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Developments in Employment Law 2022

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Developments in Employment Law 2022



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Topic Overview

- Personnel Records
- Arbitration Agreements
- Retaliation Claims
- Wage and Hour
- Massachusetts Paid Family and Medical Leave Act
- Rhode Island Marijuana Laws
- COVID Policies

- M.G.L. ch. 152, § 52C
 - Personnel Record: a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action.
 - 20 or more employees
 - Shall include: the name, address, date of birth, job title and description; rate of pay and any other compensation paid to the employee; starting date of employment; the job application of the employee; resumes or other forms of employment inquiry . . . all employee performance evaluations, including but not limited to, employee evaluation documents; written warnings of substandard performance; lists of probationary periods; waivers signed by the employee; copies of dated termination notices; any other documents relating to disciplinary action regarding the employee.

- M.G.L. ch. 152, § 52C
 - An employer shall notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action.
 - Within 5 days of receiving a request to review shall provide opportunity to review during normal business hours.
 - Within 5 days of receiving a request for a copy, employee shall be provided with a copy
 - 2 reviews per year

- M.G.L. ch. 152, § 52C
 - If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position which shall thereupon be contained therein and shall become a part of such employee's personnel record.
 - Can mutually agree to remove records
 - Shall maintain for three years from date of separation

- Meehan v. Medical Info. Tech., 177 N.E.3d 97 (Mass. 2021)
 - Employees have a legal right to file a rebuttal statement to be included in their personnel file
 - Terminating an employee for violating that right constitutes wrongful termination in violation of public policy
 - Both the act of submitting the rebuttal and the contents of the statement are protected

Arbitration Agreements

- Arbitration versus Court
 - Forum and decision have greater level of privacy
 - Greater ability to control the process
 - More control over choosing the ultimate decision-maker(s)
 - Less likely to obtain pre-hearing dismissal
 - More predictable outcomes
 - Shorter timeframe to resolution
 - Lower attorney's fees/higher costs
 - Greater finality in outcome
 - Class action waivers

Arbitration Agreements

- Enforceability
 - Generally favored by courts, but still subject to legal attack
 - Contract principles apply:
 - Meeting of the minds
 - Consideration
 - Waiver
 - Violation of public policy
 - Unconscionability
 - Etc.

Arbitration Agreements

- Hernandez v. Universal Protection Service, LLC, No. 2181cv00335 (Middlesex Sup. Cut. Aug. 23, 2001 (Frison, J.)
 - Failure to provide employee with the arbitration agreement at any time before the matter was filed in court, including in response to employee's personnel record request, constituted a waiver of the arbitration agreement.

Arbitration Agreements

- Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021
 - Employees have the option to avoid arbitration
 - Can enter into an arbitration agreement *after* dispute arises
 - Courts, rather than arbitrators, determine whether the Act applies

- Retaliation Claims: Employer takes an adverse action against an employee for engaging in protected activity
 - Protected activities: e.g., reporting perceived harassment, requesting disability accommodation, applying for leave, etc.
 - Retaliation claim can be established even when basis for protected activity is discredited, e.g., no harassment occurred
 - Potential for significant exposure

- Stuart v. City of Gloucester, 2021 WL 4477476 (D. Mass. Sep. 30, 2021)
 - Found that a cause of action existed for a "retaliatory investigation."

Wage and Hour

- Chapoteau v. Bella Sante, Inc.
 - Sunday premium pay

Wage and Hour

- Jinks v. Credico (USA), LLC, 177 NE3d 509 (Mass. 2021)
 - Joint employer analysis as it applies to wage and hour laws

Wage and Hour

- Reuter v. City of Methuen; Devaney v. Zucchini Gold, LLC
 - Mandatory trebling of pay damages

Wage and Hour

- Patel v. 7-Eleven, Inc.
 - Independent contractor test applies to franchisee-franchisor relationship

Wage and Hour

- El Koussa v. Attorney General (June 14, 2022)
 - Supreme Judicial Court strikes down two initiative petitions proposing laws classifying covered app-based drivers as independent contractors

MA Paid Family and Medical Leave

- Paid Family and Medical Leave (PFML)
 - Different from FMLA – although both may apply
 - Benefits began January 1, 2021
 - Applies to most employees
 - Eligible for up to 26 weeks of paid leave
 - Qualifying reasons: caring for employee's own serious health condition, including illness/injury or pregnancy/childbirth (up to 20 weeks); caring for family member with serious health condition (up to 12 weeks); bonding with child after first 12 months of birth, adoption, placement (up to 12 weeks);

MA Paid Family and Medical Leave

- Paid Family and Medical Leave (PFML) Cont.
 - Qualifying reasons: caring for employee's own serious health condition, including illness/injury or pregnancy/childbirth (up to 20 weeks); caring for family member with serious health condition (up to 12 weeks); bonding with child after first 12 months of birth, adoption, placement (up to 12 weeks); caring for family member injured in the armed forces (up to 26 weeks); and managing family affairs while family member is on active duty (up to 12 weeks)
 - Protects employees against changes in pay, losing benefits, and retaliation

