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Cape Cod Human Resources Association

General Counsel Employment Law Report

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English Only Workplace Rule: No Esta Bien

An employer who insisted on a broad, English only workplace rule will pay over $2.6 million to a group of aggrieved workers. The EEOC is not a fan of these rules and the facts of this case did not help: Banning any Spanish spoken on site and calling Spanish a foul language. The supervisor also demoted and terminated Hispanic employees and replaced them with non-Hispanic employees. Yeah, not cool.

Even the worst facts can provide some valuable tidbits. First, you can shake your head and think: "Wow I am so much better (smarter, cooler) than that!" Then you can peel back the ruling to find out where the EEOC stands on this issue. Policies directing only English all the time are discriminatory– that is clear. When mandating English as a workplace language, the employer must provide advance notice of the rule and show that it is justified by business necessity. The rule can apply, for example, in emergencies or situations where a common language will promote safety. Please note that English only rules for customer interaction may not rise to that level. Finally, employees must be allowed to speak their language during breaks and in a lunch room setting.

Language discrimination claims are part of national origin discrimination, which is on the rise. If you believe your workplace would benefit from a language policy, it must be narrowly tailored to survive a discrimination claim. Contact us. We can help. (Podemos ayudarle.)*

*Apologies to actual Spanish speakers for my Spanglish

Weed and the Workplace

Thirty three states and DC have legalized marijuana use in some form (map here). Yet on the federal level, marijuana is a banned Class I substance. Legal in many states, illegal under federal law. This conflict is making workplaces feel dazed and confused. Let's get into the weeds a bit.

What you can do:

- Employers retain the right to have a drug-free workplace
- Do not tolerate impairment on the job
- Legalizing marijuana does not mean use must be tolerated at work
- Safety concerns are still important: Workers covered by Department of Transportation rules, (trucking, mass transit, airline, rail workers) must be screened for drug and alcohol use if in safety-sensitive jobs.
- Marijuana policies complying with state law should be clearly communicated
- Federal contractors must have a drug policy that includes marijuana use, testing
- Train managers on detecting and documenting impairment and company marijuana policies
- Educate employees about your marijuana-use policy and the repercussions for failed tests, if used

What you should be cautious about doing:

- Policy: Location matters. Know the laws in each state where you have employees and tailor all policies
- Testing: tricky because of the delay factor with marijuana: tread carefully and apply judiciously. This handy testing Q & A confirms no test exists that can prove a person is impaired on the spot.
- Pre-Employment Screening: State law may require an employer to engage in an interactive dialogue about their medical marijuana use before refusing to hire.
- Termination: Amazon is in court now for firing a user of medical marijuana after a random test and it does not look good. Second chance or action less than termination might be a better route for good employees.

The cannabis culture and state laws have changed. The federal law shows no sign of following. That conflict is crazier than a Cheech & Chong movie (yep, dating myself here). Puns aside, we can help with proactive and reactive marijuana issues in your workplace. Call us.

ABC Easy as…Not So Easy After All: Independent Contractors

Over the last decade, many states have restricted the definition of an independent contractor. In these states, the default status of a worker is an employee unless specific guidelines are met. The rise in the gig economy has propelled this trend in large part but worker protection and filling state's tax coffers is at work too. As usual, the employer is responsible for the correct categorization of workers or face large expenses. California, Massachusetts, Connecticut, Delaware, Illinois, Indiana, Nebraska, Nevada, New Hampshire, Vermont, Washington, West Virginia and now New Jersey (legislation proposed) are among the states that use the strict "ABC" test, summarized here:

- (A) The worker is *free from the control* and direction in performance of the work under the contract and in fact.
- (B) The worker performs work that is *outside the usual course* of the hiring business.
- (C) The worker is *customarily engaged* in an independently established trade, occupation, or business of the same nature as the work performed.

If you guessed (B) as the trickiest factor to overcome, you can go to the head of the class. And if you are thinking, hey all the cool kids are ignoring the ABC test and using independent contractors–why can't I? It is true that some employers still choose to ignore the strict state law tests (not our clients of course). They do so however at their peril. There is no defense to wrongly classifying your workers, just penalties, fines and back taxes. If you have questions, please give us a call. We can help.

Online Reviews: The Bane of Business

Arguably, the biggest contribution to the information age is the online review. The ubiquitous Yelp or Glassdoor rants that range from somewhat helpful to ridiculous. Take the 1 Star Yelp review of Yellowstone Park (yes you read that right), which complained of the strong sulfur odor. Most online reviews are negative and then live on the internet forever. For a business, negative online reviews impact not just customers but recruitment.

Can you protect your workplace and stop them? Short answer: not completely. As readers of this blog know, the National Labor Relations Board (NLRB) regulates protected speech, or Sec 7 concerted activity, under the NLRA. Online reviews are no exception. The NLRB issued an interesting advisory opinion where a law firm employed the following non-disparagement clause:

[D]uring and after Employee's employment or association with Law Firm ends, for any reason, Employee will not in any way criticize, ridicule, disparage, libel, or slander Law Firm, its owners, its partners, or any Law Firm employees, either orally or in writing.

Then they added the "savings clause" we often see in employment handbooks and policies:

However, nothing in this Section 3.2 shall be deemed to limit or prohibit Employee from engaging in concerted group activity and communications with coemployees to try to improve his or her working conditions, as provided under Section 7 of the National Labor Relations Act.

Genius! Just what you would expect from a law firm. But the savings clause did not save the firm from its fatal mistake: chilling speech about working conditions. Among other things, the NLRB found that this language could discourage or prevent an employee or group of employees from reaching out to a union (a third party) over working conditions–the essence of the Section 7 rights and concerted activity.

What can I protect? The NLRB did not extend Sec 7 protection to disparaging co-workers, and the services or products of the law firm, which it stated do not impact Sec. 7 rights. If the law firm had narrowed the non-disparagement clause to these areas it would have survived scrutiny.
Protecting your business's reputation is important. We can help you craft effective, lawful policies to safeguard your reputation and workplace or review your current policy. Call us.

General Counsel's Office Hours

Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.