

LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN Fall 2013

Sex, Drugs and Guns: What's New in the Workplace?

Employers and workers are adapting to significant changes this fall, even apart from the pending Affordable Care Act. The Supreme Court's summer landmark rulings on same-sex marriage and the related patchwork of state laws provide much excitement as well as unanswered questions. Employees face new challenges pursuing claims for supervisor harassment and for retaliation. Illinois got into the act with new protections for employees, presenting a myriad of issues for workers and employers on 3 fronts: noncompete and other post-employment restrictions, guns, and medical marijuana.

Work/Life after Supreme Court's First Same Sex Marriage Decisions

2013 brought key legal changes affecting employers and individuals in the LGBT arena, including the Supreme Court's landmark same sex marriage decisions. President Obama is the first sitting U.S. president to endorse gay marriage. The Court's Hollingsworth and Windsor decisions in June, striking portion of the Defense of Marriage Act (DOMA), were its first rulings on same-sex marriage.

While not legalizing gay marriage across the country, the Court gave full federal recognition of gay couples legally married in states where gay marriage is lawful. The historic gains for same sex couples include the right to receive the same federal health, tax, Social Security and other benefits as heterosexual couples.

The decision will apply to couples in the 13 states and D.C., where same-sex marriages are currently allowed. The rulings have also renewed energy in Illinois and other states to get same sex marriage laws on their books. In August, Minnesota and Rhode Island became the newest states to allow same sex marriage.

But there is still a patchwork of state laws, some permitting same sex marriage, some allowing civil unions, and others recognizing only heterosexual marriage. Many issues remained after the DOMA rulings, most importantly which state law applies: where the couple was wed or where the couple lives.

Some of these questions have been answered. For example, the federal government announced Aug. 30 that all legally-married same-sex couples, regardless of where they live, will be recognized for federal tax purposes. Specifically, the IRS and the Treasury will **recognize for all tax purposes any marriage entered into in a state that recognizes the marriage** as valid, even if the couple resides in a state that doesn't recognize the marriage as valid. Married same sex couples can now apply for income tax refunds for 2010, 2011, and 2012 based on joint filing and other deductions (e.g. health care benefits provided to their partner) or to claim married status for federal estate tax purposes.

How the DOMA rulings apply to benefits under the federal Family and Medical Leave Act (FMLA) is another key question. The law requires employers with 50+ employees to provide medical, family and military leave, including relating to an employee's spouse and children.

Based on the changes, same-sex spouses are now 'spouses' under federal law if they are 'spouses' under state law. For now, an employee can take leave for a serious medical condition or military-family leave for the same-sex spouse, if the employee **lives in a state that allows same-sex marriage**. Whether the Obama administration expands the definition (similar to IRS tax benefits) and bases FMLA benefits on where couples were married, remains to be seen. By the same token, children of same-sex spouses are now stepchildren of the non-natural parent in the relevant states, and FMLA leave applies to their care.

Illinois does permit an alternative to traditional marriage. '**Civil unions**' confer some state-level legal benefits to couples, under the 2011 Illinois Religious Freedom Protection and Civil Union Act. Couples (both 18 or older) of the same or opposite gender may elect to enter into a civil union, which allows joint tax returns, state protections for child custody, estate planning, property ownership and transfer, and a role in medical and end of life decisions for partners. In Illinois, couples married, civilly unioned or domestically partnered based on laws of another state or country, are entitled to all of the recognitions and benefits available under **Illinois law** to spouses.

Will Progress Lead to Federal Ban on Sexual Orientation Discrimination?

Similar to same sex marriage, there is a patchwork of laws relating to sexual orientation as a protected class. Many states and localities (including Illinois, Chicago, and Cook County) and federal employers prohibit discrimination, harassment and retaliation based on sexual orientation. **But it remains unprotected under federal Title VII anti-discrimination law for private employers.**

A proposed law, passed by a Senate committee in July, and waiting for full Senate and House votes, can change this. The **Employment Nondiscrimination Act (ENDA)** would amend Title VII and ban employment discrimination based on sexual orientation and gender identity by civilian, nonreligious employers with at least 15 employees (amending Title VII).

'Supervisor' Definition Limited for Harassment Liability

A recent decision has modified the Supreme Court's 25-year-old rulings holding employers automatically vicariously liable for harassment by "supervisors." The Farragher and Ellerth decisions in 1988 distinguished the burden for harassment by co-workers or third parties, making the employer liable only if it knew or should have known about the activity and failed to take reasonable steps to stop it.

