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General Counsel Employment Law Report

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How a Non-Compete Could Hurt Your Business

Just out of college and with her first job lined up, my 22 year old niece recently sent me her offer letter. And a non-compete. And a non-solicitation. And a background check notice, including a faulty credit report notice. She was overwhelmed with legalese and unsure why her employer would need all that. The offer letter was fine but the rest? Fresh off the internet and in violation of Massachusetts law. (Background checks were addressed recently **here**.) The major faults? Too restrictive in time and place. No garden leave provision for pay when out of work, as the sweeping MA law requires. Several states have limits in place already, as well as some municipalities. It is time to re-think the automatic offer letter with non-compete package for all or many hires.

What started as a trend in tech away from restrictive covenants has spread over many industries. The need for work autonomy in our culture is mirrored by the increase in these laws each day (in spite of the failed Senate bill). Non-competes still have a place for some employees, but not all. As a threshold matter, courts will not likely uphold non-competes for hourly employees and in some cases those making less than $100,000. Duration? 12 months maximum and forget about a nationwide ban unless you are paying the former employee not to compete during that time.

Rather than court disaster with a broad non-compete for all employees, employers should ask what are they trying to protect? The question must be asked on a case by case basis: what is the best way to protect my business interests from harm by this position/employee?

You can lawfully protect the following legitimate business interests:

- Employer's Trade Secrets
- Confidential Information
- Employer's Goodwill

All is not lost– other restrictive instruments may serve you better. Non-solicitation of employees and customers, and a non-disclosure of trade secrets and client lists are often the better choice. Please know doing nothing is better than using unenforceable forms from the internet: overkill is not a good practice.

You can protect your business interests and your new employees can start on the right foot, not frightened of lawyers. We can help.

New “Wealth Test” Will Deny Green Cards to Applicants Deemed Likely to Require Public Benefits

Earlier this week, the Trump administration announced a proposed rule that, if implemented as written, would focus on a green card applicant’s earning potential and use of certain public benefits to determine whether he or she is eligible for permanent residency. Under the proposed rule, an applicant would be considered a public charge if he or she has received one or more of certain public benefits, including Medicaid, Medicare, food stamps, or Section 8 assistance.

To make a determination on whether an individual could be considered a public charge and dependent on government assistance in the future, USCIS would review the applicant’s current and estimated income, job history, job skills, health status, assets, and their current or past history of public benefits receipt. By this administration’s standards, the ideal applicant is a healthy person of employable age with financial assets, resources, support, or income of at least 250 percent of the Federal Poverty Guidelines (or about $64,000 a year for a family of four).

In general, this updated regulation will impact individuals applying for a green card through a family member and nonimmigrants applying for a change of status or an extension of stay. The rule, if implemented as proposed, would make it much more difficult for those who have an inconsistent employment history, are low income or underemployed, retired, disabled, or suffering from a medical condition that impacts their employability. If you have received any of the above listed benefits in the three years before you apply for an immigration benefit, contact us. We can help employees determine the best strategy for their green card application.

The DOL Has an Opinion on IEP Meetings

Just in time for back to school, the Department of Labor issued an opinion letter stating intermittent FMLA leave is permissible for attendance at a child's Committee on Specialized Education (CSE) meetings under their Individualized Education Program (IEP). Opinion letters do not have the force of law but are excellent guides to how a hearing officer or judge would rule.

The issue arose when two parents requested intermittent FMLA leave for their child's IEP meeting and the wife's leave was rejected by her employer. The parents submitted the question to the DOL for an opinion. The child received a pediatrician-prescribed occupational, speech, and physical therapy. Under the IEP they are to hold meetings four times a year to discuss medical needs, educational needs, well-being, and progress. As in common at many IEP meetings, a speech pathologist, school psychologist, occupational therapist and physical therapist are in attendance at the meetings along with teachers and school administrators. The DOL stated that the FMLA permits employees to take leave "to care for" a serious health condition of their family member. They state that "to care for" also means "to make arrangements for changes in care" even if it does not involve a facility that provides medical treatment. Here, since the meetings discussed medical decisions regarding the child, it constitutes permissible intermittent leave under FMLA.

We know what you're thinking, as if FMLA isn't complicated enough, this just opens the can of worms to more intermittent leave. Treat this situation as you would any FMLA certification. The medical certification provided by the employee should contain specific language supporting the need for conferences under the IEP and the parent's attendance. The leave should relate to making medical decisions to care for the child, discuss the child's well-being and progress, and ensuring the school's environment is suitable for their medical needs. However, be careful in seeking documentation to support every subsequent meeting. Unless there is evidence the employee is lying, the employer should rely on the original medical certification.

Be sure to train and inform your HR department, managers, and supervisors that FMLA intermittent leave could now include attendance at school IEP meetings.

For employers in Massachusetts, this is not too much of a stretch since these rights were already provided under the Small Necessities Leave Act. This Act allows employees to take up to 24 hours of unpaid leave every 12 months to attend a child's school activities, like an IEP or school play. Either way, now under FMLA and the Small Necessities Leave Act, employees can attend IEP meetings where medical care or treatment is in play.

Have more questions? We can help.

New Lunchbox, Pencils, Paid Family and Medical Leave Regs…Get Ready

PFML has been a rollercoaster ride from the start. Good times. The fun is just starting though because the actual leave does not kick in until 2021! For now, we have several months of funding and complying that are critical to get right.

The Department of Family Medical Leave (DFML), the new agency charged with administering Paid Family Medical Leave, released new definitions and clarifications recently. Here is a list of those important changes:

- The definition of "wages" will be the same as set forth in the unemployment statute (M.G.L. c. 151A). As a practical matter, the wages you report to Unemployment Assistance should be the same wage base you use to report contributions for PFML. Under both laws, "wage" includes: salaries, hourly pay, non-cash tips, stipends, commissions and bonuses, overtime, vacation, sick pay, and 401K employer contributions. To see the DFML's guide click here. For those who want to get in the weeds, the full definition of wages is here.
- As we all know, withholdings begin October 1, 2019, and will apply to wages *paid*, not wages earned. This key clarification means that even if the wages were earned in September, payment for those wages issued on or after October 1, 2019, would have PFML withholdings.
- Employees who have H-2A visas are exempt from withholding and remitting contributions. However, all other temporary foreign worker visa programs (H-1B, H-2B, O-1, O-2) and international student and foreign exchange program visa holders are considered covered individuals and are subject to withholding. The DMFL gives guidance here.

As a general reminder, written notice must be given to employees by September 30, 2019. DFML has provided examples of the written notice, provided in the link under "Notifying Massachusetts W-2 Employees." You must receive an acknowledgement of receipt from each employee, either by paper or electronically. Here is a copy of the workplace poster, which must be posted where it can be easily read (translations of the poster found here). The DFML is also holding educational sessions around the state. Schedules and locations are provided on their site here.

Be sure to check back here and with the DFML's guide for updates. As always, if you have any questions, we can help.

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.