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Are you aware of the new OFCCP Regulations that went into effect on March 24, 2014, for federal contractors and subcontractors?

If not, check out the "Seven Steps to Compliance with New OFCCP Regulations," published on our blog, www.**HRLawMatters**.com.

A Hazy Area of the Law: The Impact of Medicinal and Recreational Marijuana Laws on Employers

By Gene Webb and Brad Valentine

Your employee recently failed a drug test, and in accordance with company policy, you terminated the employee. After notifying the employee of the company's decision, he replied that he only smoked medicinal marijuana in the confines of his home, never violated state law, and was never under the influence of marijuana while on the job. The employee later threatens you with litigation. Should you be concerned? How does your state's law affect your potential liability?

In recent years, states across the country (including Alaska, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia) have enacted legislation legalizing the use of marijuana for medicinal purposes. Colorado and Washington have also become the first states to legalize the possession and sale of marijuana for recreational use. Both medicinal and recreational marijuana laws raise questions regarding an employer's lawful ability to enforce its drug policies and to take adverse action against an employee for certain off-duty conduct.

Indeed, employees in states that have legalized marijuana have increasingly brought lawsuits challenging their employer's ability to take an adverse action based on legal behavior. Thus, there are several important questions that need to be addressed in order for employers to fully understand the new issues facing the employment arena.

Employee and Employer Rights Under State Law.

State statutes regarding the use of marijuana vary widely in terms of their protections for employers and employees. Indeed, Colorado is somewhat favorable to employers providing that employers are not required to "permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace." The law also allows employers to have policies restricting the use of marijuana by employees. Washington law does not specifically address employers' rights in this context, but it does provide for a cost-benefit evaluation of the law's economic impacts on, among many other things, workplace safety.

On the other hand, Arizona, Connecticut, Rhode Island, Delaware, and Maine have laws that are more employee-friendly. In particular, the Connecticut, Maine, and Rhode Island laws create a protected status for medicinal marijuana patients and prohibit employers from taking adverse action against an employee solely due to that status. Arizona and Delaware have both adopted more explicit and impactful statutory language by prohibiting discrimination against registered and qualifying patients who test positive for marijuana components or metabolites. An exception to this rule is that an employer may act upon the results of a failed drug test if the patient used, possessed, or was impaired by marijuana on the employers' premises or during the hours of employment.

A New Avenue for Employee Lawsuits.

This new area of the law has now created a new avenue for employees to bring lawsuits against their employers. Indeed, lawsuits across the country have been brought stemming from terminations due to marijuana use. In these lawsuits, the terminated employees have argued that they are statutorily protected under medicinal marijuana laws, and their discharge violated public policy. These cases are more prevalent in states like Colorado that have "off-duty conduct" laws (those that protect employees from being terminated for legal, off-duty conduct).

Recently, a compelling argument was asserted in Colorado based on the state's off-duty conduct law. In *Coats v. Dish Network, LLC,* a Dish Network telephone operator was allegedly terminated from his job pursuant to company policy because he failed a random drug test. The former employee, who is a licensed Colorado medicinal marijuana patient, argued that he never used marijuana on the employer's premises and was never under the influence of the drug while at work. The former employee thus argued that his termination for smoking marijuana while he was off-duty was the result of an unfair or discriminatory employment practice.

In April of 2013, the Colorado Court of Appeals upheld the firing of the employee and held that, despite the Colorado constitutional provision allowing medical marijuana use, smoking marijuana was not a "lawful activity" within the meaning of Colorado law. The Court reasoned that an activity must be legal under both federal and state law to be classified as a lawful activity. Thus, since marijuana is a Schedule I drug under the Controlled Substances Act ("CSA"), the employee was not protected by Colorado law. On January 27, 2014, the Colorado Supreme Court agreed to review the Court of Appeals' decision, so it is possible that the determination will be modified.

While it is impossible to predict with certainty how any other court will rule on a lawsuit in this context, the *Coats* case has, for now, strengthened the position that an employer is permitted to terminate an employee for medicinal marijuana use, even if the employee did not use marijuana while at the worksite or during work hours and is not impaired at work. Colorado court decisions in the arenas of unemployment benefits and discrimination further illustrate favorable employer treatment.

Nevertheless, although the federal CSA still classifies marijuana as a Schedule I substance, the U.S. Department of Justice has relaxed its enforcement of the CSA's marijuana provisions. In August of 2013, the DOJ issued a memorandum regarding marijuana enforcement, which delineates certain enforcement priorities for federal prosecutors. The DOJ hinted that individuals using small amounts of marijuana for lawful uses under these newly enacted state laws will not be an enforcement priority.

