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The Pacific N.W. Employer

A Bulletin on Employment, Labor, Benefits and Immigration Law for Clients and Friends of Jackson Lewis LLP

What Does Marijuana Legalization Mean for Washington Employers?

Washington State voters on November 6, 2012, approved Initiative 502, thereby legalizing marijuana for recreational use. The Initiative took effect on December 6, 2012, and allows the sale and possession of small amounts of marijuana in Washington State. Individuals who are 21 years and older may now lawfully purchase, and possess, up to one ounce of useable marijuana, or larger amounts of marijuana-infused products, at licensed retail outlets that have been approved by Washington's state liquor control board.

Although Initiative 502 took effect on December 6, it will likely take more than a year for required rules to be issued establishing a system for licensing growers, distributors, and retailers. Licenses will not be issued until after those regulations are adopted. In the meantime, it will still be illegal under state law to grow, distribute, or market marijuana, except as now permitted under state law for medical marijuana. And even after Initiative 502 becomes fully operational, it will remain unlawful to open or consume marijuana in the view of the general public.

While possession of marijuana in accordance with the Initiative's changes to the state's Controlled Substances Act is not a criminal or civil offense under Washington law, marijuana possession remains unlawful under the federal Controlled Substance Act. Federal officials are currently considering several strategies to address the new conflict between state and federal law, including possibly pursuing legal action that could undermine voter-approved Initiative 502. At this time, however, it remains unclear how federal officials will officially react to this conflict.

So how does this impact Washington employers? Washington's new law does not contain any express employment protections for marijuana users. The Washington Supreme Court previously held in *Roe v. TeleTech Customer Care Management* that similar protections from criminal and civil liability under Washington's Medical Use of Marijuana Act (MUMA) did not prohibit an employer from discharging an employee for failing a required drug test nor did MUMA impose a duty to accommodate an employee's medical marijuana use. It remains to be seen, however, whether courts will apply the *Roe* reasoning to the changes made by Initiative 502.

In light of this development, Washington employers may anticipate increasing issues with marijuana use by applicants and employees. Employers with such concerns should consider creating or updating policies to address substance abuse that impacts employees' conduct or work, or reviewing their existing policies about drug-testing, safety, and substance abuse. These may include policies that prohibit employees from using or being under the influence of lawful substances such as alcohol and prescription drugs as long as the policies are written in a manner consistent with applicable federal and state laws prohibiting disability discrimination or regulating drug testing. Additionally, unionized employers should remember their possible collective bargaining obligations associated with these subjects.

Employers should continue to follow legal developments relating to the Initiative that may affect substance abuse policies. Employers with multi-state operations should also continue to monitor developments across the nation. For example, Colorado voters also passed a measure to legalize marijuana for recreational use by adults in their state.

Jackson Lewis attorneys are available to answer inquiries regarding this and other workplace developments.

Oregon and Washington Minimum Wages in 2013

Oregon and Washington are two of ten states where the minimum wage is tied to inflation. The standard minimum wage in Oregon went from $8.80 to $8.95 an hour beginning January 1, 2013. In Washington, the standard minimum wage went from $9.04 to $9.19 an hour. (Neither state's law allows employers to take a tip credit against minimum wage for tipped employees.)

INSIDE THIS ISSUE:

Oregon Court Takes Restrictive View of 'Independently Established Business' Requirement for Independent Contractors

Businesses constantly are challenged with correctly classifying workers as either employees or independent contractors. Of course, employers have good reason to be vigilant: misclassification can result in costly audits, assessments of back taxes, and stiff penalties. Under the Oregon independent contractor statute, the "independent contractor" must be engaged in an "independently established business." The Oregon Court of Appeals, the state's intermediate appellate court, has released an opinion highlighting how restrictively and strictly it interprets the state's independent contractor statute.

