Labor&Employment

Where There's Smoke: NY Companies Should Re-examine Marijuana Policies

BY KATHRYN BARCROFT

With the growing trend toward legalization of marijuana for both medical and recreational purposes, New York companies should carefully evaluate their workplace policies to adhere to the latest legal developments impacting employees.

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Gov. Andrew Cuomo's 2017 legislative agenda, as reported by the press on Jan. 12, 2017, proposed lessening the penalties for recreational marijuana use.[1] In 1977, New York state decriminalized private marijuana possession, which made possession by private users a violation, not a criminal offense,[2] while marijuana possession by a user in public view is a misdemeanor. Under current state law, private users caught with small amounts of marijuana for the first time receive a fine akin to a parking ticket but are not criminally charged.

The governor's proposed change to the law would decriminalize the possession of small amounts of marijuana by recreational users in New York so that non-violent individuals who buy and use small amounts of marijuana will not be prosecuted by law enforcement. Cuomo's proposal, unlike some other states that have legalized marijuana, would not impact the prosecution of persons who illegally supply and sell marijuana in New York state.[3]

Gov. Cuomo recognized that his agenda for marijuana is indicative of a "national trend and dramatic shift in public opinion concerning marijuana," and stated that the recreational use of marijuana poses "little to no threat to public safety."[4]

New York is already a medical marijuana state—meaning that under certain circumstances an employee's use of marijuana, a drug that is illegal under federal law, is permitted under state law when certified for use by an authorized physician. The New York Compassionate Care Act (the CCA), signed into law in July 2014, provided for legalization of the use of medical marijuana for persons with serious illnesses.[5]

Medical marijuana laws currently exist in well over half the United States, and California, Alaska, Colorado, Maine, Massachusetts, Nevada, Oregon, and Washington have legalized recreational marijuana use. Medical and recreational marijuana use laws have also been passed in the District of Columbia.[6] The trend toward state-level legalization of marijuana potentially creates issues for New York employers. Increasing legalization will impact drug testing policies, hiring and discharge decisions, and accommodations for employees who suffer from serious illnesses and are being treated with marijuana. The issues are thorny because marijuana use, in recreational or in medical form, is still illegal at the federal level.

The use of marijuana, including medical marijuana, is prohibited under the federal Controlled Substances Act (the CSA). The CSA lists marijuana as a Schedule I substance, which means that it has no medically acceptable use, presents a high risk of abuse, and lacks acceptable safety use under medical supervision.[7] Under the CSA the use, possession, or manufacture of marijuana is a federal criminal offense.[8] Unlike at the state level, where a majority of states have approved the use of marijuana for medical reasons and a handful of states have approved recreational marijuana use, there are no such exceptions under the CSA.

The U.S. Supreme Court has held that the federal government is permitted to enforce federal marijuana laws, even in states that have enacted medical marijuana laws.[9] During President Barack Obama's administration, in late August 2013, Deputy Attorney General James Cole issued a statement that the federal government would not interfere with state and local law enforcement of marijuana activity unless the activity interfered with or violated certain federal enforcement priorities.[10] The federal government's position may change with the new Trump Administration's appointment of Attorney General Jeff Sessions, who has reportedly opposed the legalization of marijuana.[11] Commentators have noted, however, that while Senator Sessions opposes the legalization of marijuana, during his confirmation hearings he admitted that the arrest and imprisonment of marijuana offenders are problematic for the federal government in terms of resources. Recent press suggests that President Trump has leaned toward support for a state's right to choose whether to legalize marijuana, but he has not yet revealed any specific policy regarding this Schedule I drug or advocated legalization at the federal level.[12] In circumstances where there is a conflict between federal law and state law, federal law will prevail.

> The federal government's **position may change** with the new Trump Administration's appointment of Attorney General Jeff Sessions, who has reportedly **opposed the legalization of marijuana.**

The trend toward marijuana legalization at the state level was evident in the recent election. On Nov. 8, 2016, California, Nevada, Maine, and Massachusetts voters joined Alaska, Colorado, Oregon, Washington, and the District of Columbia in legalizing the recreational use of marijuana for adults.

While New York has yet to join these recreational marijuana use states, the CCA legalized marijuana use for certain individuals suffering from serious illnesses.[13] There are certain conditions under the CCA that must be met, however, in order for a medical patient to be eligible for medical marijuana. The patient must (1) suffer from a "severe, debilitating or life-threatening condition" (the conditions listed in the statute include, inter alia, cancer, HIV, Parkinson's disease, and multiple sclerosis) accompanied by an associated or complicating condition (such as chronic pain, severe nausea, seizures, or severe or persistent muscle spasms); (2) be certified as having the required "condition" by a physician who is registered with the New York Department of Health to certify patients under the CCA; and (3) obtain the medical marijuana from a licensed New York "medical marijuana dispensary."[14]

New York, like some of the other states that permit the use of medical marijuana, established in the CCA some employment protections for employees who use medical marijuana. The CCA provided that businesses cannot subject a certified patient, permitted to use marijuana under the CCA, to disciplinary action for exercising the right to use medical marijuana.[15]

The non-discrimination provision of the CCA also provides that "[b]eing a certified patient shall be deemed to be having a 'disability' under article fifteen of the executive law (human rights law)"—the New York State Human Right Law (the NYSHRL).[16] The NYSHRL prohibits employers with four or more employees from terminating or refusing to hire an individual or discriminating against an individual with respect to compensation or terms or conditions of employment, because the individual is certified under New York state law to use medical » Page 12

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SEC Whistleblower Program Experiences Historic Year

BY JULIA M. JORDAN

The U.S. Securities and Exchange Commission's 2016 Annual Report on its Dodd-Frank Whistleblower Program reflects that 2016 was historic for the program, both in terms of whistleblower activity and enforcement of whistleblower protections.