Why Should Employers that are Located in Other States Care?

Simply put, as illustrated by the legislation in states across the country, as well as the DOJ's changing position on the enforcement of marijuana, the culture of the United States and its views on marijuana are changing. As voters in Colorado and Washington approved the ballot initiatives legalizing recreational marijuana, Massachusetts voters approved an initiative that decriminalized the possession and use of marijuana by residents with debilitating medical conditions.

Today, twenty states and the District of Columbia have enacted similar laws. Additionally, Maryland has passed laws that do not legalize the use or marijuana but allow defendants being prosecuted for the use of marijuana to introduce evidence of a medical necessity as a defense.

More recently, legislators in thirteen states have introduced bills in their respective states that, if passed, would legalize forms of medicinal marijuana. In addition, Alabama and Indiana have also introduced legislation that would provide certain defenses to the prosecution of unlawful marijuana possession.

Perhaps even more monumental is a recent ballot initiative surge in Alaska which seems likely to qualify for an August 2014 ballot vote. If the initiative passes, Alaska would join Colorado and Washington in becoming the third state to legalize the recreational use of marijuana.

How Should Employers Respond to These Increasingly Common Medicinal Marijuana (and Recreational Use) Laws?

For now, employers should look to recent judicial decisions interpreting medicinal marijuana laws to provide guidance on the inevitable litigation soon to arise regarding recreational use statutes in Colorado, Washington, and potentially Alaska.

In medicinal marijuana states that do not provide employee protections (which are most states) an employer currently stands on strong footing when enforcing its drug policies. In states that do provide employee protections, employers should review their drug policies to ensure they harmonize with corresponding state laws, including "off-duty conduct" laws.

Given that both federal and state laws govern the proper crafting, implementation, and enforcement of these drug policies, employers may desire the assistance of legal counsel in this endeavor. If so, please contact a member of the Troutman Sanders LLP Labor & Employment Section.

Which 'Federal Contractors' Are Subject to the New Minimum Wage Executive Order?

By Richard Gerakitis, Jim McCabe, and Patrick Schwedler

On February 12, 2014, President Obama signed an Executive Order (EO) that will raise the minimum wage to $10.10 an hour for certain workers employed by federal contractors. The EO will apply to covered federal contracts and subcontracts that are solicited on or after January 1, 2015. While the exact scope of the EO will not be known until the Department of Labor (DOL) releases the EO's implementing regulations on October 1, 2014, the fact sheet released by the White House claims that the EO will serve to benefit hundreds of thousands of federal contractors' workers.

The EO will apply to four types of federal contracts, provided that the wages of workers under such contracts are governed by the Service Contract Act (SCA), the Davis-Bacon Act (DBA) or the Fair Labor Standards Act (FLSA). Those four types of covered contracts are:

1. procurement contracts for services or construction;

2. contracts or contract-like instruments for services covered by the SCA;

3. contracts or contract-like instruments for concessions; and

4. contracts or contract-like instruments entered into with the federal Government in connection with federal property or lands and related to offering services for federal employees, their dependents or the general public.

Much of the early commentary has suggested that the EO's reach will be limited, as it appears to be primarily aimed at contracts falling within the parameters of the SCA and DBA (which are generally *already* subject to minimum wage rates in excess of $10.10 an hour). SCA coverage applies to any government contract, the principal purpose of which is to furnish services in the United States through the use of service employees. DBA coverage, on the other hand, applies to contractors and subcontractors performing work on federal or District of Columbia construction projects. While the EO certainly overlaps with both the SCA and DBA, federal contractors should be aware that, depending on the language of the DOL's regulations (to be released by next October), the EO has the potential to apply to a *far greater range of industries* than those that are traditionally subject to the SCA and DBA.

Two undefined phrases in the EO — "contract or contract-like instrument" and "procurement contracts for services" — will likely determine the scope of the EO. If "contract" and "services" are defined as under the SCA and DBA, the reach of the EO will necessarily be limited. However, if these terms are defined differently as, for example, under Executive Order 11246 and related regulations which impose affirmative action requirements on certain federal contractors, the reach will be very broad and could apply to *all* federal contractor workers — not just ones working on federal contracts.

If the White House is to make good on its promise that the EO will benefit hundreds of thousands of federal contractors' workers, expect the DOL regulations to provide broad definitions for the two undefined phrases "contract or contract-like instrument" and "procurement contracts for services." This expectation also makes sense when one considers the fact that contractors subject to the SCA and DBA are generally required to pay their employees in excess of $10.10 to begin with. But, just how far the EO will go remains to be seen.