The case, *Compressed Pattern, LLC v. Employment Dep't Tax Section*, No. A146647 (OR Ct. App., Oct. 31, 2012), concerned an architectural design firm's classifying an individual who provided it with occasional drafting services as an independent contractor. The lower court ruled that Compressed Pattern had improperly classified the individual and the firm appealed.

Under their work arrangements, Compressed Pattern would provide the individual with design specifications and general deadlines to complete drawings on discrete projects. The firm did not provide him with any office space or materials. The individual set his own hours and performed services for other companies besides Compressed Pattern.

The Court of Appeals held that the drafter was not an independent contractor under ORS 670.600. Under the statute, a worker may be classified as an independent contractor if he (1) is free from direction and control over the means and manner of providing services; (2) fulfills certain licensing or certificate requirements necessary for some services; and, critically, (3) is "customarily engaged in an independently established business."

The Court held that the drafter did not meet the last requirement. The statute provides that the "independently established business" prong is met only where a worker meets three of the following five criteria:

1. Maintains a business location that is separate from the location of the service recipient, or in a portion of his own residence used primarily for business;
2. Bears the risk of loss on his services, shown by factors such as being required to correct defective work, warranting the services provided, negotiating indemnification agreements or purchasing liability insurance;
3. Provides contracted services for two or more different persons within a year, or routinely engages in efforts reasonably calculated to obtain contracts for similar services;
4. Makes a significant investment in the business, such as by buying tools or equipment, paying for premises or facilities, or paying for licenses, certificates, or specialized training required to provide the services; and
5. Has the authority to hire and fire other persons to provide assistance in performing the services.

The Court ruled that the drafter in this case did not maintain a separate business location (#1) because he did not "maintain" a separate workspace; he borrowed space from another company without paying rent and without being charged for using specialized drafting software. The Court also found that the drafter did not bear the risk of loss for his services (#2): he was "willing," but not "required," to correct mistakes; he did not carry liability insurance; and he charged by the hour (eliminating the risk that he would underbid a project). Further, the Court found the drafter had not made a significant investment in his business (#4). He used free space and equipment and had invested $1,500 to take architectural licensing exams, but this licensing was not strictly required to perform drafting services. Having concluded the individual did not meet three of the five criteria for an "independently established business," the Court ruled the architectural design firm improperly classified the individual as an independent contractor.

As *Compressed Pattern* demonstrates, employers in Oregon should carefully and regularly perform audits of their independent contractor classifications. Even workers who are hired to perform services on a project-by-project basis, with complete independence, and without using the employers' office space or equipment, may not meet the Oregon independent contractor test if the workers have not significantly invested in their own business, such as by maintaining a permanent workspace, investing in materials, or formally warranting their work. Jackson Lewis attorneys are available to assist employers in auditing their workplace policies and practices.

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Health Care Reform Update: More Fees - Redistribution of Risk

Employers wrestling with how to budget for the additional costs associated with the 2010 health care reform law have one more cost to consider: the "transitional reinsurance program" fee. Barely discussed in the public forum up to now (probably because the amount per plan was not determinable), the government has clarified how this fee could impact employers sponsoring group health plans. It has issued proposed regulations estimating that the annual contribution rate to cover this fee for 2014 will be $63 per individual covered under a group health plan. For more information, see our article at http://www.jacksonlewis.com/resources.php?NewsID=4302.

Nurse who Suffered Panic Attack and was Sent Home Can Pursue FMLA Interference Claim

A nurse who was sent home by her employer's human resources director after suffering a panic attack can pursue her interference claim under the federal Family and Medical Leave Act, the U.S. Court of Appeals in St. Louis has ruled. *Clinkscale v. St. Therese of New Hope*, No. 12-1223 (8th Cir. Nov. 13, 2012). Reversing summary judgment in favor of the employer, the Eighth Circuit found that sufficient factual issues existed as to whether the employer had notice of the nurse's FMLA-qualifying condition before determining she allegedly had abandoned her position. The Eighth Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. For more on this case, please see our article at http://www.jacksonlewis.com/resources.php?NewsID=4276.

