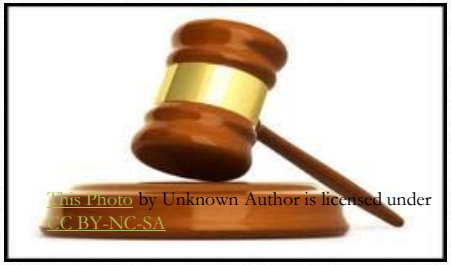
Employment Law Update

What employers need to know for 2018 and beyond

KCUC MEETING
JUNE 20, 2018

JAN WEST, ESQUIRE
Goldberg Simpson, LLC
502.589.4440

RECENT CASES AND POTENTIAL IMPACT ON EMPLOYERS



Tucker v. Bluegrass Regional Mental Health Retardation Board

Discrimination

1) Employee is in protected group
2) Employee terminated or demoted
3) Employee was qualified for the position
4) Treated differently than other employees

Retaliation

- Employee complains about discrimination
- Employee is fired or demoted
- There was a connection between the complaint about discrimination and the termination

Employee failed to prove discrimination or retaliation

- Tucker did not show that she was treated differently than similarly situated male employees because she was not paid less than those employees
- Although Tucker filed an EEOC claim, which qualified as a complaint about discrimination, she failed to prove that she was fired for that reason as she had performance issues

Lessons from Tucker

If an employee files an EEOC claim or complains to management or HR about discrimination against herself or another employee it is risky to terminate employee shortly after complaint is made unless there is good documentation of performance issues

Kentucky law does not allow discrimination against employees based on gender, race, religion, national origin, disability. There are also issues if employee is fired after filing a workers' comp claim. If employee in a protected class is terminated for performance, make sure performance problems are well-documented in personnel file.

Sixth Circuit Case Prohibits Discrimination Against Transgender Employees

EEOC v. Harris Funeral Homes

- A male employee was hired by the funeral home. During employment, employee stated that he would be transitioning to a woman. The funeral home terminated the employee on religious grounds as the director believed the transition "violated God's commands".

EEOC v. Harris Funeral Homes

- Sixth Circuit found that transgender individuals are in a protected class and discrimination against these individuals constitutes gender discrimination.

Lessons from EEOC v. Harris

- Employees cannot be terminated based on sexual orientation (EEOC and 7th Circuit positions) or transgender status (Sixth Circuit position) even if termination is based on employer's religious beliefs
- Revise employment manuals to state that employees can't be discriminated against based on sexual orientation or transgender status
- Transitioning employees may have a right to keep this information private under HIPAA rules so only share this information with others if employee consents
- Use employee's preferred name and gender in the workplace

What happened in Powers v. Keeneland?

Powers worked at Keeneland racetrack as a chaplain for 14 years. He received a monthly salary, had an office, business cards, and parking spot. He did not have a fixed schedule and did not have benefits such as a pension, vacation days or health insurance.

Powers was terminated and sued claiming that he was an employee of Keeneland and was fired due to his disability (Parkinson's disease).

Was Powers an independent contractor

- Extent of control exercised by Powers over his work – he set his own schedule and maintained complete control over the services he provided
- The skill required by occupation – being a chaplain was a specialized skill set which weighs in favor of being an independent contractor
- Direction and control exercised by Keeneland over Powers – Keeneland did not provide oversight over the work being performed by Powers
- Whether Keeneland provided the instrumentalities, tools and place of work for Powers – in this case it did and this weighed in favor of Powers being an employee

Powers v. Keeneland Association
Employee or Independent Contractor?

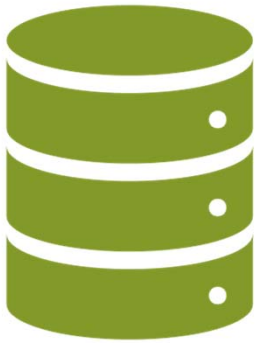
- It is important to categorize correctly for tax purposes (W-2 or 1099) and employees have certain statutory rights that independent contractors do not have, such as the right to sue for discrimination.

Factors considered by the Court weighed in favor of Powell being an independent contractor

Be very careful in determining whether worker is an employee or independent contractor. An independent contractor agreement is helpful but is not dispositive of the issue.