During fiscal year 2016, which runs from Oct. 1, 2015 to Sept. 30, 2016, the SEC's Office of the Whistleblower (OWB) received over 4,200 whistleblower tips, the largest in the program's history. The OWB issued awards totaling over $57 million, which was higher than all award amounts issued in the previous years of the program, and included six of the 10 largest whistleblower awards issued to date.

In addition, in fiscal year 2016, the agency brought its first standalone whistleblower retaliation case against an employer for terminating an employee for reporting a potential securities violation, and multiple enforcement actions based on an employer's use of separation agreements that potentially stifled whistleblowing. The agreements at issue in those enforcement actions, among other things, imposed a financial penalty for the violation of strict non-disclosure terms, and required employees to waive their rights to monetary recovery in the event that they filed a complaint with the SEC.

Notably, the 2016 report reflects that 65 percent of the 34 individuals who have received whistleblower awards to date under the program were insiders of the entity on which they reported wrongdoing to the SEC, and that this percentage grew in fiscal year 2016. Moreover, 80 percent of those insiders either raised their concerns internally to supervisors or compliance personnel, or understood that such personnel were aware of the violations, prior to their making a report to the SEC. The 2016 report therefore reflects that many of the regulated companies that were the subject of the successful whistleblower claims had an opportunity to address those claims prior to a report being made to the SEC.

The 2016 report states that in fiscal year 2017, the agency will continue to:

- Rely on whistleblower tips to generate leads for potential enforcement actions.
- Focus on employer's use of confidentiality, severance and other kinds agreements that may impede an employee from making a report to the SEC.
- Identify cases where companies retaliate against an employee for whistleblowing, including by reviewing federal court cases that allege violations of Dodd-Frank and/or the Sarbanes-Oxley Act.

Of course, the new administration could revisit these priorities. The OWB was established in response to Dodd-Frank's direction to the SEC to make monetary awards available to certain eligible whistleblowers, and President Trump has heavily criticized that statute. President Trump, however, also promised to root out corruption during the campaign, and the OWB has been viewed by some commentators as a successful program in achieving that goal. According to recent news reports, House Republicans are currently planning on proposing legislation that would keep the SEC whistleblower program intact but would modify the program to prohibit "co-conspirators" from receiving awards. At present, the program prohibits awards to such individuals only if they are criminal convicted for the same or related conduct.


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Accordingly, regulated companies should continue to:

- Promote internal reporting of potential wrongdoing.
- Promptly investigate whistleblower reports, and remediate any wrongdoing identified in those investigations.
- Prohibit retaliation against whistleblowers.
- Review employee policies, practices and agreements to ensure that they do not deter an employee from reporting to the SEC.

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Government Activism Creates Compliance Minefield

BY JAMES HOLAHAN AND THERESA RUSNAK

In 1913, President William Howard Taft signed legislation that created the U.S. Department of Labor. Two decades later, a flurry of New Deal legislation extended federal protection to the right to organize and bargain collectively (National Labor Relations Act), created a safety net of financial support for the elderly, disabled and unemployed (Social Security Act), and codified the 40-hour workweek (Fair Labor Standards Act).

Since then, the American public has accepted, and arguably expected, the federal government to be a force for change in the workplace. The Family and Medical Leave Act and the Affordable Care Act are recent examples of this leading role.

By all accounts, however, President Donald Trump intends to take a large regulatory step back as his administration begins to assume and assert power. Steps to repeal the Affordable Care Act are already underway, and numerous regulatory initiatives have been placed on hold or stopped altogether. This federal banner—one that has flown over the employment law landscape for several decades—is now under siege, but ultimately may be rescued by the states (mostly blue states). Several states have recently passed legislation increasing the minimum wage (New York, Oregon, Arizona, Colorado and Maine)[1] and imposing paid family leave (New York and the District of Columbia).[2] Increasingly, local governments are also regulating employers within their jurisdictions. For example, Seattle and San Francisco have passed laws on "predictive scheduling" requiring retail and food establishments with 500 or more employees to give good faith estimates of an employee's hours in advance and provide additional compensation to employees whose hours are changed on short notice.[3]

