated as spouses for purposes of cafeteria plans. As a result, for same-sex spouses, pre-tax payments for insurance premiums may not be made, health care expenses may not be reimbursed from a Flexible Spending Account ("FSA"), and change in status events related to the same-sex spouse will not permit mid-year election changes. On the other hand, insured health plans are subject to state law benefit mandates and must recognize same-sex marriages if the policies are issued in Washington.

With respect to retirement plans, the Internal Revenue Code and ERISA provide certain benefits and protections for spouses that do not automatically apply to same-sex spouses. Examples include default qualified joint and survivor annuity form of benefits, required spousal consent for benefit form and beneficiary designations, and spousal rollovers. As with health plans, employers may amend their plans to provide comparable benefits and protections to same-sex spouses.

What Should Employers Do Now to Comply With the Marriage Equality Act?

- Review handbook policies and practices that address state law requirements, such as leave entitlement, and modify policies to comply with the new law.
- Review all benefit plans to determine whether amendments are necessary or desirable.
- Consult with your insurance broker regarding the impact of this new law on insured group health plans.
- Be prepared for employees' questions about how this law will affect your company's benefit programs.
- Stay tuned because the law may continue to develop and your policies may need to be revised, particularly if the U.S. Supreme Court rules on the constitutionality of DOMA.

How Will Decriminalizing Marijuana Use Affect Your Company's Drug Use or Testing Policies?

Perhaps no other subject had piqued the interest of employees more than the law decriminalizing the use of marijuana for "recreational" use. Initiative 502, which also becomes effective on December 6, is largely silent about how this law affects the workplace. The law is designed to license and tax the sale of marijuana. It requires the Washington State Liquor Control Board to regulate and tax marijuana for persons twenty-one years of age or older, and it creates a new threshold for determining when a person is driving under the influence of marijuana. It further states that the production, manufacture, processing, distribution, sale or possession of marijuana in compliance with the new law will not constitute a violation of Washington state law.

What the new law does *not* do is legalize the use of marijuana in the workplace. Marijuana use and possession remains illegal under federal law. Last year, in *Roe v. Teletech Customer Care Management,* the Washington Supreme Court recognized this when it determined that Washington's Medical Use of Marijuana Act did not protect medical marijuana users from adverse hiring or disciplinary decisions under an employer's drug testing policy. The plaintiff in that case was terminated when she tested positive for marijuana. She then claimed she had a prescription authorizing her to use marijuana for medical purposes and was therefore wrongfully terminated. But the Supreme Court disagreed, stating that the law did not prohibit an employer from discharging an employee for medical marijuana use, even if the employee used marijuana while off-duty and offsite. Washington courts will likely rely on *Roe* and reject any legal challenges based on this new law if (or perhaps when) employees seek to challenge an employer's reliance on a positive marijuana test as grounds for any hiring or disciplinary decision. At the same time, however, employers should proceed carefully when disciplining an employee for using marijuana while off-duty or if the employee provides a prescription for medical marijuana.

What Should Employers Do Now to Comply With the Recreational Marijuana Law?

- Employers who do not already have policies addressing illegal drug use in the workplace should consider adopting written policies. Employers with policies should take the opportunity to review their policies.
- Employers who do not perform drug testing should still consider adopting a policy prohibiting employees from using, possessing or distributing illegal drugs in the workplace, and should state in their policies that marijuana is considered an illegal drug.
- Employers who adopt drug testing policies should clearly state what is considered a positive test and which substances are tested. Employees may not be aware that some illegal drugs, such as marijuana, remain in their bodies for a long time and therefore may trigger a positive test, even days after marijuana has been used. Any testing policy should also provide an avenue for employees to disclose prescriptions for medical marijuana.
- Multi-state employers should ensure that their policies comply with state laws that regulate testing, such as Alaska and Idaho, to take advantage of the additional protections that those laws provide.
- Unionized employers who are considering adopting policies or revising their policies should keep in mind that they will need to bargain with the union over the policies. In addition, unionized employers must be prepared to demonstrate good cause for discharge upon a positive result. Employers typically rely on safety reasons, but this may be difficult where the employee uses medical marijuana only while off-duty and is not impaired at work.
- Given the developing law, drug-free workplace and testing policies should be regularly reviewed by counsel. In addition, employers should consult with counsel before disciplining any employee for a positive marijuana test.

The NLRB

Whether unionized or not, employers need to be aware of recent activity by the National Labor Relations Board ("NLRB") aimed at enforcing the National Labor Relations Act ("NLRA"). The NLRB's activities significantly impact key employer policies, including policies related to the use of social media by employees, confidentiality in investigations and employer policies regarding at-will employment. The NLRB is keeping a close watch on activities that it views as potentially violative of Section 7 of the NLRA, which protects employees' rights to organize, join, or form a union, or engage in concerted activity, as well as the right to refrain from these activities.