MA Paid Family and Medical Leave

- Retaliation
 - There is a ***presumption*** of retaliation in that ***any*** negative change in seniority, status, employment benefit, pay or other terms or conditions of employment which occur at any time during the period of leave or within the first 6 months of return to work is ***presumed*** retaliation

Rhode Island Marijuana Law

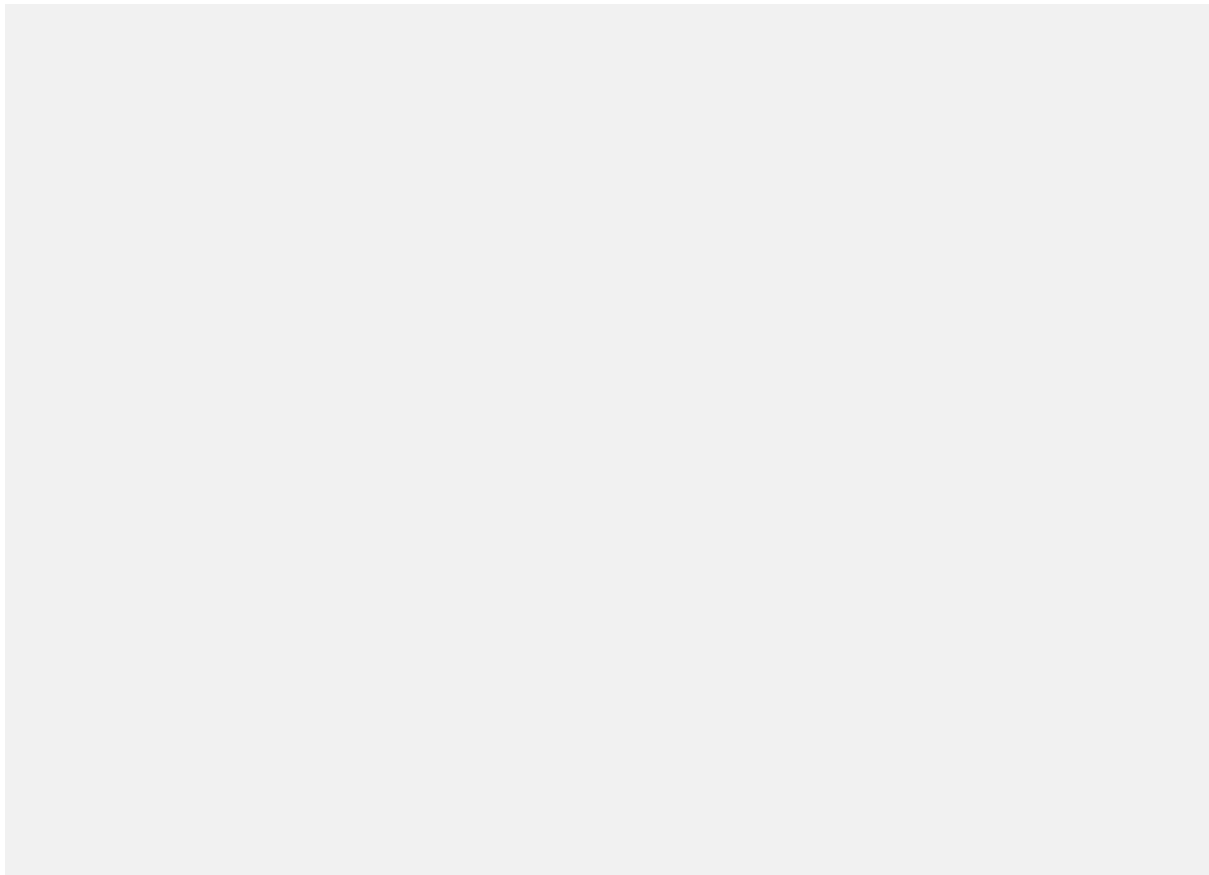
- Bill legalizing marijuana effective May 25, 2022
 - Impact on employers?
 - Medical cannabis had been permitted since 2006
 - Effective immediately, employees can legally possess and cultivate
 - Employers cannot fire or take disciplinary action against an employee solely for an employee's private, lawful use of cannabis outside the workplace and as long as the employee has not and is not working under the influence of cannabis

Rhode Island Marijuana Law

- Bill legalizing marijuana effective May 25, 2022
 - Impact on employers (cont.)?
 - Employers can implement policies prohibiting recreational marijuana in the workplace, including working under the influence
 - Testing positive does not necessarily = "under the influence"
 - For employees in safety-sensitive positions, employers may adopt and implement a policy prohibiting the employee's use of cannabis 24 hours prior to beginning work

- Employer Flexibility on COVID Policies
 - Return to in-person
 - Vaccine mandates/testing
 - ADA requests

QUESTIONS?







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