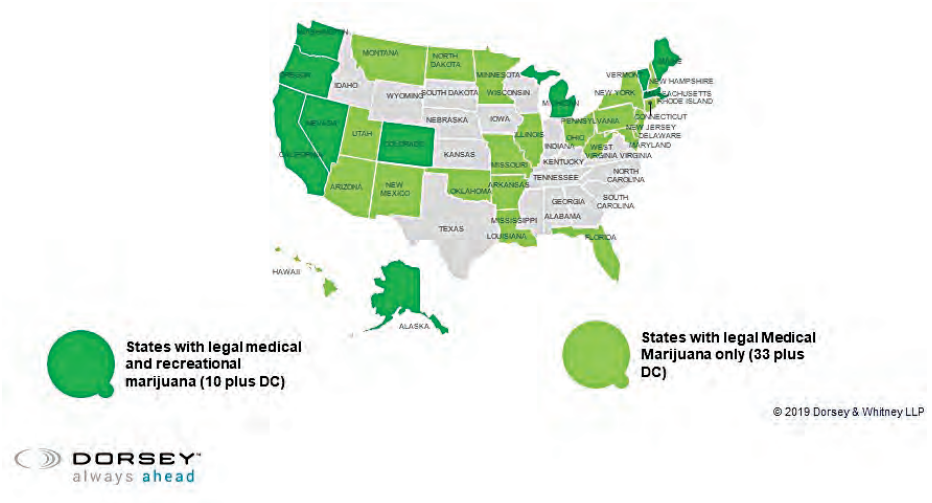
Weed & Work: As Legalization Spreads, So Does Uncertainty Over Employers' Duty to Accommodate Marijuana Use

When it comes to marijuana, the legal landscape is changing rapidly. Ten states, including California, have legalized recreational use. In more than twenty other states, some form of medical marijuana is legal. Employers, particularly those with multi-state operations, need to stay vigilant as state laws change in this arena. To be clear, no state prohibits employers from discharging an employee who is under the influence of marijuana while working. However, there is an emerging trend of states prohibiting discrimination against employees who require the use of marijuana (during off hours) to alleviate symptoms due to a disability or medical condition.



The trend is catching on the East Coast, where a New Jersey court recently held that an employee who was fired for failing a drug test due to his use of medical marijuana could bring a claim for disability discrimination and failure to accommodate. The reasoning of that case, and similar cases in Connecticut and Massachusetts, is that employers are required to provide reasonable accommodations to employees with disabilities, and allowing an employee an exemption to a "clean" drug-testing requirement may qualify as a reasonable accommodation, particularly if the use of the drug does not affect the employee's work.

As of yet, California law does not require employers to provide an accommodation due to the use of medical marijuana, under the California Supreme Court's 2008 decision in *Ross v. Ragingwire*. There, the court reasoned that because the purpose of the law allowing medical marijuana was to provide immunity from criminal prosecution for medical marijuana cardholders, it has no effect on employers' obligations under California's separate scheme of employment laws. Going on three years since recreational marijuana was legalized in California, *Ross* remains the law of the land. Courts in Oregon and Washington came to the same conclusion in decisions dated 2010 and 2011, respectively, which still stand today. Meanwhile neighboring states Nevada and Arizona recently passed legislation specifically prohibiting discrimination against employees based on their status as medical marijuana cardholders, and starting in 2020, Nevada employers cannot refuse to hire *any* employee based on a positive marijuana drug test, regardless of whether the use is medical or recreational.

Whether the recent trend toward requiring accommodations for medical marijuana users will bring a change to the laws in California remains to be seen. Last year, the Assembly failed to pass a bill that would prohibit discrimination against users of medical marijuana, and no such bill passed the 2019 legislative session. Nevertheless, California employers should track the issue closely, and those with operations in multiple states should revise their drug testing policies and procedures to comply with those state laws that require some accommodation for medical marijuana.