Do Your Policies Pass Muster With the NLRB? You Might Be Surprised. The NLRB continues to closely scrutinize employers' constraints on employees' use of social media to engage in workplace speech. Earlier this year, the NLRB's Acting General Counsel issued three guidance memoranda, each of which found seemingly reasonable social media policies to be in violation of Section 7 because employees could "reasonably" interpret such policies to infringe on their Section 7 rights. More recently, the NLRB issued two rulings involving non-unionized workplaces, focusing on policies that prohibit or limit speech that may be critical of the employer. The rulings provide a few key takeaways.

What Should Employers Do Now When Reviewing Workplace Policies?

- Take a fresh look at any workplace policies that limit employee communications or conduct.
- Avoid broad prohibitions restricting employees from making disparaging or defamatory statements about the employer.
- Avoid prohibitions restricting employees from discussing terms and conditions of employment, such as pay, workplace injuries, disability accommodations and management activities.
- Review media policies to see if employees are entirely prohibited from talking to the media about the company.
- Consult with counsel before disciplining employees for conduct that may be protected under Section 7 of the NLRA.

Can Asking Employees to Keep Investigations Confidential Get Employers in Hot Water? The NLRB has challenged a mainstay of workplace investigations, ruling that employers' blanket requirements for employee confidentiality violate Section 7. In *Banner Health Systems, d/b/a Banner Estrella Medical Center and James A. Navarro*, the Board rejected the employer's argument that it needed to protect its investigations and was therefore justified in routinely asking employees not to discuss ongoing investigations into employee misconduct. The NLRB concluded that "generalized concern over protecting the integrity of [the company's] investigations" could not outweigh an employee's Section 7 right to engage in concerted activity. In the good news category, the NLRB did not rule that employers could never request confidentiality and provided examples where confidentiality requests are proper. According to the NLRB, confidentiality may be permitted where:

- A witness needs protection;
- There is a possibility evidence might be destroyed;

- Testimony is in danger of being fabricated; and
- There is a potential for a cover up.

What Should Employers Do Now to Comply With *Banner Health*?

- Review investigation and confidentiality policies and remove any references to blanket confidentiality requirements.
- At the outset of any investigation, consider on a case-by-case basis whether a confidentiality requirement is justified.
- Train all individuals involved in handling investigations on how to address confidentiality needs in each particular situation.

Are "At-will" Disclaimers Safe for Now? At-will employment clauses have long been a staple of employee handbooks. Most states recognize and uphold the "at-will" employment doctrine with limited exceptions. Thus, the NLRB's announcement that such clauses might violate the NLRA surprised and worried many employers. The NLRB's Office of the General Counsel recently issued two advice memoranda addressing two different at-will provisions in employee handbooks for non-unionized employers, and found that neither violated Section 7. These memoranda follow a controversial decision in which an administrative law judge ("ALJ") found an at-will disclaimer did violate employees' Section 7 rights. While the two new memoranda do not overrule the ALJ's decision, they provide helpful guidance on how employers can draft or revise their at-will policies.

How Should Employers Apply These Rulings to Their Own At-will Policies?

- Employers should not introduce at-will provisions in response to attempts at collective bargaining or other concerted employee activities.
- Employers may continue to use at-will policies that confirm that the at-will employment relationship can only be changed by a written agreement between the employer and employee, and only by certain identified agents of the employer.
- Employers should review their at-will policies to ensure they do not suggest that there is no possibility that the at-will relationship can be changed through collective bargaining or other concerted employee activity.
- Employers should make sure that acknowledgment forms, commonly used in conjunction with employee handbooks, follow these same guidelines.

The EEOC's Focus on Domestic Violence

The U.S. Equal Employment Opportunity Commission ("EEOC") recently issued guidance highlighting how employment decisions concerning workers who are victims of domestic violence, sexual assault or stalking can run afoul of Title VII and the Americans with Disabilities Act ("ADA") and its amendments, even though neither statute expressly protects those victims. For example, Title VII would prohibit an employer from discharging an employee upon learning that he or she was a victim of domestic violence if the employer relied on stereotypes about how it might affect the employee's future performance. As another example, an employer may violate the ADA if it does not prevent harassment of an employee based on facial scars resulting from a domestic violence incident. Many of the EEOC's examples are common sense, but it is a good reminder to those employers operating in states without crime victim or domestic violence laws

that there may still be liability under federal employment laws for discrimination or harassment of domestic violence victims.

What Steps Can Employers Take to Promote Compliance With These Laws?

- Review handbooks to make sure anti-harassment, anti-discrimination and no retaliation policies address victims of domestic violence, stalking and sexual assault.
- Determine whether you operate in a state (like Washington and Oregon) or a city (like Seattle) that has laws expressly protecting or providing leave for employees who may have been victims of domestic violence, stalking or sexual assault.
- Expand training to educate managers and employees about how to deal with issues stemming from domestic violence, stalking and sexual assault.

For more information, please contact the Labor and Employment Practice Group at Lane Powell: employlaw@lanepowell.com