However, the burden is now more difficult even based on alleged supervisor harassment. Until recently, the definition of "supervisor" was broad, including any person who directs day-to-day activities of other employees, including working foremen and other quasi-management.

In Vance v. Ball State Univ., the Supreme Court limited supervisors to those persons with clear and tangible authority to hire, fire, and discipline. As a result, employees harassed by

foremen or other quasi-managers excluded from this definition can still pursue harassment claims, but they will need to prove the higher negligence standard.

Court Imposes New Rules for Retaliation

Employers can certainly discipline or fire an employee for performance or misconduct, even if the employee previously complained of unlawful behavior, such as discrimination or harassment under Title VII. But sometimes there is a question about the employer's motivation for the adverse action: was it the employee's poor performance/misconduct or the employee's complaint? Or both?

In University of Texas Southwestern Medical Center v. Nassar, the Supreme Court established that employees must prove that a **complaint of Title VII unlawful behavior was the "but for" motivating reason** — not just one of several reasons — for adverse employment action taken against the employee.

Illinois Employees Receive Relief on Noncompete Enforcement

Many Illinois employees can breathe a sigh of relief based on a recent court ruling imposing a stricter burden on employers trying to enforce noncompete and other post-employment obligations like nonsolicitation of customers and employees. Under the old rule, the simple offer of new or continued at-will employment was sufficient legal consideration to validate the employee's obligations. But, courts became increasingly concerned that at-will employment, which can be terminated anytime without cause or notice, was insufficient to bind the employee. Courts began to impose a duration requirement, with no black line rule.

Last June, the Illinois appellate court in Fifield v. Premier, confirmed that absent other consideration (e.g. a signing bonus), two years of new or continued employment is required for enforcement of the post-employment obligations. The Illinois Supreme Court recently refused to accept the case for review.

Gun Laws and the Workplace

There is an expanding universe of state laws governing the presence of guns in the workplace. Currently, approximately 20 states, including Florida, Georgia, Minnesota, Oklahoma, Texas, Utah and Wisconsin, have passed "bring your guns to work laws," allowing licensed employees to bring firearms to work.

Illinois has no such law. But, the Illinois Firearm Concealed Carry Act which took effect in July, permits anyone with a Firearm Owner's Identification (FOID) card who has passed a background check and undergone gun safety training (16 hours) to obtain a concealed carry permit. Private property owners, including employers, can prohibit employees and others from carrying firearms, by posting a no conceal and carry sign, clearly and conspicuously, at the entrance of the building or premises. However, a licensee — including an employee — can still carry a concealed firearm on his person, within a vehicle or within the external perimeter of a vehicle, **while in a parking lot** of property even where conceal and carry is prohibited.

Medical Marijuana and Effects on Employment

21 states and the District of Columbia now have laws legalizing marijuana to some extent. While Colorado and Washington have legalized marijuana for recreational use, the others permit medical marijuana.

Illinois Gov. Quinn has signed the Compassionate Use of Medical Cannabis Pilot Program Act, a 4-year pilot program effective 1/1/14 legalizing marijuana for medical purposes. It will allow registered users (with identification cards issued by the Department of Public Health) to buy up to 2.5 ounces every 14 days from a state-licensed dispensary.

Employers and workers across the nation are facing new questions, including how these laws effect the workplace. The Illinois statute contains certain provisions balancing the interests of employers and employees. For example, employers cannot penalize employees for their status as patients registered to purchase medical marijuana. But **employers may restrict or prohibit marijuana use at work.** Employers may also adopt reasonable policies concerning the consumption, storage, or timekeeping requirements for registered users. Additionally, drug-free workplace policies are still valid, but must continue to be enforced in a nondiscriminatory manner.

How these new employee rights will impact drug testing and policies, disability and leave laws will be an interesting focus next year.

Law Firm News

The Law Office of Lori A. Goldstein LLC is proud to be listed on JJ's List as a business committed to disability awareness in customer service and the workplace.

Thanks to Intraspectrum Counseling, Career Resource Center and Kessler, Orleans and Silver for the recent opportunities to present on employment law issues. I am also proud to be a new contributor of employment law articles to the Chicago Daily Law Bulletin. I look forward to future presentations and opportunities. Let me know if your organization may be interested.

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This bulletin is an advertisement intended to provide clients and others with general information and is not intended to provide specific legal advice or opinions. For assistance with topics addressed in this bulletin or other workplace issues, please contact Lori Goldstein at (847) 624-6640 or lori.a.goldstein@gmail.com. Visit www.lorigoldsteinlaw.com for information about the Law Office of Lori A. Goldstein, LLC.

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