Regulation Acceleration Likely

This trend of state and local employment regulation is likely to accelerate if the federal government recedes from the battlefield under President Trump. If that occurs, the compliance burden for employers who work in multiple jurisdictions is also going to increase. For example, Monro Muffler Brake offers complete auto care at more than 1,100 company-operated stores in 26 states. Every day, Ed Mullen, Monro's vice president of employee relations, confronts a patchwork of different and sometimes conflicting state, federal and local workplace regulations: "New regulations appear so often and existing regulations change so frequently that I devote a lot of my own time as well as the time of attorneys and other compliance experts to tracking, learning and implementing the changes occurring at the federal, state and local levels. Making fair and accurate workplace decisions requires nothing less."[4]

A Compliance Minefield

The compliance minefield is a daunting one—even for experienced HR professionals like Ed Mullen. One recent trend—the "ban the box" initiative—reveals how difficult it can be for human resource professionals to stay on top of new developments, understand the differences in treatment (nuanced and otherwise) adopted by the different states and municipalities, and then develop a consistent policy approach that complies with the law, protects the employer's interests, and provides fairness across the board to employees.

Conviction History

The National Employment Law Project reports that, since 2010, nine states (Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont) have required private employers to remove the convic- » Page 12

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Also

Workplace Analytics and the Law: What Today's Practitioner Needs to Know

BY ERIC J. FELSBERG

What if an employer could use personnel activity records to predict which of its employees are about to leave the organization, or most likely to file a complaint?

Many employers may be doing just that. Companies are increasingly turning to workplace analytics, a suite of powerful quantitative methods and tools, combined with detailed employee activity records to streamline employment processes, saving time, money, and resources. While there is a large number of practical uses for analytics in workforce management, a few specific applications have piqued the interest of business leaders, U.S. federal enforcement agencies, and some in the legal community.

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Analytics in Action

In his book "Predictive Analytics, The Power to Predict Who Will Click, Buy, Lie, or Die," author Eric Siegel discusses two examples of how analyzing workforce data streamlined employment processes and saved money. In the first example, a well-known technology company developed a scoring system to predict which employees (from a workforce of several hundred thousand) were more likely to leave the organization. The "flight risk" score gave managers the opportunity to intervene or to plan accordingly. As a result, the company realized an estimated $300 million in potential savings. In the other example, a retail bank used data to predict which teller applicants were more likely to quit in the first 12 months. Using this information, the bank reduced attrition from 80 percent to 38 percent, saving $600,000 in the initial year.

Savings associated with efficiently identifying successful candidates are underscored by a 2012 CareerBuilder survey which found that a majority of employers had experienced a bad hire, and that 24 percent of these employers said that a bad hire costs them more than $50,000. It is clear that analyzing workforce data can be valuable, yet formal frameworks for assessing legal risk and ethical issues are still evolving.

Are There Legal Risks?

The use of workplace analytics is still in its infancy, despite widespread use of similar methods in other fields. The SHRM Foundation echoed this sentiment in its May 2016 report "Use of Workplace Analytics for Competitive Advantage," with one commentator, Peter Louch, noting that "HR has been late to adopt tools that other sectors—finance, academia and marketing—have already embraced." While the reason for this lag is unclear, it may be due to the way human resource practitioners are trained to manage personnel matters. As I noted in my article in the January/February issue of Workforce Magazine, "Big Data and the Law: New Tools but a Better Workplace?," human resource matters often involve emotions and complex notions of equity and fairness. Human resource professionals are trained to examine each personnel matter individually, talk to the parties involved, review documentation, and consider institutional employment policies in a legal context. Making employment decisions based on cold, hard data may seem risky to these practitioners. And others appear to share this concern.

It is true that algorithms designed to assist employers with workforce decisions **do not always guarantee an unbiased result or recommendation.** Poor algorithm design can result in analysis results and recommendations that are tainted with unlawful bias.

The Government's View. In October 2016, the U.S. Equal Employment Opportunity Commission (EEOC) held a public meeting on the benefits and risks of the use of big data analytics in the workplace. Former EEOC Chair Jenny R. Yang explained that "[b]ig data has the potential to drive innovations that reduce bias in employment decisions and help employers make better decisions in hiring, performance evaluations, and promotions." Yang added that "[a]t the same time, it is critical that these tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity." Then Commissioner Victoria A. Lipnic, added, "[i]t can be a challenge to determine whether, when, and how laws may apply in our increasingly technology-driven workplaces." Other governmental bodies, including the White House and the Federal Trade Commission, have also cautioned about the risk of using big data analytics when making workplace decisions.

The Design and Use of Workplace Analytics Tools. It is true that algorithms designed to assist employers with workforce decisions do not always guarantee an unbiased result or recommendation. Indeed, poor algorithm design can result in analysis results and recommendations that are tainted with unlawful bias. As an example, take a simple algorithm that has been designed to help a talent acquisition team identify successful candidates for employment. If the algorithm is constructed in a way that explicitly takes a candidate's race or gender status into account, bias will be a serious concern. Even if race or gender is not explicitly taken into account, unintentional, but harmful, bias may still be an issue if, for example, use of the algorithm disproportionately excludes particular race or gender groups. Of course, without workplace analytics, decisions are generally based on the experience and well-intentioned intuition of individuals. However, we must remember that human intuition is imperfect and could itself be tainted with inconsistency and bias. With proper design and regular monitoring, workplace analytics can support decisions with neutral data science and remove this element of uncertainty and risk. Effective workplace analytics platforms provide guidance to employers when making employment-related decisions. Algorithms generally do not, and should not, be the sole drivers of these decisions.