Kentucky Unemployment Insurance Commission v. Hourigan

- This case addressed "termination for cause" for purposes of determining whether a terminated employee may receive unemployment benefits.
- Different standard for unemployment commission to find that an employee was terminated for cause such that employee is prevented from getting unemployment benefits
- If employee quits or is terminated for misconduct (drinking on the job, stealing, insubordination, violation of company rules) they are not entitled to unemployment benefits. If employee is terminated or laid off due to no fault of his own, he is entitled to benefits



Court found Hourigan was terminated for cause due to violation of company rules

- Hourigan was a manager and a subordinate reported sex harassment by a co-worker. Company rules required Hourigan to report harassment complaints to upper management and he failed to do so. Hourigan decided on his own that the complaint had no merit and took no action. Hourigan was fired for failing to follow company rules
- Unemployment initially was granted but on appeal the Ky. Court of Appeals found that the company had uniformly applied the rule regarding reporting harassment when firing Hourigan – no unemployment benefits for Hourigan

Lessons from Hourigan

- Ensure that rules for employee conduct or in writing (preferably in an employee handbook)
- Apply the rules fairly to all employees and document disciplinary violations

Non-Compete Agreements

Are these upheld by Kentucky courts and if so, what are the rules for valid non-compete agreements?

General rules for non-competes in Kentucky

- Reasonable in time

  1-3 years

- Reasonable in geographic scope

  Within the state or within 100 miles is reasonable, the whole United States is not

- Courts almost always approve non-solicitation agreements regardless of geographic scope if reasonable in time

Non-Compete v. Non-Solicitation

Non-Compete

- Prohibits employees from working for or owning a business that is competitive with employer's business for a specific period of time and within a geographic location

Non-Solicitation

- Prohibits an employee from directly or indirectly soliciting customers or prospective customers of the employer
- Prohibits an employee from soliciting other employees to leave and work with him or her

Non-Competes may be invalid if signed during employment rather than at the beginning

- Charles T. Creech, Inc. v. Brown – Kentucky Supreme Court ruled that a current employee could not be forced to sign a non-compete absent some additional consideration (increased salary, bonus, or additional benefits)
- Formerly courts had held that continued employment was sufficient consideration for a non-compete signed during employment
- Unusual situation in this case as Brown had worked for the company for 20 years so it is unclear whether this would apply if employee, for example, had worked two years and then asked to signed non-compete.

Non-Competes During Employment

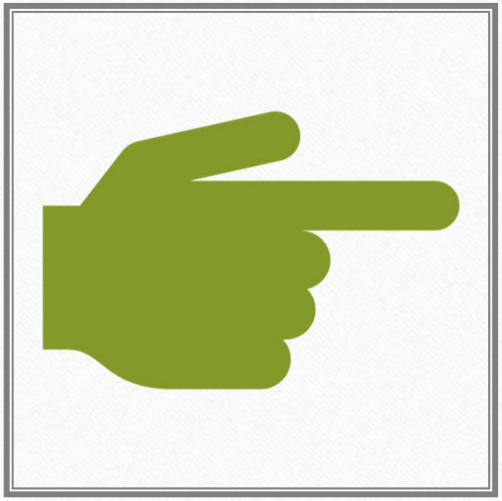
- If you ask an employee to sign a non-compete after he or she has been working for the company for more than a year, offer additional consideration such as a bonus, increase in salary or additional benefits

New Supreme Court Decision Favoring Employers

- Current Supreme Court is proving to be employer-friendly with the addition of Justice Gorsuch
- NLRB v. Murphy Oil USA found that arbitration clauses in employment contracts which require employees to waive the right to bring a class-action lawsuit are valid.
- This means that in the future, employees can be prevented from banding together to file class-action lawsuits for discrimination, wage and hour violations, etc.
- Each employee will be required to file a separate action which makes the cases less attractive for plaintiffs' firms.

Changes Under the Trump Administration

- Employer-friendly repeal of prior rules
- An Obama-era rule requiring government contractors to report past labor violations over the past three years has been repealed.
- A rule requiring companies to keep records of employees' injuries and illnesses beyond the present five-year period was repealed
- EEOC rule requiring companies with more than 100 employees to report race and gender of employees with breakdown of pay and hours worked was repealed



Proposed DOL Rule Struck Down by Texas Court

- A rule that would have increased minimum salary for exempt employees was struck down. The Department of Labor Rule would have changed the overtime mandate amount from $23,000.00 annual salary to $47,000.00 which would have affected 4,000,000 workers. This is being appealed by the DOL and it is likely that a revised version will go into place with the salary requirement decreased to around $33,000.00.