Case before U.S. Supreme Court May Broaden Definition of 'Supervisor'

Fourteen years after deciding that employers can be liable under Title VII of the 1964 Civil Rights Act for the conduct of supervisors who create a sexually hostile work environment, the U.S. Supreme Court is addressing a related, unanswered issue: Who qualifies as a "supervisor." On November 26, 2012, the U.S. Supreme Court heard oral argument in *Vance v. Ball State University*, No. 11-556. A decision is expected before the Court's term ends in June 2013. For more information, please see our article at http://www.jacksonlewis.com/resources.php?NewsID=4291.

Jackson Lewis Blogs

Workplace laws, regulations, trends, and strategies change and evolve every day. Our blogs – written by Jackson Lewis attorneys and focusing on key issues and industries – can help you stay informed about these developments. Find all of our blogs, including our two newest, Non-Compete and Trade Secrets Report and Affirmative Action & OFCCP Law Advisor, at http://www.jacksonlewis.com/blogs.php and subscribe to receive notices by e-mail.

MANAGEMENT EDUCATIONAL OPPORTUNITY

The Immigration Two-Step: Accessing the Global Talent Pool and Employment Compliance During the "ICE"age

Wednesday, January 16, 2013 | Seattle, WA

Registration: 8:00 - 9:00 a.m. | Program: 9:00 - 11:00 a.m.

As the economy improves, employers must balance the need to access the global talent pool against the complexity of immigration compliance. This presentation will provide employers with practical strategies on how to effectively and safely manage both domestic and foreign employees in today's complex workplace. Register today to save your spot!

For more information on this and other programs or to register, please visit www.jacksonlewis.com/events.

JACKSON LEWIS NEWS

Bryan O'Connor Named Managing Partner of Seattle Office

Jackson Lewis LLP is pleased to announce **Bryan P. O'Connor** has assumed the role of Seattle office Managing Partner, succeeding **Wayne W. Hansen**. Mr. Hansen, who has served in the role since the Seattle office opened in 1998, will stay on as Partner and continue to represent employers in all phases of traditional labor law negotiations.

Mr. O'Connor advises and represents employers in all aspects of traditional labor law across numerous industries, including construction, manufacturing, retail, health care, utility, food distribution, and government-related services. His practice also includes a wide spectrum of employment law advice and litigation, including both state and federal claims and individual and class action suits. Mr. O'Connor regularly conducts employee and management training seminars, and is a frequent lecturer on labor and employment law topics.

Portland Office

Jackson Lewis LLP is pleased to welcome to the Portland office **Sarah J. Ryan** as Partner.

Ms. Ryan, who chaired the Labor and Employment group of her previous firm, has been in private practice in Portland for more than 25 years. Her main areas of practice are employment law and complex commercial litigation. Ms. Ryan has advised clients and litigated employment claims regarding harassment, discrimination and retaliation, intellectual property protection, wage and hour, breach of contract, and many other workplace law issues. She is a frequent speaker on employment topics, including claims avoidance, reductions-in-force, and legally mandated leaves of absence. Ms. Ryan has been recognized by her peers as an industry leader in labor and employment in Chambers USA and maintains the AV® Preeminent™ Rating from *Martindale-Hubbell®*.

Ms. Ryan may be contacted at (503) 229-0404 or Sarah.Ryan@jacksonlewis.com.

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Jackson Lewis LLP represents management exclusively in employment, labor, benefits and immigration law and related litigation.

The firm has more than 750 attorneys practicing in 49 locations nationwide.

Jackson Lewis represents employers before state and federal courts and administrative agencies on a wide range of issues, including discrimination, wrongful discharge, wage/hour, affirmative action, immigration, and pension and benefits matters. Jackson Lewis negotiates collective bargaining agreements, participates in arbitration proceedings and represents union-free and unionized employers before NLRB and other federal and state agencies. The firm counsels employers in matters involving workplace health and safety, family and medical leaves and disabilities.

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