Authors:
Nisha Verma, Senior Associate, Costa Mesa, verma.nisha@dorsey.com
Jessica Linehan, Partner, Costa Mesa, linehan.jessica@dorsey.com
Gabrielle Wirth, Partner, Costa Mesa, wirth.gabrielle@dorsey.com
Mike Droke, Partner, Seattle, droke.michael@dorsey.com

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Prevention is the Best Cure: Stop Employee Lawsuits Before They Happen

Being an employer in California in 2019 is darn hard. Engage any employer on this topic and they will effortlessly rattle off several things that California does to punish business owners. In most cases, an employment-related issue will be at, or near the top of this list. There are so many laws with which to comply, and instincts aren't enough. Legislation continues to evolve and case decisions are handed down by the courts daily. And neither can keep up with today's workforce and the way in which workers and companies want to engage. Employers must continue to find ways to keep away from trouble. And trouble is out there.

According to the U.S. Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or employee, there were 4,344 charges filed with the EEOC in 2018 in California alone. Compare that to our neighbor to the north, Oregon, which had just 180 charges filed in the same year. The only states exceeding California were Texas, Florida, Georgia, Illinois, and Pennsylvania.

Last year's statistics from the Department of Fair Employment and Housing (DFEH), the California state agency responsible for enforcement against unlawful discrimination in employment, will be out later this summer. But we do know that in 2017, there were 12,872 "right-to-sue" letters requested of the DFEH. These are automated letters issued in response to a request the employee makes, that do not ask the DFEH to investigate the claim. Receiving a "right-to-sue" letter from the DFEH is a prerequisite to bringing a lawsuit against an employer for discrimination. An additional 4,346 employment matters were investigated by the DFEH, triggered by the DFEH's determination that it had jurisdiction over the matter and that the employee had a potential claim.

It is incredibly easy for employees to file a claim today, even without leaving their homes. Virtually all government agencies, the DFEH, EEOC, and California Labor Commissioner, allow employees to submit claims online. Each agency has its own jurisdiction, and in most cases will try to assist the employee in reaching a resolution with the employer. But often more dangerous to a business than facing the government's involvement in an employee claim, is when an employee stumbles into an attorney's office. Why? Among other things, the California Labor Code shifts the responsibility so that the employer must pay the employee's attorney's fees if the employee wins a claim. Under rare circumstance is this reciprocal, meaning that an employer generally cannot make the employee pay for its attorney's fees if the employee loses the claim. Frequently, an employee's underlying damages are manageable. But when interest, penalties, and attorney's fees are added to the mix, the business may have limited options. The attorney's fees that may be awarded from the fee-shifting statutes often drive the litigation.

I have had many conversations with employee-side attorneys who tell me that the reason their client first picked up the phone to call them, had no legal basis. The call is commonly initiated by an employee who feels she has been treated poorly and wants to get back at the employer. While the phone call may start out with a legally unsupportable claim, when asked the right questions by the attorney, the employee soon realizes that she could have a different, and even better claim against her employer.

The conversation goes something like this, "Well…employment in California is at-will which means you can be fired for attendance problems because you were taking care of your sick cat. I'm sorry that they walked you out in front of everyone in the middle of your shift while you were crying. But I've looked at your paystubs and I see a few issues in the way that you were paid. Can you come to my office at 2:00 tomorrow? Let's make them pay for what they did to you."

While keeping up with the ever-changing employment laws is important, it's not enough. No one is perfect and businesses have many distractions pulling their attention and resources in different directions. It's important to hire smart and make the effort to find the right person for the position, including conducting background checks and thorough reference checks. As soon as a concern arises, speak with your employee about it. Confrontation is difficult for some managers, and a problem employee may have no idea that a manager is sitting in the Human Resources office demanding that the employee be terminated immediately. Work with your team to exercise those management muscles. Teach managers to be firm, but not to demean or be disrespectful. You may start with providing verbal warnings that are documented in manager's notes. Elevate the verbal warnings to written warnings when necessary – and not just a string of emails. There is something to be said for a formal, written warning in a proper format that the employee knows will be placed in his employee file. Schedule a meeting with the employee in the upcoming weeks or months, depending on the severity of the concerns, to discuss his improvement (hopefully). If not, the employee has been warned and understands the process. He may not agree, but it might be enough to keep him out of an attorney's office.

