SHRM Vermont State Council
Employment Law &
Legislative Advocacy Update

Weekly Highlights
February 12, 2016

STATE OF VERMONT

H.187 - Absence from work for health care and safety (Paid Sick Leave)

In the last weekly update, the "Campion Amendment" to exempt small businesses from providing paid sick leave was the hot topic. A new proposal, the "Campbell Amendment", surfaced this week, and as opposed to an automatic exemption, includes a deferral of the paid sick leave mandate for small Vermont businesses. The Campbell Amendment requires a small business impact study to be conducted this year, with the study results due in 2017. This would give the legislature until January 2018 to determine if the exemption for small businesses with five or fewer employees should stick. The bill with the Campbell Amendment passed out of the Senate by a slim 15-14 margin.

The House must agree with this version of the bill before it becomes law, and if it does, Vermont would be the only New England state that has passed legislation of this nature without a small business exemption.

S.241 – Personal possession and cultivation of cannabis and the regulation of commercial cannabis establishments (Legalization of Marijuana)

To summarize the purpose of the bill as originally drafted:

- Legalize cannabis use and cultivation on a recreational basis for those 21 years of age and older
- Create a regulatory body to oversee the sale of commercial cannabis
- Allow for commercial manufacture and sale of non-edible cannabis products for topical use

The bill has moved through several committees in the Senate already, including the Judicial and Finance Committees. The Finance Committee made several changes to the bill via an amendment, with an overall goal of keeping production small and financed primarily by in-state investors, and specifically reducing the number of allowed retail establishments, the size of permitted cultivation and the proposed possession limit. A 25% tax rate for marijuana was set in the Finance Committee amendment that passed on Friday.

The Senate Economic Development, Housing and General Affairs Committee heard testimony all week from bill proponents as well Vermonters concerned about legalization. This Committee is drafting an amendment focused on expanding employer's drug testing capabilities, and calls for a voluntary drug-free workplace program that Vermont businesses could join. Once part of the program, employers would lawfully be able to test prospective or current employees under the following categories: applicants, reasonable suspicion, company-wide testing, follow up for drug rehab participations, and post accident. A couple of specific situations being addressed in the amendment include if an employee gets injured at work and refuses post-accident drug testing, they would not be entitled to worker's compensation, and if an employee is discharged for violating the drug free workplace policy, the termination from employment would be considered gross negligence, and the employee would not be entitled to unemployment benefits.

If you want to reach out to any of the members of the Senate Economic Development, Housing and General Affairs Committee, the list of members can be found at:
http://legislature.vermont.gov/committee/detail/2016/32

It is clear from the testimony being heard that there are still many open questions about legalizing marijuana in Vermont. The numerous issues around workplace liability are of great concern to employers. If the Economic Development, Housing and General Affairs Committee passes this amended bill, it will then head to the Senate Appropriations Committee for consideration. To track the movement of this bill through the Senate, you can go to the following link: http://legislature.vermont.gov/bill/status/2016/S.241

Other bills that may be of interest:

H.688 - Establish a good cause standard for termination of employment in Vermont

This bill is in the House General, Housing and Military Affairs Committee, and calls for the creation of a "good cause" standard in order for employers to dismiss employees after completion of a probationary period. Per the bill good cause means a "good faith reason for discharge related to a legitimate business reason or that the employee has been employed by the employer for less than 90 days. Good cause does not include reasons for discharge that are trivial, arbitrary, capricious or otherwise unrelated to a legitimate business reason."

Unless there is a document between the employer and employee to the contrary, an employee is currently deemed "at will" in 49 states (Montana is the exception).

H.808 – An act relating to accommodations for pregnant employees

Also in the House General, Housing and Military Affairs Committee, this bill requires employers to make reasonable pregnancy-related accommodations for pregnant employees unless such accommodation would be an undue hardship on the employer.

NATIONAL UPDATE - PROVIDED BY SHRM

HUD to Pay $900,000 over Failure to Accommodate Claim

Managers can't expect HR professionals to do all of the heavy lifting when it comes to reasonably accommodating employees with disabilities.

"It's incumbent on HR to educate managers that they have their own responsibility," said Evan North, an attorney with Boies, Schiller & Flexner in Washington, D.C., who secured a $900,000 settlement on Jan. 29 for a former U.S. Department of Housing and Urban Development (HUD) employee. A manager can't just pass off an accommodation request to HR and be considered done with the request, North asserted. Instead, a manager must be involved in the interactive process for identifying a reasonable accommodation, along with HR and the employee.

The settlement is large for a disability discrimination case, exceeding all but three of the Equal Employment Opportunity Commission's most significant disability discrimination cases.

Strained Relationship with Supervisor

Denise Lenkiewicz alleged that she was denied accommodations from 2009 to 2011 for her arthritis, broken foot and chronic obstructive pulmonary disease (COPD).

The vast majority of employees who sought accommodations from HUD in 2011 received some form of accommodation, said co-counsel Wells Harrell, also of Boies, Schiller & Flexner in Washington, D.C. Some of the handful who were not accommodated had, like Lenkiewicz, strained relationships with supervisors, he stated.

Lenkiewicz, who handled Freedom of Information Act requests for HUD, said she became too winded from her daily commute, among other activities, to perform her job duties. She requested a parking space so she wouldn't have to walk from the Metro subway stop, a walk that put stress on her lungs. She also asked for a parking space because of a broken foot that did not heal properly, Harrell said.

Lenkiewicz then rented a scooter to get to work. She requested a printer near her desk, rather than using a community printer down the hall. All of these accommodation requests were summarily denied, North remarked.

For more than 18 months, Lenkiewicz asked the agency for various reasonable accommodations, including the option of teleworking. The accommodation policy provided that an employee could request accommodations from managers or HR, and Lenkiewicz said she did both. She requested telework in 2009, when she did not want to bring the scooter in because she was afraid of damaging it. HUD's reasonable accommodation branch allegedly never got back in touch with her.

In 2010, Lenkiewicz tore a tendon in her knee and took leave, returning in the summer. She requested to telework again in December 2010 when her breathing and mobility got worse. But her accommodation request was denied. Her request for telework should have at least started a conversation about accommodation but it did not, Harrell said.

Without accommodations, Lenkiewicz became unable to come to work after May 2011, and she was discharged in November 2011.

After pursuing an administrative complaint without success, Lenkiewicz sued under the Rehabilitation Act in federal district court, claiming that she was unlawfully denied reasonable accommodations for her disabilities. In settling the claim, HUD did not admit that it or any of its employees violated any of her rights.

However, Harrell said that Lenkiewicz's manager failed to approach her accommodation requests with the desire to find a solution. Her manager "did not engage with her to improve her productivity, but just sent her to HR," he emphasized. Harrell said that if HR thinks managers are not familiar with accommodation procedures or are not communicating with employees about accommodations, then managers should be pushed to get involved with HR and employees in the accommodation process.

HUD declined to comment for this article.

This case is *Lenkiewicz v. Castro*, No. 1:13-0261 (D.D.C.). *The author, Allen Smith, J.D., is the manager of workplace law content for SHRM. Follow him @SHRMlegaleditor.*

For more information about the SHRM Vermont State Council Legislative Employment Law and Legislative Advocacy Update, please contact Shelley Field at 802-772-2215 or shelley.field@casella.com.