Individual Mandate Repealed

- GOP efforts to repeal the Affordable Care Act in its entirety failed but in December, 2017 President Trump signed a tax bill that resulted in the removal of the "individual mandate" penalty.
- Beginning in 2019, individuals will no longer be penalized for failing to purchase an insurance product but subsidies will still be in effect.

I-9 Forms

There will continue to be greater scrutiny of I-9 forms

The current form to be used is the form dated August 31, 2019

Minimal changes from previous form but employers will be assessed substantial fines for not using the most current form for new hires

Use of Medical Marijuana in the Workplace

States that have legalized marijuana for recreational and/or medical use but allow employers to continue to enforce their drug-free workplace policies:

- CA, CO, DE, IL, MT, NV, NH and WA

States that have anti-discrimination provisions for lawful use OUTSIDE the workplace:

- AR, AZ, CT, DE, IL, ME, MN, NY, NV, PA and RI

Drug-Free Workplace Act

DFWA applies to certain federal contractors. There are some misconceptions about the DFWA. It does not require drug testing in the workplace or require employers to fire employees for a positive drug test. It does require a continuous, good-faith effort to maintain a drug-free workplace through policies, education, and employee assistance programs.

Must Employers Accommodate Medical Marijuana Usage in the Workplace?

California case addressed this and the California Supreme Court said no accommodation is required for use off duty or in the workplace.

Florida statute legalized medical marijuana use but the statute specifically provides that employers are not required to accommodate medical marijuana use in the workplace.

Colorado Supreme Court held that termination of an employee for off-duty, medical marijuana use was lawful. The Colorado Lawful Activities Act did not protect employee. Even though it is legal in Colorado, marijuana use is illegal under federal Controlled Substances Act.

What Should Employers Do?

1

Remind employees that impairment is not tolerated and medical marijuana is no exception (in states where it has been legalized). It is a safety issue.

2

Train supervisors and managers on how to spot potential impairment

3

Offer employees assistance where appropriate (for serious health conditions under the FMLA or disabilities under the ADA).

ISSUES TO BE AWARE OF IN 2018 AND BEYOND

Labor Unions

- Kentucky is now a "right to work" state meaning that workers can no longer be obligated to join labor unions as a condition of their employment.

Social Media

It is more important than ever to develop a social media policy and include it in your employee handbooks as over 80% of all employees have an account on at least one social media platform.

Policy cannot prohibit employees from making negative statements about employer on social media as this could be interference with free speech.

Policy can and should prohibit employees from disclosing confidential company information on social media or discussing specific clients without permission.

Sexual Harassment and the "Me Too" movement

In light of greater awareness by employees of the types of behavior that constitute harassment in the workplace, it is critical to develop a process for reporting and investigating harassment and apply the policy uniformly.

Outline of Harassment Policy

- Zero tolerance for sexual harassment or harassment based on employee's race, religion, gender, disability, age or sexual orientation
- Set forth procedures for an employee to report harassment. They should have the option of reporting it to HR, their immediate supervisor or manager or the company owner.
- All harassment allegations to be ultimately reported to HR and investigated.
- Employees who are found to have engaged in harassment will be terminated.

Harassment Policy

- Examples of improper behavior in the work place include:
  - Offering or granting benefits or preferential treatment in exchange for sexual favors
  - Taking or threatening adverse employment action for refusing a request for sexual favors, i.e., retaliation
  - Sending sexually suggestive emails or pictures
  - Placing sexual suggestive photos, magazines or posters in the workplace
  - Engaging in unwelcome physical contact

Conclusion

- Employers should be vigilant in monitoring changes in the law that may affect you and result in fines, lawsuits or Department of Labor investigation
- Obtain legal advice before terminating an employee, particularly if the employee is in a "protected class" based on gender, race, age, disability, religion
- Regularly update your employee handbooks and always include a provision stating that employment is "at will" and can be terminated by employer or employee at any time