If implemented correctly, the algorithms that power workplace analytics tools generally perform quite well, but there are still important considerations when interpreting analysis results, which can sometimes seem confusing or even contradictory. For example, supplied with myriad data points, an algorithm designed to assist talent acquisition teams in identifying successful candidates may discover a relationship between someone's place of residence and the likelihood of success on the job. The true reason that a candidate was successful may actually be due to a relevant set of skills that just so happened to be concentrated in people coming from a few select locations. Associating a location with success, instead of investigating the underlying reason or cause, can lead human resource teams to make incorrect assertions and poor, even biased, decisions.

The law is still catching up to the rapidly evolving world of workplace analytics and we may expect future guidance on its use from institutions like the EEOC. For now, it is critical that employers comply with applicable laws and ensure that protected characteristics such as race and gender are not explicitly taken into account when designing these types of algorithms. And, employers should also regularly monitor these algorithms for biased outcomes. When using workplace analytics platforms, employers should take care to design algorithms that identify and leverage variables that are "job related for the position in question and consistent with business necessity" within the meaning of Title VII of the Civil Rights Act of 1964 and consider validating the use of the selection mechanisms within the framework of the Uniform Guidelines on Employee Selection Procedures (1978), for example.

Concluding Thoughts

Employers are increasingly using workplace analytics to help streamline their employment processes. Designed and deployed properly, workplace analytics can be a very effective tool for managing the workplace, helping companies optimize their personnel processes resulting in saved time, money, and resources. But before embarking on a workplace analytics initiative, employers must ensure that it is appropriately designed and in compliance with applicable law.

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An Employment Policy Is Only Good if the Company Enforces It

BY JONATHAN MEER

An employer's formal policies often sit front-and-center in a discrimination or wrongful termination matter. Courts and administrative agencies in New York frequently consider such policies and handbooks in employment disputes.

When an employer demonstrates uniform application and enforcement of such policies, it helps create firm support for the employer's actions. However, in cases where there is a variance on how an employer enforces its own policies, questions of fact can be raised that create more challenges for an employer's defense. Attorneys involved in employment disputes understand that how policies are enforced can make a difference if employment litigation arises in the future.

Evidence of Enforcement

Just having a policy in place that addresses, for instance, hiring practices, progressive discipline and general antidiscrimination policies is not enough. Rather, the employer often will have to give examples of how it enforces these policies as part of its defense to an employment dispute.

One recent case that demonstrates the importance of an employer following its own policies opposing discrimination is *Sarr v. Saks Fifth Ave.*, 2016 NY Slip Op 31751(U), ¶ 3 (NY Cty. Sup. Ct. Sept. 20, 2016). The employee here alleged violations of New York State and New York City Human Rights Laws, claiming discrimination and retaliation based on religion. The court dismissed the complaint against the employer, finding that the employer met its burden for setting a legitimate, nondiscriminatory reason for the termination of employment based on the employee's repeated violations of the employer's workplace attendance policies. These policies included requiring the employees to report to work on time and provide supervisors prior notice when an employee is going to be late or absent. They also included the employer's policy to terminate employment after giving a fair warning for such violations. The court noted that the employer provided the employee with four warnings that he was violating policies before terminating his employment. The employer also provided evidence that other employees similarly situated were given the same warning and termination letters for violating the same policies. To that end, based on the employer's enforcement of its own policies, the court dismissed the complaint.

Similarly in the matter of *Dunn v. URS*, No. 13-CV-6626 (S.D.N.Y. Sept. 30, 2016), at issue in this Title VII discrimination action was the employer's application of its Standby Leave policy. The employee, after multiple documented job deficiencies, was placed on standby leave when removed from his position. The court found that the employee had "not provided evidence of negative treatment of African American employees, disparate application of the Standby Leave policy to African Americans, or even a different application of the Standby Leave policy to any similarly situated individual." Rather, after considering the documentary evidence of the employee's poor performance reviews, the court found that the employee's own deposition testimony was conclusory and insufficient to conclude that the employer was motivated by race and dismissed the matter.

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The employer often will have to **give examples of how it enforces these policies** as part of its defense to an employment dispute.

Employer's Abidance

However, when there are questions of fact regarding an employer's own abidance with a policy, there can be an added layer of difficulty in an employer's defense. The fact that an employer does not adhere to one aspect of its employment handbook or corporate policy, or there is a lack of contemporaneous documentation, in itself is not evidence of discrimination or wrongful termination. See, e.g., *Holleman v. Art Crating*, 2014 U.S. Dist. LEXIS 139916, at 127 (E.D.N.Y. Sept. 30, 2014) (dismissing with prejudice each of plaintiff's Title VII, NYSHRL and NYCHRL claims). Instead, courts and administrative agencies look at the pattern of the employer's enforcement of the policy.