Employers Should Carefully Monitor OSHA's Proposed Injury and Illness Prevention Program in the Year Ahead

By Richard Gerakitis and Patrick Schwedler

Developing a rule that mandates that employers create an injury and illness prevention program has been a high priority of the

Occupational Safety and Health Administration (OSHA) since early on in the Obama administration. This rule, referred to as I2P2 for short, has been delayed numerous times in the last couple of years for various (often political) reasons. OSHA, however, remains steadfast and is doing what it can to push this rule onward. To that end, OSHA has published a considerable amount of marketing materials on its website aimed at garnering public support and distilling fears about I2P2's requirements. Among these materials is a quote on I2P2 from Dr. David Michaels, the Assistant Secretary of Labor, stating: "Injury and illness prevention programs are good for workers, good for business and good for America." But for employers seeking to avoid OSHA headaches, it is not so cut and dry.

In 1989, OSHA published voluntary Safety and Health Program Management Guidelines. According to OSHA's newly published semiannual regulatory agenda, I2P2 will build on these guidelines, as well as lessons learned elsewhere. A draft of I2P2 has yet to be released, but OSHA has explained that I2P2 involves planning, implementing, evaluating, and improving processes and activities that protect employee safety and health. Moreover, OSHA has indicated that I2P2's core elements will include:

- management leadership;
- worker participation;
- hazard identification and assessment;
- hazard prevention and control;
- education and training; and
- program evaluation and improvement.

If currently promulgated state plans serve as a useful barometer, I2P2 will almost certainly require that employers develop a written plan that identifies and attempts to eliminate workplace hazards.

According to OSHA, it has substantial data on reductions of injuries and illnesses from employers who have implemented similar effective processes. All would agree that preventing injuries and illnesses in the workplace is a good thing. But with all things OSHA, it is not that simple. Rather, valid concerns exist that cast doubt on the efficacy of I2P2. Namely, I2P2 undoubtedly presents significant challenges and concerns for risk-averse businesses.

First, I2P2 could routinely lead to duplicate citations, one citation for the hazard itself and another for failing to identify it. Second, employers should expect that if an accident occurs, one of OSHA's first demands will be to inspect the written I2P2. More often than not, OSHA will likely take the circular position that had the employer's I2P2 been effective, the accident would not have occurred. Third, I2P2 could theoretically operate as a second "general duty" clause, providing OSHA yet another tool to cite employers with unfettered discretion. Fourth, for smaller employers, I2P2 may be too complicated and demanding to make economic sense. Finally, commentators have surmised that I2P2 appears to be an end around to reviving OSHA's ergonomics standard that was repealed by President Bush in 2001. The logic behind this observation is that an effective I2P2 will mandate that employers confront and address ergonomics hazards. As a part of its public relations campaign to advance I2P2, OSHA has affirmatively stated that I2P2 is not an ergonomics standard. This reassurance, however, has not revealed that assessing and eliminating ergonomic hazards is not a component of an effective I2P2.

Fifteen states currently have mandatory injury and illness prevention programs. Among these states is California, which has required that all non-exempt employers develop a written injury and illness prevention program since 1991. In California, failing to maintain an effective injury and illness prevention program is amongst the most commonly cited Cal-OSHA violations, occurring in about 25 percent of all inspections. If Cal-OSHA's propensity for enforcement under this rule is any indication of what employers have in store under I2P2, it is important that employers carefully monitor the status of I2P2 and take its requirements seriously once it becomes law.

As OSHA's top rulemaking priority, rest assured that OSHA will not quit until I2P2 becomes finalized. OSHA is currently scheduled to issue its proposed rule for I2P2 in September of 2014. Stay tuned.

Class or Collective Waivers and Employment Arbitration—Should Employers Consider Deploying This New Weapon?

By Christina Bost Seaton and Steve Riddell

Even though many employers have long thought that they cannot deploy arbitration agreements in the employment context to avoid class and collective action claims from their employees (because the Courts had held that it was unfair to employees), now, more than ever, courts are willing to enforce arbitration agreements that contain class action or collective action waivers.

The fairly recent, and rapidly expanding, trend to enforce arbitration agreements began with the Supreme Court's landmark decision in *AT&T Mobility v. Concepcion*, where the Court upheld the enforceability of a class action waiver in a consumer contract. This was an important victory for companies selling products and services to consumers. Valid class action waivers in contracts (even what are sometimes called contracts of adhesion, like cell phone service contracts) mean that customers seeking relief must bring their own individual lawsuit, rather than benefit from sharing the costs of a lawsuit with other consumers in a class action. Bringing such claims individually is, practically speaking, cost prohibitive for many consumers. That fact usually results in a sharp decrease in litigation brought by consumers.