Colleen M. McCarthy, Esq. is a Partner and chairs the Firm's Employment Practices Group. She has dedicated her practice to representing and protecting employers, through preventative counseling and sound practical advice. Ms. McCarthy has counseled employers about the complicated employment laws that impact their businesses to ensure that they are in compliance, and to reduce the chance of costly litigation.
Ms. McCarthy may be reached at (949) 608-6900 or cmccarthy@ferruzzo.com.

Almost Two Years of the #MeToo Era: The Unexpected Impact on Your Business

by Tiffanny Brosnan and Christy Joseph

Almost two years have passed since the Harvey Weinstein story broke in October 2017, and no one could have predicted how far-reaching its impact would be felt. Employers of all sizes are reevaluating their practices and focusing on preventative measures. The #MeToo movement has affected how harassment cases are litigated and settled and has spawned new theories of litigation against businesses and their shareholders. It has changed everything from hiring practices to due diligence in mergers and acquisitions.

Emphasis on Training, Hotlines and Investigations
California legislation now requires employers with five or more employees to provide two hours of sexual harassment training by the end of 2019 to all supervisory employees, and one hour of sexual harassment training to all nonsupervisory employees.

Companies have introduced employee hotlines as a safe space to anonymously lodge a complaint. This fulfills California regulation stating employers must have a third-party reporting mechanism, so that employees are not required to complain to an immediate supervisor.

After a complaint of harassment occurs, employers in California are obligated to conduct an impartial and timely investigation by qualified personnel.

Due Diligence in Mergers & Acquisitions
The increased legal, financial and reputational risks a business faces have the potential to effect a merger or acquisition. To prevent this, businesses are making modifications, including:

- Assessing the seller's human resources department, investigative practices, training materials, and claims history.
- Demanding new representations and warranties from the seller, which affirm: its investigative practices are sound; it is unaware of any sexual harassment or abuse occurring within the company or among executives; and that no such complaints or lawsuits have been raised, or settlements paid.

Executive Hiring
Companies are looking at their hiring and onboarding practices and implementing several new strategies, including:
- Tougher scrutiny in the hiring process aimed to identify past complaints against a candidate.
- Executive agreements, an affirmative representation that the executive has not been involved in past misconduct.
- Incorporating sexual harassment or misconduct into the definition of "for cause" in executive agreements.

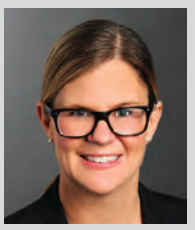
Confidential Settlements
A company's ability to deduct settlements related to claims of sexual harassment or abuse including those related to attorney fees can be important to a company's bottom line. However, the #MeToo movement criticized employers for keeping sexual harassment claims and settlements confidential. In response, California enacted legislation which restricts this practice.

Shareholder Derivative Litigation & Securities Actions
Companies are now facing derivative class actions brought by shareholders alleging breach of fiduciary duty or waste of corporate assets for knowing about sexual misconduct and turning a blind eye or concealing it from shareholders. Investors are likewise bringing securities lawsuits, based on drops in the price of their shares when #MeToo claims are made public, alleging the company or executives made false or misleading statements about an executive's unethical behavior with an intent to mislead investors.

What's Next?
The ripple effect of the #MeToo movement continues with other states such as New York and Delaware following California's lead with reactive legislation. In 2018 Congress added $16 million to the EEOC's budget and the EEOC Chair stated she intended to use the funds to enhance the agency's work in harassment prevention.

The importance of having a culture that discourages such conduct and promptly addresses it when issues arise is now more important than ever to businesses to avoid what can be devastating effects to an organization's purpose.

Tiffanny Brosnan's practices employment litigation and counseling, advising employers on a variety of issues.



Christy Joseph's represents employers in matters involving various labor and employment issues.

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How Can You Meet the Challenges of Finding Great Talent?

When the job market is tight, candidates are in the driver's seat. That can make it more difficult to find the right person for your team. Hiring and retaining great talent may require you to make some adjustments in your search and hiring process.

Why Hiring Great Talent Is Critical
Your organization's productivity depends on hiring the best talent. In fact, a recent study showed that high performers are four times as productive as average performers. And if the job being tackled is complex? Those high performers are eight times as productive.

There's a reason Jim Collins of "Good to Great" fame considers "the ability to get and to hang on to enough of the right people" as the single most important constraint on any organization's ability to succeed.