One representative example is *Viscecchia v. Alrose Allegria*, 117 F. Supp. 3d 243, 258 (E.D.N.Y. 2015). In this action, which alleged gender discrimination and retaliation on Title II and New York State Human Rights Laws, at issue was the employer's policy with respect to hair and employee grooming. The employer's policy required that "hair must be clean, trimmed, well brushed and neat at all times," prohibited "beaded, braided or streaked hair," and required that men's hair "be above the shirt collar." The employee claimed that his failure to comply with the hair policy, which ultimately led to the termination of his employment, was discriminatory because the employer "failed to enforce the overall policy even-handedly." Based on allegations that the employer did not discipline a female employee who had "streaked" hair and "while terminating male employees who violated other aspects of the hair policy, an employee could have a good faith, reasonable belief that such conduct violated both federal and state discrimination laws." As such, the court denied the employer's motion to dismiss the plaintiff's gender discrimination and retaliation claims regarding alleged selective enforcement of the overall hair policy.

Another example of a court maintaining a discrimination action against an employer for failure to consistently apply a corporate policy is *Esmilla v. Cosmopolitan Club*, 936 F. Supp. 2d 229, 249 (S.D.N.Y. 2013). This matter, which involved a retaliation claim under §215 of New York State Labor Law, focused on the application of the employer's policy with respect to the discipline of an employee who complained that management was using certain funds in violation of New York State Labor Law. The court focused on the fact that the employer's description of the progressive disciplinary policy differed from the policy in the employment handbook. The court found that the "apparent inconsistencies between defendant's formal disciplinary policies and how plaintiff was treated, together with the temporal proximity of plaintiff's purported complaints and her termination, are enough to create a triable issue of fact as to whether defendant's stated reason for terminating plaintiff's employment was pretextual." As such, the employer's motion for summary judgment was partially denied.

Thoughts to Consider

The issues raised in employment disputes are continually evolving. Whether right or wrong, the one piece of evidence often cited by both sides is the employment handbook and the company's policies contained therein. These policies, often the embodiment of existing laws, are looked to as a baseline of the organizational environment. However, what is said in these policies is not necessarily the bottom line. How policies play into the company's life, used or not used, makes the difference in how much stock a court or administrative agency puts in them. While an organization's counsel should continually discuss developments in labor and employment law, including the creation of new protected classes and compliance with changing regulations, it is important that entities understand how these laws are applied.

Central to that discussion is advising organizations that uniform enforcement of its rules and regulations often plays a key factor in defending an employment dispute. Companies wishing to include rules and regulations in their handbooks actually have to follow through. As an example, simply saying that an employee violated a certain rule repeatedly without contemporaneous notes in the employee's personnel file, when such records are present for another employee, diminishes the company's ability to use such arguments as part of its legitimate, non-discriminatory reason for the termination of that person's employment.

The same can be said for a company having a progressive discipline policy but failing to use it consistently or at all. Allowing feelings of guilt to prevent an employer from adding a negative comment in an employee's file, but making a record for a different employee, can later hurt the employer's defense. Employment handbooks and corporate policies should be more than just inspirational words; they should be implemented as drafted and agreed to by the employee. Uniform practices can make the difference in defending a discrimination case or a wrongful termination dispute. Otherwise, the words on the paper are just words and nothing more.

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Litigating Against a Former Employer for **Additional Compensation**

BY JENNIFER B. ZOURIGUI

At the end of an employment relationship, a former employee may assert that he or she is entitled to additional compensation from a former employer. This could be, for example, in the form of bonus, commissions, or profit sharing.

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If a demand has been made by the former employee and the former employer refuses to pay, the former employee will be left with the sometimes difficult decision of whether or not to pursue litigation. In my practice, I have had the benefit of handling these type of matters on both sides of the coin—representing both individuals seeking additional compensation and the companies defending against such claims. With this dual perspective, there are four topics I find it is best to discuss with a former employee before commencing litigation.

Topic 1: Analyzing and weighing the merits of the claim. In assisting an individual in determining if they want to pursue litigation, the first task, as with any potential claim, is to analyze the strength of the claim, reviewing the employment contract, if any, and any applicable labor laws. The analysis should also include asking the former employee such questions as: whether a release was signed at the end of employment; whether there was a discretionary aspect to the compensation at issue; or whether there is a potential waiver defense.

Topic 2: Realistically considering the costs of an individual litigating against a company. If the results of such analysis are that the claim is favorable, the determination by both lawyer and client whether an individual should actually engage in litigation against the company where he or she was formerly employed must go beyond the merits of the claim. As with other types of litigation, this can include a frank discussion about the costs of litigation. But in this situation, it also means being realistic about the likely unequal footing of the parties. If no settlement or compromise could be reached when a demand for the compensation was made, it is unlikely the mere filing of a lawsuit will change the company's position. There is "the cost of business" mentality that many companies are willing to take when dealing with litigation. And more likely than not, a company may use litigation costs to outmaneuver an individual. This may include, for example, excessive motion practice or overly burdensome discovery demands. Of course, a skilled litigator working on behalf of the individual will know how to fight back but inevitably this may mean spending more money.

