

Alert

New Developments for Employers Regarding Employee Reproductive Health Decisions, Marijuana Drug Testing and Wage Reporting Requirements

June 6, 2019

Employers should be aware of recent developments in the area of employment law: (1) an amendment to the New York City Human Rights Law (“NYCHRL”) to include sexual and reproductive health decisions as a protected category; (2) New York City’s prohibition of pre-employment drug testing for marijuana usage; and (3) new wage and hour reporting requirements from the Equal Employment Opportunity Commission (“EEOC”).

“Sexual and Reproductive Health Decisions” as a Protected Category

Effective May 20, 2019, New York City amended the NYCHRL to include “sexual and reproductive health decisions” as a protected category for employment purposes. The NYCHRL defines sexual and reproductive health decisions as “any decision by an individual to receive services, which are arranged for or offered or provided to individuals relating to sexual and reproductive health, including the reproductive system and its functions.” Under the amended NYCHRL, protected sexual and reproductive health decisions include, but are not limited to, fertility-related medical procedures; sexually transmitted disease prevention, testing and treatment; and family planning services and counseling, such as birth control drugs and supplies, emergency contraception, sterilization procedures, pregnancy testing and abortion.

Prohibition on Pre-Employment Drug Testing for Marijuana Use

Effective May 10, 2020, New York City will prohibit pre-employment drug testing for marijuana usage. The new NYCHRL amendment prohibits employers, labor organizations, employment agencies or their agents from requiring prospective employees to submit to drug testing for marijuana or any tetrahydrocannabinols (“THC”) as a condition of employment.

The amendment does not apply to persons applying to work in positions (i) involving the supervision of children, medical patients or vulnerable persons; (ii) in law enforcement; (iii) that require compliance with certain provisions of the state labor law and city building code relating to construction and public work sites; (iv) impacting the health and safety of employees or the public; or (v) that require a commercial driver’s license.

Additionally, the amendment does not apply to drug testing that is required pursuant to federal, state or local statute, regulation or order; a federal government contract granting financial assistance to an employer; or a collective bargaining agreement to which the employer is a party.

The New York City Commission on Human Rights is expected to promulgate rules for the implementation of this amendment prior to the amendment’s effective date on May 10, 2020.

The amendment is not without controversy. Many employers drug test prospective employees and will be affected by the amendment. Further, since the language of the amendment refers to “prospective employees,” it is unclear how the amendment will affect an employer’s ability to drug test employees after they have been hired. The Commission’s forthcoming regulations will hopefully add clarity.

New Wage and Hour Reporting Requirements

On April 25, 2019, in *National Women’s Law Center (NWLC) et al. v. Office of Management and Budget (OMB) et al.*, the U.S. District Court for the District of Columbia reinstated a 2016 rule requiring the U.S. Equal Employment Opportunity Commission (“EEOC”) to collect data on employee compensation and hours sorted by race, ethnicity and gender. The new reporting requirement, referred to as Component 2 of the Employer Information Report EEO-1 (“EEO-1 Report”), is intended to assist the EEOC in identifying discriminatory pay practices.

Private employers with 100 or more employees and federal contractors with 50 or more employees are required to submit Component 2 data for calendar years 2017 and 2018 by Sept. 30, 2019. These employers must report W-2 wage information and total hours worked — sorted by race, ethnicity and gender — for persons employed during a selected pay period between Oct. 1 and Dec. 31 of 2017 and 2018. All reports are subject to the confidentiality provisions of Section 709(e) of Title VII of the Civil Rights Act of 1964.

The EEOC has issued a statement that it will provide further information as soon as possible to assist employers in preparing their filings.

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