The Main Challenge to Hiring and Retaining Great Talent
As the Baby Boomers move into retirement in ever increasing numbers, they leave behind positions to be filled — but in many cases, the talent simply isn't there to replace them, especially in certain fields. Much of this is a factor of the ebbs and flows of population growth and decline.

Factors affecting the complexity of today's job market involve the uncertainty of the marketplace, which makes some talented people uninterested in leaving the security of the job they know for an untested position at your organization. HR departments have come under a lot of pressure to reduce costs in the past decade or so, which makes it more difficult to reach out to the most talented people for the spots you're trying to fill.

How to Hire Great Talent? Move Fast
How long does it typically take your HR department to move through the entire process, from creating a job posting to completing a hire? This metric varies by industry, of course, but the average as of 2017 was approximately 30 days to hire. If you think that sounds like a reasonable amount of time, you could be setting yourself up for trouble. During those 30 days, you're likely to lose your best candidates to other firms. In fact, top candidates typically get snapped up within an average of 10 days. If you're taking longer than that to make your hiring decisions, it's time to get creative and shorten your timetable.

How can you speed up your hiring process? Here are a few steps to put into practice:
• **Look for talent even when you have no open position.** Create a position if necessary to lock down star talent during that brief window when they're available.
• **Work regularly with your recruiters.** While your HR team is busy handling all the other aspects of their jobs, recruiters can have their eyes open for talent constantly.
• **Check your biases.** Do you assume that the right person to fill a given position will look a certain way, fall within a certain age bracket, or have a certain experience or training background? Widen your search to find the talent you need.
• **Automate basic HR tasks.** Plenty of HR technology is now available to help you free up your team from paperwork. Leverage that tech and put processes into place so that your crew isn't always in reactive mode, and free up their time to focus on the initiatives that attract high performing talent.

Filling crucial roles in a tight job market requires a dedicated focus and plenty of know-how. At Marquee Staffing, we have a deep pipeline of passive candidates that we can tap to meet your hiring needs. Contact us today at www.marqueestaffing.com.

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Renee Loignon Dion, Chief Financial Officer
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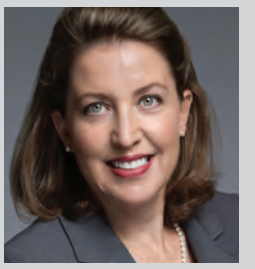

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Hiring and Employing Foreign Workers

By Mitchell L. Wexler, Partner and Amrita Jolly-Sodhi, Associate, Fragomen

Sourcing and acquiring the right talent for companies is crucial for its success. When employers engage in recruiting for new talent, especially in STEM related fields, often times questions arise regarding how they can select the right candidate pool and if necessary how to secure the correct visa type for foreign national candidates.

The Immigration and Nationality Act, 8 U.S.C. § 1324b expressly prohibits discrimination based on citizenship status. More specifically, the law prohibits:

(1) Citizenship status discrimination in hiring, firing, or recruitment or referral for a fee;

(2) National origin discrimination in hiring, firing, or recruitment or referral for a fee;

(3) Unfair documentary practices during the employment eligibility verification, Form I-9 and E-Verify processes; and

(4) Retaliation or intimidation.

Wexler

Bearing these provisions in mind, it can be confusing for recruiters who are often charged with gathering information on prospective candidates. Businesses typically aim to confirm if the candidate has the legal right to work or if the candidate requires sponsorship now or in future as early in the recruiting process as possible.

In order to make this determination, best practices, from an Immigration law perspective, is to ask:

(1) Are you legally authorized to work in the United States for our Company?

(2) Will you now or in the future require sponsorship for employment visa status (e.g. H-1B visa status)?

If you decide to ask this question to candidates keep in mind that you should ask the same question to every applicant. If they answer "yes," then the door is opened and you may ask about their immigration history (if an applicant otherwise reveals they are in the US pursuant to a non-immigrant visa - F-1, H-1B, TN, L-1, H-4, etc. - then the door is opened, even if they incorrectly answer the above question). Before implementing this in your recruiting practices, we recommend having your employment counsel weigh in before making any changes.