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The first task, as with any potential claim, is to **analyze the strength of the claim,** reviewing the employment contract, if any, and any applicable labor laws.

Topic 3: Discussing how emails, texts, and social media may be discoverable. The company being sued will seek discovery regarding the former employee's claim. But they will also assert defenses and, possibly, counterclaims. They will demand discovery in connection with those as well. The former employee should understand that this will likely mean discovery requests in connection with their emails or even text messages. I typically advise clients that they should expect that the former employer will request discovery from any personal email accounts but will also have access to and will search their old work email accounts. For some, this won't matter. But for others, there may be some discomfort with their email communications being reviewed and scrutinized. Worse yet, for some, there may be information within those emails that could be harmful.

There is also the issue of social media, including Facebook and Twitter accounts. Not only should an attorney consider advising his or her client not to make any statements about the former employer or the litigation on social media, but there should also be a review and discussion of any existing negative statements about the former employer or details about work that perhaps should not have been posted and the potential impact on the litigation.

Topic 4: Understanding that skeletons in the work closet will come out. Be ready for the former employer to fight fire with fire. When those emails and other documents are reviewed, they will be looking for ways to attack back—including the former employee's performance. Both formal written reviews and informal feedback may be at issue, especially if there is any discretionary aspect to the compensation sought. But even if the contractual language is non-discretionary, the company may still argue that the former employee failed to perform. A plan should be discussed for how to counter any such contentions by the former employer, crafting both legal and factual arguments.

Another counterattack I frequently see is a claim that the former employee has violated a confidentiality agreement and retained company documents or other property. Maybe the employee had a work laptop that was not retuned. Or routinely brought documents home during the employment term but may have been required to return such information to the company prior to departure. Once the company reviews old work emails, another issue that may come up as a potential violation of the work agreement is if the former employee was forwarding emails or other documents to a personal email account during employment.

In addition to breaches of confidentiality agreements, if there is a non-compete or non-solicitation agreement, the former employee should expect the company will raise any claims for breach if they exist. It is possible the former employer may not have been aware of what might be considered a breach but the former employee's claim brings it to light. Alternatively, a company may have decided to forbear asserting a violation of a non-compete—until the former employee engaged in litigation. If this is a potential counterclaim, an analysis of the scope and validity of the restriction will be necessary, as well as a balancing of the risks and rewards of initiating a lawsuit for the additional compensation.

Although the former employee may not have signed any non-compete agreement, in New York there is an inherent duty of loyalty to an employer during the course of the employment. This duty is less well known than a non-compete restriction. It means an employee may not compete with his employer during employment and cannot place his personal interests above those of the employer. The employee may take preparatory steps to set up her own company but cannot use the employer's time or facilities. Particularly if the employee left to start her own business, a frank discussion about what steps were taken during the employment should be raised.

All of these topics should be discussed with the former employee *before* litigation commences so the individual has a realistic perspective of the various issues that could come up along the way. Knowledge is power—and a fully armed litigator can more successfully navigate the case to a successful conclusion. This will also make for a stronger working relationship with the client if the lawyer prepares them for the fight ahead.

Compliance

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tion history question on job applications.[5] These state prohibitions, however, vary substantially. For example, one state (Hawaii) prohibits any inquiry about convictions until after a conditional offer of employment has been made.[6] Another state (Minnesota) prohibits any inquiry until after an applicant has been selected for an interview or before a conditional offer of employment.[7] Several states link the ability to inquire about convictions to the initial interview—for example, two after being selected for an interview (Illinois and Minnesota), two during the initial interview (Oregon, Rhode Island), and one after the initial interview (New Jersey).[8] Finally, two states merely prohibit employers from including the convictions inquiry "box" on initial employment applications (Connecticut and Vermont).[9]

Adding to this confusion—29 cities and counties have imposed similar restrictions on municipal contractors and private employers. Perhaps democracy is working well when citizens rally their representatives in state and local government to act upon important social issues, but these legislative responses to social issues do not always hit the mark. Recent studies suggest that ban-the-box policies decrease the probability that young, low-skilled Black and Hispanic male applicants will be interviewed or hired.[10] The authors of these studies opine that when an applicant's criminal history is unavailable, employers statistically discriminate against demographic groups that they believe are likely to have a criminal record.[11] In other words, one form of discrimination yields to another.

