LAW OFFICE OF LORI A. GOLDSTEIN, LLC

CLIENT BULLETIN FALL 2018

Sending continuing gratitude to my clients, referral sources, colleagues, friends and family. I wish you amicable, peaceful relationships at work and in life. I look forward to helping businesses and employees work cooperatively and show mutual appreciation.

ON THE POLITICAL FRONT

November 2018 Election Results

- The recent elections impacted the composition of our national and many local legislatures, and added a significant number of elected female, LGBTQ and minority officials. More states legalized marijuana (Missouri and Utah for medical use, and Michigan - the first midwestern state to legalize recreational use.)
- In the **first statewide referendum on transgender rights**, Massachusetts voters supported a state law protecting transgender people from discrimination in public accommodations, including bathrooms and locker rooms.
- Closer to home, **voters overwhelmingly agreed** with a Cook County referendum encouraging Cook County towns to **opt in** to the 2017 **Cook County paid sick leave and minimum wage increase** laws. While more than 80% of municipalities opted out of one or both laws last year (some have since opted in), almost 90% of Cook County voters supported opting in. Stay tuned as more towns reconsider opting in based on their residents' votes, requiring employment policy changes.

Administration Imposes New Protocol for Colleges on Harassment/Assault

Secretary of Education Betsy DeVos recently proposed a major overhaul to the way colleges and universities handle sexual misconduct complaints. Under the new plan, colleges would have to **investigate complaints only if the alleged incident occurred on campus** or in other areas overseen by the school, and only if it was **reported to certain officials**. The plan scales back Obama administration rules, which currently require colleges to review all student complaints, regardless of their location or how they came to the school's attention.

The new plan would also afford an opportunity for **accused students to cross-examine their accusers** (through a representative to avoid personal confrontations.) The proposal will go through a 60-day public comment process before finalized.

It effectively tells schools how to apply Title IX, the 1972 law that bars schools that receive federal money from discriminating based on gender. In fact, the plan raises the bar for proving a violation, requiring claimants to prove the school is "deliberately indifferent." Experts say the plan is likely to **reduce actions taken by the Education Department**, which penalize schools for failing to uphold Title IX.

This comes on the heels of a report last summer that more than half of women in academia have experienced some form of harassment, with LGBTQ people and women of color having the highest incidence. Harassment prevalent in the sciences could explain why women stay away from those fields. The report **recommended that Congress pass laws allowing victims to sue faculty directly, not just the school**.

Meanwhile, **proposed local legislation** includes adding mandatory training, requiring posting of sexual harassment policies and multiple avenues of complaint, and expanding to 2 years the 180-day state and local deadline and the 300-day deadline to file complaints with the federal Equal Employment Opportunity Commission (EEOC.) Supporters also encourage a "sunshine law," which **prohibits confidentiality agreement in settlements** that keep individuals from helping other employees with similar cases.

OSHA Returns to Original Position on Post-Accident Testing

Employers were relieved last month when the Occupational Safety and Health Administration published a memorandum clarifying that **there is no prohibition against post-accident drug and alcohol testing.** A few months back, OSHA confused and frustrated employers by banning employers from using drug testing or the threat of drug testing as a form of **adverse action against employees who report injuries or illnesses**." Instead, employers were limited to drug testing when there was a "reasonable possibility" that drugs or alcohol contributed to the accident or injury.

The recent clarification is good for employers and employees alike, as a drug-free workplace is safer. Post-accident drug testing would only violate OSHA's anti-retaliation rule if the employer took the action to penalize an employee for reporting a work-related injury or illness rather than for the legitimate purpose of promoting workplace safety and health.

Public Union Dues Now Voluntary

Settling a longstanding controversy, the Supreme Court ruled in June that **public sector unions** do not have a constitutional right to force employees to **pay dues**. Based on the decision in *Janus v. AFSCME*, employers must have consent from an employee in order to deduct "fair share fees" from the paycheck to support a public-sector union. This ruling does not involve unions at private companies.

