NorthEast Talent Solutions

A newsletter brought to you by NorthEast Talent Solutions, LLC

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HR UPDATE

Top stories in this newsletter:

Marijuana Legalization in New York and New Jersey

Posting Employee Notices

Look Back at COBRA

Marijuana Legalization in New York and New Jersey

On March 31, 2021, Governor Andrew Cuomo legalized recreational cannabis use for adults in New York State. Employers must now determine how marijuana legalization impacts their business practices and policies and how to respond to suspected marijuana use both inside and outside the workplace.

On the federal level, marijuana remains a Schedule 1 drug under the Controlled Substances Act, considered a substance with no medical value and a high potential for abuse. In contrast, on the state level in New York, New Jersey and most other states, marijuana is now decriminalized or legalized, for medical use, recreational use, or both.

New York and New Jersey state law prohibits employers from discriminating against an employee based upon the employee's lawful use of cannabis outside of the workplace. Under these new laws, when hiring applicants for a new position, New York and New Jersey employers cannot reject an applicant based solely on a positive cannabis test result. This protection applies to all employees, including employees working in safety-sensitive job positions.

What does this mean for employer drug-testing? When making hiring decisions, employers should consider discontinuing testing applicants for cannabis use altogether unless a federal regulation or contract requires testing. New York and New Jersey employers might want to follow the example of New York City employers who have been prohibited from performing pre-employment drug testing for cannabis since May 10, 2020.

Significantly, these employee protections are not intended to limit an employer's ability to maintain a drug-free workplace. Employers remain able to enact substance-free workplace policies that prohibit cannabis use during working hours, on company property, and while using employer equipment or other property.

New York employers can prohibit and take adverse employment actions against employees who are "impaired" in the workplace. The New York law defines an impaired employee as someone who "manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligations to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law."

New Jersey employers are permitted to drug test applicants and employees for cannabis as part of a pre-employment screening; upon reasonable suspicion of an employee's use of cannabis items at work; upon finding "observable signs of intoxication related to usage of a cannabis item; as part of a work-related accident investigation (even if there is no suspicion of intoxication); random testing; and as part of regular screening of current employees to determine use during an employee's prescribed work hours."

The New Jersey law details the type of drug testing an employer can conduct and requires a physical evaluation by a trained "Workplace Impairment Recognition Expert."

Finally, New York employers may also take adverse action against applicants and employees who use cannabis off duty if such action is required by state or federal law or the employer's failure to act would cause employers to violate federal law or result in a loss of a federal contract or federal funding. New Jersey employers also have an exemption for federal contractors.

New York and New Jersey employers should work with counsel to update their workplace policies and procedures with respect to cannabis, drug use, and drug testing. Employers should also prepare to train their supervisors in identifying instances of cannabis "impairment."

Posting Employee Notices

In January of this year, the U.S. Department of Labor released their annual adjustment of penalties imposed for labor law posting fines.

The new maximum fine amounts are $178 for the Family and Medical Leave Act; $13,653 for Job Safety and Health: It's the Law; and $21,663 for the Employee Polygraph Protection Act. Additionally, on May 26, 2021, the Equal Employment Opportunity Commission announced an increase in its maximum penalty for failure to post anti-discrimination notices to $576.

While these fines are most often imposed when an employer has willfully violated the law, posting requirements deserve increased attention and focus from employers, especially in light of COVID-19 and an increasingly remote workforce.

The U.S. Department of Labor issued guidance at the beginning of this year on how to comply with notice and posting requirements with a remote workforce.

— Continued on Page 2—

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Posting Employee Notices, cont.

Customarily, employers complied with many continuous posting requirements by hanging a poster in a conspicuous location in the workplace. In the age of COVID, employers should consider designing a virtual space on the company website or portal for posting federal and state posters and/or notices. If your employees usually log onto an internal portal at the start of their workday, consider making the posting webpage appear automatically on employees' computers upon logging on.

Employers who have staff that are entirely remote can satisfy continuous posting requirements by electronic postings so long as the employer customarily disseminates information to employees via electronic means and the electronic postings are readily available to employees at all times.

If your business has a combination of on-site and remote employees, you must continue to physically post notices for your onsite employees as well as implement electronic posting for your remote staff.

In instances where employers must satisfy a one-time notice requirement, the notice can be disseminated by e-mail as long as employees already customarily receive e-mails from the employer.

During the hiring process, electronic-only posting is permitted where the hiring process is conducted entirely virtually and the electronic notices are available to job applicants at all times.

Employers must inform their employees of where and how to view electronic notices. Consider amending your employee handbook to include information about the virtual location of employee notices.

Look Back at COBRA

The last issue of this newsletter contained important information about the provisions of the American Rescue Plan Act (the Act") that took effect on March 11, 2021. This article provides greater detail into an employer's obligations under the guidelines of the Act as well as employees' rights to continued coverage in accordance with the Act.

In general, the Act provides "Assistance Eligible Individuals" and covered relatives with the option of continuing coverage through their employer's health care plan for the period of April 1, 2021 through September 30, 2021 at no cost to the employee. Normally COBRA insurance is available to an employee upon separation from employment so long as the employee was not removed for gross misconduct at an added cost to the employee. Under the Act, employers pay 100% of COBRA insurance premiums and are later reimbursed through tax credits provided by the federal government.

"Assistance Eligible Individuals" are individuals who are eligible for COBRA as a result of a reduction in hours or an involuntary termination of employment and who elect COBRA continuation coverage. Consistent with previous practice, if an individual's employment is terminated for gross misconduct, the individual and individual's beneficiaries would not be considered an "Assistance Eligible Individual" for purposes of the Act and would not be eligible for coverage under the Act.

If an "Assistance Eligible Individual" becomes eligible for other group health coverage, through a new employer, a spouse's plan, a health flexible spending arrangement or if the employee is eligible for Medicare, then that individual would lose their eligibility for this program.

Here is where this program becomes more complex. Under the Act, an "Assistance Eligible Individual" not only includes an individual who concurrently becomes eligible for COBRA continuation coverage during the April 1, 2021 through September 30, 2021 time period ,but it also includes individuals who lost coverage for the above reasons prior to April 1, 2021. In addition, individuals who lost coverage for the above reasons prior to April 1, 2021, but who either did not elect COBRA at the enrollment time or their COBRA benefits were discontinued due to the inability to pay premiums prior to April 1, 2021, must also be provided with the additional election opportunity for COBRA continuation coverage under the Act.

For these reasons, employers will need to review personnel records and identify individuals that must be provided with information pertaining to the COBRA continuation coverage, as failure to provide notice can result in severe penalties. The Act provides that employers who fails to provide notice to "Assistance Eligible Individuals" could pay excise taxes of $100 per qualified beneficiary for each day the employer is in violation of the Act. Therefore, individuals who lost coverage on or around October 1, 2019 due to involuntary termination or reduction of work hours must be provided with notice in accordance with the Act.

In addition to the above, employers will want to review severance plans, agreements and/or policies to ensure that they accurately reflect the new provisions under the Act.

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