Last year, in *American Express v. Italian Colors Restaurant*, the Supreme Court expanded the *Concepcion* ruling to the area of contractual waivers of class arbitration. The Court determined that a contractual waiver of class arbitration was enforceable under the Federal Arbitration Act — even if a party cannot otherwise afford to vindicate its rights through individual arbitration. This was an important decision because it provided a clear way to avoid the result of *Oxford Health Plans LLC v. Sutter*, where the Supreme Court gave deference to an arbitrator's (probably incorrect) finding that there was a basis for class arbitration in the parties' arbitration agreement because the arbitration clause was silent on whether or not class actions were permissible or impermissible. Companies wishing to avoid the result in *Oxford Health Plans* may now, pursuant to *American Express v. Italian Colors Restaurant*, specifically include class arbitration waivers in their arbitration agreements.

Moreover, in the relatively recent Supreme Court decision of *Nitro-Lift Technologies, L.L.C. v. Howard*, the Court overturned a ruling by the Oklahoma Supreme Court that permitted judicial review of a non-competition provision despite the contract's arbitration clause, which required the arbitration of the non-competition dispute. So, there is good reason to think that the decisions in *Concepcion* and *Italian Colors Restaurant* will also apply in the employment law context Indeed, on March 21, 2014, the Eleventh Circuit in *Walthour et al. v. Chipio Windshield Repair, LLC et al.* cited both *Conception* and *Italian Colors Restaurant* in holding that an arbitration agreement that waives an employee's ability to participate in a collective action under the Fair Labor Standards Act is enforceable under the Federal Arbitration Act.

So, what should a company consider when deciding whether or not to implement arbitration agreements, and/or arbitration agreements containing class or collective action waivers?

When it comes to claims for money damages arbitration may be preferable because (1) arbitration is typically faster and less expensive (though costs are rising) than traditional litigation; (2) arbitrations are private proceedings; (3) arbitrations have no plaintiff-sympathetic juries; and (4) the company can have some choice in the selection of an arbitrator. This is not to say, however, that arbitrating claims for money damages does not have downsides as well. For example, it is much easier for baseless claims to proceed to a full arbitration hearing, as it is difficult to get an arbitrator to grant early motions to dismiss (or motions for summary judgment). And, because arbitrations are private, there is often less predictability as to the outcome. Moreover, the right to appeal arbitration rulings is extremely limited, so there are fewer checks and balances on arbitrators.

Matters are further complicated when your company includes an arbitration agreement in its form employment agreement, and that form agreement contains restrictive covenants. For example, how would the company in such circumstances proceed when an employee leaves the company, steals confidential information, poaches employees and the company's clients, and goes to work for a competitor? The company clearly wants injunctive relief. But obtaining injunctive relief (such as a temporary restraining order or a permanent injunction) in an arbitration proceeding is often problematic. Injunctive relief typically takes far longer to obtain in arbitration than it would at the courthouse, where parties can seek immediate (at least temporary) relief. In addition, arbitrators lack contempt power to enforce any injunctive relief they grant. Also, a party who ignores an arbitrator's order does not face jail (while a party who ignores a court order does face going to jail).

Common sense suggests that employers who wish to litigate non-compete claims should draft an exception in their arbitration clause allowing them to pursue injunctive relief to enforce non-compete and non-solicit provisions through the courts. However, this may not be the best idea because many states find that an agreement drafted in that manner is one-sided, an unfair contract of adhesion, and, accordingly, the agreement may be treated as invalid from the outset ("*void ab initio*," to use the fancy Latin term courts and lawyer enjoy). This is currently the case *even in the face* of the extremely favorable precedent of *Concepcion* and *Italian Colors Restaurant*.

What if the agreement at issue had been a restrictive covenant rather than an employment agreement? The employer could lose the benefit of the entire agreement and be forced trying to shoehorn its claim into other causes of action.

Where does this leave employers? First, employers must recognize that arbitration is not a silver bullet. Implementing arbitration across the board will not necessarily lead to the employer prevailing in all claims that are brought. With that said, there may be targeted instances in which employers would likely benefit from arbitration — particularly where employees try to bring class or collective actions, including class action claims alleging discriminatory practices or collective actions seeking relief for alleged wage-and-hour violations. If employees cannot pursue class or collective action claims, many possible plaintiffs (and, even more importantly, plaintiffs' lawyers) may find that it is no longer worth their time and money to pursue these types of claims on an individual basis against an employer. For this reason, employers may decide that the downsides of arbitration are outweighed by the benefits.

Employers seeking to avail themselves of the benefits of an arbitration program should seek experienced employment counsel, who can help them carefully draft a limited arbitration provision (along with a class and collection action waiver) that has the highest likelihood of being enforced.