AGE DISCRIMINATION 50 YEARS LATER

It has been 50 years since the Age Discrimination in Employment Act (ADEA) took effect in June 1968. The ADEA was an important part of 1960s civil rights legislation that was intended to ensure equal opportunity for older workers (age 40 and older.) According to an EEOC report on the state of older workers, **age discrimination persists** as outdated assumptions about older workers and ability continue, despite today's experienced workers being more diverse, better educated and working longer than previous generations.

Only 3 percent of those who have experienced age discrimination complained to their employer or a government agency. Studies show that more than **3/4 of older workers** surveyed report their age is an **obstacle** in getting a job, even with a booming economy and low unemployment.

The extent of **ADEA's protection of applicants** is currently an issue brewing in the 7th Circuit. *Kleber v. CareFusion Corp.* involved a job posting seeking an attorney with "3 to 7 years (no more than 7 years)" of relevant experience. In April, the Court ruled that the posting may have violated the ADEA because it had the **disparate impact of excluding** from consideration older lawyers with more than seven years of experience.

But in late June 2018, the court decided to rehear the case *en banc;* this occurs when an appellate court determines that 1) further consideration is necessary to secure or maintain uniformity of the court's decisions or 2) when the case involves a question of exceptional importance. Watch for new of the Seventh Circuit's next ruling.

ILLINOIS NON-COMPETES SHOULD ONLY PROHIBIT "SIMILAR" POSITIONS

The Northern District of Illinois recently took a significant step in the enforcement of non-competes. The Court ruled that under Illinois law, a covenant not to compete is unenforceable *per se* (automatically as a matter of law) if it expressly restricts an employee from taking **any position** with another company that engages in the same business, without considering whether that **position is similar to the position that the employee held with the employer** or otherwise competes with the employer.

In *Medix Staffing Solutions, Inc. v. Dumrauf*, the judge dismissed the complaint, finding that the non-competition covenant at issue was overbroad as a matter of law. The decision marks a departure from the weight of authority in Illinois that **traditionally** allows the parties to develop a **factual record** before such a finding. While the decision is not binding on other courts, Illinois employers should review whether their existing covenants should be modified in light of this opinion.

PROPOSED LEGISLATION TARGETS WORKPLACE BULLYING

General workplace bullying (as opposed to bullying based on gender, race, age or other legally protected class) is not prohibited by anti-discrimination/harassment laws. But several states including Illinois are actively pursuing anti-bullying legislation and private causes of action. The **Healthy Workforce Bill**, which has been introduced at the Illinois legislature, requires **employers with 3 or more employees** to prohibit bullying in the workplace including harassment, threats, intimidation, stalking, sexual harassment, physical violence, public humiliation, theft, destruction of property, or retaliatory actions. Covered employers would be required to establish formal policies about workplace bullying and a violation of could subject an employer to fines of up to $2,000.

Under the model legislation, bullying is defined specifically as verbal abuse, work interference that prevents someone from getting their job done, verbal or non-verbal conduct or behaviors that the target employee feels are intimidating, threatening, or humiliating, or some combination of these issues. States that have passed the Healthy Workforce Bill include Washington, Oregon, West Virginia, Massachusetts, and Rhode Island.

Workers in those states who have been victims of bullying behavior have legal **standing to sue the person who bullied them** as individuals. However, the bullying must meet a high standard of misconduct specified in the law. **Employers** whose workers have been bullied must **prevent and correct the problem**.

Announcements

- ✓ *I am a proud recipient of the **Super Lawyers Illinois award for 2018** (3rd consecutive year.)*
- ✓ *I work with **both employers and employees** on workplace matters, compliance, contracts, training, and dispute resolution.*
- ✓ ***Career Resource Center is here for you!** As a proud CRC Board member, I can't say enough about the wonderful career transition services offered by CRC, a nonprofit celebrating almost 30 years of success. We are here for newly RIF'd employees, graduates, individuals returning to the workforce, those seeking a change of employment or career, and employees who need a boost in their career transition search. Stop by for a tour, try out a workshop, or join for a year. Volunteers and donors always welcome too! **careerresourcecenter.org***