Heather Bigger, Director of Human Resources at D4—which designs customized e-discovery and managed services solutions—knows the challenge for relatively small employers who compete on a national platform. "The complexity of the federal, state and local employment laws is particularly problematic when we try to hire top talent quickly. Each applicant is like a puzzle. We need to tailor our hiring process—from the content of the application to permissible interview questions to wage theft prevention notices—to the unique rules of the states and local jurisdictions where we do business."[12]

Salary History

Trending for 2017 may be legislation prohibiting employers from making inquiries about an applicant's salary history during the hiring process. In August 2016, Massachusetts became the first state to pass such legislation,[13] and the City of Philadelphia recently followed suit.[14] The Philadelphia ordinance prohibits employers from:

- inquiring about, or requiring disclosure of, a prospective employee's wage history, conditioning employment or consideration for an interview or employment on disclosure of wage history;
- retaliating against a prospective employee for failing to comply with a wage history inquiry, or for otherwise opposing unlawful conduct under the ordinance; or
- relying on the wage history from the prospective employee's current or former employer in making a wage rate determination, at any stage in the employment process, including the negotiation or drafting of an employment contract.[15]

The ordinance provides an exception for cases where the applicant "knowingly and willingly discloses his or her wage history to the employer."[16] Similar legislation has been proposed in New Jersey, Pennsylvania, Washington, D.C., and New York City.[17]

The rationale for banning inquiries about salary history is to promote gender pay equity. Presumably, employers who cannot base a female applicant's compensation on her prior compensation history (which may be unfairly low) will have to base compensation on the market value of the position. The ordinance was strongly opposed by the Philadelphia Chamber of Commerce and Comcast, the cable giant whose corporate headquarters are in Philadelphia.[18] Like the "ban-the-box" legislation, these new laws may also have unintended consequences. Because the Philadelphia ordinance prohibits making salary inquiries of both male and female applicants, who is to say that it won't benefit male applicants as much or more than it does female applicants—thwarting its gender pay equity goal.

Although President Trump apparently intends to broadly curtail federal regulation during his tenure, there may be **employment issues of substantial national importance** that merit federal uniformity of treatment and enforcement.

Federal Government's Role?

Although President Trump apparently intends to broadly curtail federal regulation during his tenure, there may be employment issues of substantial national importance that merit federal uniformity of treatment and enforcement. In 2004, Oklahoma passed a law which permits employees to store firearms in their locked vehicles on their employer's premises.[19] Since then, more than 20 other states have passed laws limiting an employer's right to ban firearms on its property in various and different ways.[20] Broadly speaking, proponents of these "parking lot permit" laws claim that they deter workplace violence because a potential shooter knows that other employees have access to firearms. In rejecting a challenge to the Oklahoma law brought by a group of employers who forbid their employees from bringing firearms onto company property, the U.S. Court of Appeals for the Tenth Circuit noted that OSHA was aware of the controversy surrounding firearms in the workplace and had consciously decided not to adopt a standard.[21] In fact, OSHA *declined* a request to promulgate a standard banning firearms from the workplace.[22] In declining this request, OSHA stressed reliance on its voluntary guidelines on workplace violence and deference "to other federal, state, and local law-enforcement agencies to regulate workplace homicides."[23]

These observations illustrate the complexities of devising and administering sound human resource policies across multiple states and municipalities. No doubt, this challenge will not get any easier as the transition of power continues across the federal government.

1. Eric DuVall, "2017 Brings Minimum Wage Increases In 21 States," UPI, Dec. 31, 2015, http://www.upi.com/Business_News/2016/12/31/2017-brings-minimum-wage-increases-in-21-states/2571483223259/.
2. Clare O'Connor, "Washington D.C Passes 8 Week Paid Parental Leave Bill," FORBES, Dec. 20, 2016, http://www.forbes.com/sites/clareoconnor/2016/12/20/washington-d-c-passes-8-week-paid-parental-leave-bill/#dffc34477174.
3. S.F., CAL., POLICE CODE §3300G (2015); Seattle, Or., Ordinance 125135 (Sept. 9, 2016)
4. Telephone Interview with Edward Mullen, Vice President of Employee Relations, Monroe Muffler Brake, Inc. (Jan. 30, 2017).
5. Michelle Natividad Rodriguez and Beth Avery, Ban the Box: U.S Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions, NATIONAL EMPLOYMENT LAW PROJECT (2016).
6. See id. at 11.
7. See id. at 13.
8. See id. at 11-16.
9. See id. at 10, 16.
10. Sendhill Mullainathan, "Ban the Box? An Effort to Stop Discrimination May Actually Increase It," N.Y TIMES, Aug. 19, 2016, available at https://www.nytimes.com/2016/08/21/upshot/ban-the-box-an-effort-to-stop-discrimination-may-actually-increase-it.html.
11. See id.
12. Interview with Heather Bigger, Director of Human Resources, D4, (Jan. 29, 2017).
13. ALM GL ch. 149, §105A.
14. PHILADELPHIA, PA., THE PHILADELPHIA CODE §9-1131 (2016).
15. Id.
16. Id.
17. Amanda Hoover, "Philadelphia Takes Salary History Off the Negotiating Table. Could It Help Close the Gender Wage Gap?" CHRISTIAN SCIENCE MONITOR, Jan., 24, 2017, http://www.csmonitor.com/Business/2017/0124/Philadelphia-takes-salary-history-off-the-negotiating-table.
18. See Hoover, supra note 17.
19. 21 Okla. Stat. §§1289.7a and 1290.22.
20. Colin Walker, "Top Ten Issues Regarding Guns in the US Workplace," Association of Corporate Counsel, March 8, 2016, http://www.acc.com/legalresources/publications/topten/top-ten-regarding-guns-in-the-workplace.cfm.
21. See *Ramsey Winch v. Henry*, 555 F.3d 1199 (10th Cir. 2009).
22. See Richard Fairfax, Standards Interpretations Letter, U.S. Department of Labor, Sept. 13, 2006.
23. Id.

