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ATTORNEYS AT LAW



# **General Counsel Employment Law Report**

Prepared By:  
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**Program Overview**  
**CCHRA Meeting**  
**February 27, 2020**

The CCHRA General Counsel, Attorney Michael Foley, will provide a highly interactive explanation of a holistic approach to Employment Law compliance and HR-related risk management within the entire life cycle of the employment relationship:

- Mike will test our understanding of both Massachusetts and Federal employment laws. For example, do you know the answer to these true or false questions:
  - Job descriptions are not required by law and are overrated.
  - If an employee has a "Manager" title and is paid on a salary basis he or she can be considered exempt from overtime.
  - If a worker is free from the employer's control and can use his/her discretion in performing services both under a contract and in fact, then he/she can be retained as an independent contractor and not an employee.
  - In Massachusetts, employers satisfy their obligation to prohibit sexual harassment by posting their sexual harassment policy for all to see.
  - The Commonwealth's Criminal Offender Record Information Law prohibits employers from inquiring about criminal records during the applicant screening process.
- He will outline best practices for developing a strategic approach to effective risk management.
- Mike will also provide compliance tools and resource information. Here is a link to the [2020 Synopsis of Massachusetts and Federal Employment Law and Workplace Regulations](#). This is a very valuable and popular resource that will help your team meet your organization's compliance obligations and will prepare you for Mike's interactive presentation.

This is a presentation you do not want to miss.

# Congrats! EEOC Discrimination Claims are Down

It is not all doom and gloom out there. Well, mostly it is but here is a bright-ish spot: [EEOC charges](#) are at a 27 year low (NB: this does not count state agency charges). Let's look at this from the glass half full angle and conclude that employers are taking compliance obligations seriously. Here is the breakdown to back that up:

- Retaliation: 39,110 (53.8 percent of all charges filed)
- Disability: 24,238 (33.4 percent)
- Race: 23,976 (33.0 percent)
- Sex: 23,532 (32.4 percent)
- Age: 15,573 (21.4 percent)
- National Origin: 7,009 (9.6 percent)
- Color: 3,415 (4.7 percent)
- Religion: 2,725 (3.7 percent)
- Equal Pay Act: 1,117 (1.5 percent)
- Genetic Information: 209 (0.3 percent)\*

**Retaliation** remains the most common claim and is regularly included with any type of discrimination claim. An aggrieved employee will make a discrimination charge then claim an adverse employment action occurred based on the underlying claim. It is the money shot of employment law: sometimes easier to prove than the discrimination allegation with potentially lucrative damages.

Are employers taking **#Metoo** seriously? Maybe all that training the past four years has paid off. Claims were down by almost five percent last year. The EEOC is taking sexual harassment claims seriously too: In 2019, the agency recovered \$68.2M for charging parties, which is up from \$56.6M in the previous year.

Finally, the **Equal Pay Act** number rounding out the bottom looks small but it is a 5% increase over the prior year. With states also increasing equal pay protections, this is an area that will probably continue to rise. Fortunately for employers, reviewing pay practices is the best way to avoid these claims and... wait for it...we have an easy, budget friendly [pay practices audit](#) to help.

Give a call or send an email—we can help.

\*Hey math nerd: These percentages add up to more than 100% because some charges allege multiple bases.

# WEEDING THROUGH THE LEGAL LANDSCAPE FOR MARIJUANA

My mom, a dietician, always preached that the leafy greens were healthy; they reduce stress on the body she said. In today's workplaces, however, a certain leafy green is causing tremendous stress for human resources professionals, and that trend will continue in 2020.

As [more and more states](#) permit legal use of recreational marijuana (11 states and Washington DC at present), and many others allow the use of medical marijuana (33 states at present), laws are being passed to protect employees from adverse employment actions associated with their use of "weed". More specifically, Nevada has enacted a law prohibiting consideration of a positive, pre-employment drug test for marijuana when making hiring decisions. Similarly, New York will prohibit employers from testing applicants for marijuana starting on May 10. Laws of this nature will become the norm in time.

Case law is moving in the direction that when medical marijuana is prescribed for a disability, an employer must conduct a reasonable accommodation assessment before prohibiting or limiting the employee's medically necessary use of marijuana at work. As we have advised in the past, employers should engage in the interactive dialogue under the ADA in these circumstances even if they have a zero-tolerance drug policy and a failed drug tested applicant. It is hard to envision a scenario in which safety does not reign supreme over the use of marijuana at work, but perhaps that situation exists someplace. For the well-being of other staff members, employers should take a long hard look at such a proposed accommodation.

So what are employers to do in these high times?

Like alcohol, employers may prohibit impairment, use and possession of recreational marijuana during work hours and in the workplace. Under most circumstances, an employer can also prohibit impairment and use of medical marijuana during work, given its negative impact on the safe operation of the workplace. Thus, if an employee is "high" at work, an employer can still take adverse action against that employee absent a necessary and reasonable accommodation for a disability related, medically approved use. To dispel confusion within the staff, these prohibitions should be clearly stated in a company policy, distributed and signed by all staff members.

Don't want to resort to the bong to calm your nerves? Understandable. Contact Foley & Foley, PC and we will prescribe the correct policy to treat your drug-free workplace. ([tim@foleylawpractice.com](mailto:tim@foleylawpractice.com))

# Teenagers are Special (and So Are Their Work Rules)

Here is something we do not see often: a huge [settlement over child labor law violations](#).

Massachusetts cited Chipotle with more than 13,000 child labor and wage violations, costing Chipotle almost \$2 million. That is a lot of burritos. Before you say “no me importa” think of how ambitious state attorneys general are and how many [state child labor laws](#) there are to be followed (and [federal law](#) too of course). Saving the kids from mean employers makes good press for the AG’s office.

If you employ people under the age of 18 this is a good time—before summer hiring season— to brush up on your obligations. The Massachusetts AG found minors working without valid work permits, too late into the evening, and too many hours per day and per week. These seemingly small and not uncommon violations added up. Make sure your managers and front-line supervisors know the restrictions under the law.

If you have questions, need training, or want a refresh for your handbook to incorporate current child labor laws, we can help.

# Some Winter Baby Steps for 2020

Now that we have made it through January, where every workday feels like a Monday, let's do a little housekeeping:

- The **I9 form** has changed. Use [this one](#) by May 1, 2020.
- Still using those **non-competes** from the last decade? [Many states](#) have restricted them, Congress has proposed restrictions and the [FTC](#) just held a workshop indicating support for more restrictions. Dust them off and shake out the bad stuff (we can help because we know what the bad stuff is).
- Are your **job applications** up to date? At will disclaimer? No dates for graduation requested? If you use background checks is the application compliant with the Fair Credit Reporting Act (FCRA)?
- Are your **workplace posters** up to date? We love reminding you of this because they are [FREE](#). Don't buy them unless you want fancy laminated ones. No judgement.
- How are your **office snacks**? Is everyone on a diet? Same. Can't wait until spring when New Year's resolutions are a distant memory.

We have a lot of stress busting, fixed fee, easy-to-use [services](#) to keep you up to date. If you do not see what you need, we can craft something to meet your needs. Sometimes you just need to take baby steps.



## 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.