Sodhi

Once the need for a visa is identified, you should work with immigration counsel to develop both a short-term and long-term plan for this candidate. The short-term plan will ensure that the proper documents are filed, as the candidate may already have a working status that could be transferred to the new employer. The long-term plan would consist of identifying possible permanent (green card) options for the candidate to allow them to remain in the United States on a more permanent basis.

Mitchell Wexler is the Managing Partner at Fragomen's Irvine, Los Angeles, and San Diego offices. He can be contacted at mwexler@fragomen.com or (949) 660-3531.

Amrita Jolly-Sodhi is an Associate with Fragomen. She can be contacted at ajolly@fragomen.com or (949) 660-3519.

How to Let Go of Employees Legally

Every business who has a need for employees should begin working with a business lawyer or other professional sooner rather than later, in developing clear and specific actions or policies that deal with employee separation. This checklist is provided for informational purposes only, and is not considered legal advice.

Unfortunately, employee separation is inevitable. You cannot always control how employees handle their termination or resignation, but you can control how your company handles it.

Documentation
Best practices should be to start the documentation well before the separation. Whenever there are issues that arise from poor performance, breaking work rules, misconduct, etc., you should document that. Although you are not legally required to, you should also use those opportunities to try and work out issues with the employee. Have conversations and offer a supportive role in helping to avoid or fix those issues.


Nowland

Also, avoid using your documentation as a weapon. The sword has two edges. If an angry ex-employees believes you discriminated against them, and they can prove that you did not similarly document or take similar action against other employees, the documentation itself can be a way in which you have discriminated. It should also go without saying that documentation should be timely and real. Creating or fabricating documentation well after the events took place and representing that they were documented shortly after the event is not advisable.

Document preemptively in the following ways:
Have work place policies that spell out what you expect of employees. Make sure to have them sign a document that shows they have received the policy, read it, and understand it. Create a formal system for feedback that shows you have tried to work with an employee who is demonstrating poor performance. If there is a final incident that causes the balance to tip in favor of termination, document it extensively.

Having clear records to point to will leave you in a much stronger position in negotiations or with the courts should an ex-employee claim you owe tens of thousands of dollars.

The Law Offices of Thomas Nowland is an Orange County business lawfirm that helps companies navigate disputes with vendors, clients, partners and employees.

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#MeToo and Orange County Businesses: A Legal Perspective

In just over 18 months, the #MeToo movement has pressured businesses to take a long, hard look at the way they address harassment in the workplace. Recently, I have seen numerous employment cases that involved various forms of harassment that cost businesses millions of dollars in settlements and attorney fees. The seriousness of the allegations as well as the costs of defense and settlements can cripple or bankrupt a business.

Aside from yearly training for all employees, what actions do Orange County business owners need to take in order to go beyond simply recognizing the problem of sexual harassment and assault in the workplace, and actually begin to reduce its prevalence?


Polos

1. Accountability. The concept of accountability extends to bystanders. Let your employees know that anyone who is involved in or witnesses sexual harassment has a duty to report and when reporting, will be treated fairly and without the threat of retaliation.

2. Consequences. Employees need to see that there are consequences for individuals who commit workplace harassment.

3. Policies. Your business must have strong corporate policies in place and offer extensive training on how to prevent, identify, and report harassment, as well as other workplace violations.

4. Neutrality. Internal advisors are often seen as being in place to protect the company. To combat this seeming bias, companies can provide a third party to investigate harassment claims.

As we have seen since November 2017, the beginning days of the #MeToo movement, sexual harassment can take many forms and occur in all industries. It is critical for businesses to recognize that any repeated, intentional behavior directed at an employee that is intended to degrade, humiliate, embarrass, or otherwise undermine their performance can fall under harassment and place the company under the scope of liability. By learning to recognize and address workplace bullying behavior, you can help to create a healthier, more productive environment for yourself and your colleagues.

Have questions or concerns over employment claims your business is facing? Feel free to contact me at polos@psblaw.com.

The Honorable Peter J. Polos (retired) is an attorney, advisor, and connector. He serves as Panish Shea & Boyle LLP's Director of Litigation and assists in overseeing the firm's entire litigation practice, providing a unique perspective as both an experienced trial lawyer and as a judge who understands effective case presentation.