Marijuana

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marijuana.[17] Companies in New York with four or more employees are also required to provide reasonable accommodations to employees who are certified to use medical marijuana.[18]

As a result, medical marijuana users already have *some* legal protection in New York. The statute's protection, however, has certain specific limitations. For example, a company's employees are not permitted under the CCA to smoke marijuana in a public place, such as an office environment.[19] Also, the CCA does not bar employers from enforcing a policy prohibiting "an employee from performing his or her employment duties while impaired by a controlled substance."[20] Nor does the CCA require any company "to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding."[21]

Because medical marijuana is legalized in New York, employers should consider whether they are legally permitted to establish and test for a drug-free company. Another issue employers may confront is whether it is legal to terminate an employee with a legal prescription for marijuana if there is a positive result on a company drug test. There is uncertainty in employment law on this issue, given that marijuana remains an illegal drug under federal law and there is no duty to accommodate employees for the use of medical marijuana for a serious illness under the federal Americans With Disabilities Act (ADA). Unlike some state-level human rights laws, a person currently using illegal drugs is not a qualified individual with a disability and thus is not protected by the ADA.

Case law is still evolving concerning an employer's duty to accommodate an employee using lawfully prescribed marijuana and the employer's right to terminate an employee who tests positive for marijuana. These issues may become of even more concern in New York if recreational use is legalized with users no longer being prosecuted for buying and smoking marijuana.

Thus far, case law emanates primarily from jurisdictions where the medical marijuana statutes contain no specific employment protections. In states where there is no specific duty for employers to accommodate employees' off-site medical marijuana use, the employees are not typically successful in bringing employment law claims for adverse employment actions.[22] Rather, courts have held that an employer can lawfully terminate an employee who tests positive for marijuana in a random drug test, even though the employee's use of marijuana was off-duty and the employee was certified to use medical marijuana under state law.[23] In a recent medical marijuana case, the court permitted a disabled employee who used a valid marijuana prescription to proceed with a claim for violation of the District of Columbia's human rights law, but dismissed the employee's cause of action for wrongful termination.[24] The Court noted in this case that the plaintiff faced an "uphill climb" in proving he was fired because of his disability rather than for a positive drug screening test.[25] The human rights law at issue in this case did not specifically provide, like New York does, for an employment accommodation for being a certified marijuana patient.

New York employers should **pay close attention to actions by the Trump administration** regarding federal regulation of states concerning marijuana use and federal enforcement.

In states like New York, where the statute directly addresses employment accommodations for medical marijuana use and classifies a certified marijuana patient as having a "disability" under the human rights law, employers should carefully consider any adverse action that they may take against an employee who is lawfully using medical marijuana. Employers may also have to consider whether off-duty marijuana use impairs an employee's job responsibilities regardless of whether there is a drug testing policy. If medical marijuana use impacts job performance, the employer may have to consider if an alternative type of work or schedule might accommodate the employee's marijuana use to avoid a state discrimination claim. Another consideration may be the privacy rights of employees with respect to drug test results and medical information related to certified patient marijuana use.

New York employers should pay close attention to actions by the Trump administration regarding federal regulation of states concerning marijuana use and federal enforcement. Employers should also follow federal court cases that may address the inconsistencies between state and the federal law.

1. See Washington Times, "NY Gov. Cuomo wants state to decriminalize pot possession," (Jan. 12, 2017).
2. N.Y. Penal Law §221.05 (McKinney).
3. NYup.com, Michael Greenlar, "Gov. Cuomo proposes decriminalizing marijuana," (Jan. 11, 2017).
4. See supra note 1.
5. N.Y. Public Health Law §§3360 to 3369-d (McKinney).
6. Legality of cannabis by U.S. Jurisdiction, Wikipedia.
7. 21 U.S.C. §812.
8. 21 U.S.C. §844(a).
9. *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005).
10. See 8/29/13 James M. Cole, Deputy AG Memorandum to US Attorneys at www.justice.gov.
11. See Melia Robinson, "Marijuana is about as popular as Donald Trump in these 5 red states," (Jan. 18, 2017).
12. Id.
13. N.Y. Public Health Law §§3360 to 3369-d.
14. N.Y. Public Health Law §3360.
15. Id. at §3369.
16. Id.
17. N.Y. Exec. Law §290-296 (McKinney).
18. Id. at §296.
19. N.Y. Public Health Law §3362.
20. Id. at §3369.
21. Id.
22. See *Ross v. Raging Wire Telecommunications*, 42 Cal. 4th 920, 174 P.3d 200 (Cal. Sup. Ct. 2008).
23. *Coats v. Dish Network*, 350 P.3d 849 (Sup. Ct. Colo. 2015).
24. *Coles v. Harris Teeter*, — F. Supp. 3d —, 2016 WL 6684189 (D.D.C Nov. 14, 2016).
25. Id., 2016 WL 6684189, at *3.