HIRE RIGHT

Quarterly Compliance Compilation

HireRight Top Stories

A New York State Of Mind – What Legalized Weed In The Workplace Means For Employers

Alonzo Martinez, Associate Counsel - Compliance

After years of debating and advancing marijuana laws, beginning with legalizing the medical use of cannabis in 2014 to decriminalize minor marijuana-related offenses in 2019, lawmakers in New York have gone all-in legalizing the recreational use of marijuana by adults. On March 31, 2021, New York Governor Andrew Cuomo signed into law the New York State Cannabis/Marijuana Regulation & Taxation Act, reducing barriers to employment for users and encouraging employers to rethink their positions on marijuana.

Getting Started

The Act creates an Office of Cannabis Management (OCM), an independent arm of the New York State Liquor Authority's Division of Alcohol Beverage Control. The OCM will be responsible for operationalizing and regulating marijuana within the state and will assume duties over the state's existing medical marijuana program. The OCM is expected to establish standards for cultivation, create licensing programs for distributors, processors, and retailers of recreational marijuana, adopt advertising and marketing rules and implement a social equity program that will assist individuals disproportionally impacted by cannabis enforcement.

While legalization is effective immediately, you won't find shops opening in your neighborhood until the OCM has implemented the rules necessary to regulate marijuana. Regardless, individuals in New York may currently possess, purchase, share and consume up to 3 ounces of cannabis and up to 24 grams of concentrated cannabis. While it may take months or years for retail sales to start, employers should prepare to comply with the legislation.

Employer Impact

Thankfully for employers, the New York State Cannabis/Marijuana Regulation & Taxation Act does not diminish an employer's ability to maintain a zero-tolerance drug-free workplace. Employers are not required to permit or otherwise accommodate the use, possession, sale, or transfer of cannabis in the workplace and can prohibit employees from being impaired during work hours.

Notably, for users of marijuana, the Act amends Labor Law Section 201-d, protecting workers' rights to engage in the use of cannabis outside of work. Specifically, the Act requires employers to not discriminate against a worker's use of cannabis when off-duty, outside of the employer's facility, and when not using the employer's equipment or other property. As it relates to an employer's pre-employment drug screening program, most New York employers may not refuse to hire a candidate based on their legal use of marijuana.

An employer would not violate a lawful recreational marijuana user's rights based on three specific exceptions:

1. An employer may adversely affect a recreational marijuana user's employment if an employer is required to bar a marijuana user based on a state or federal statute, regulation, ordinance, or other state or federal government mandate.
2. If a worker is impaired by marijuana while working, and the worker's impairment interferes with an employer's obligations to provide a safe and healthy workplace, an employer may choose to take an adverse employment action.

3. Finally, employers who would violate federal law or may experience loss of a federal contract or federal funding may disqualify a recreational marijuana user from hire or employment.

The Act places employers who engage safety-sensitive but non-regulated workers between a rock and a hard place. When gauging the deterioration of a worker's abilities based on marijuana use, an employer must identify "specific articulable symptoms" of impairment to challenge the worker's fitness for duty. Even if an individual tests positive for marijuana while at the workplace but does not exhibit "specific articulable symptoms" of impairment, an employer may be barred from impacting that worker's employment.

What's Next?

Since the legalization of recreational marijuana in New York is effective immediately, employers should quickly rethink their stance on marijuana and the impact of their adjudication policies on lawful marijuana users. Most employers not subject to federal regulation or other express obligation covered by New York's new law to bar users of marijuana from the workplace will need to address policy statements that lean otherwise. Similarly, employers may want to rethink pre-employment testing for marijuana since a lawful recreational user cannot be barred from employment. Of note, New York City barred employers from testing prospective candidates for marijuana in 2020. Finally, employers will need to carefully develop and implement policies to assess a reasonable suspicion of impairment at the workplace or while on duty to defend an adverse action taken due to a positive test for marijuana. As the state gets underway in implementing its recreational marijuana program, employers can expect to gain clarity behind the intent and enforcement of existing rules and the possible evolution of the law as time progresses.

The Garden State Gets Greener! New Jersey Legalizes Recreational Marijuana

Alonzo Martinez, Associate Counsel - Compliance

In November 2020, voters in New Jersey overwhelmingly approved Public Question 1, amending the state's constitution to legalize the purchase and recreational use of marijuana for persons at least 21 years old. While the amendment became effective at the start of the year, it wasn't until February 22, 2021, when New Jersey Governor Phil Murphy signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (NJ CREAMMA) into law. NJ CREAMMA provides far-reaching protections for recreational marijuana users and saddles employers with many new considerations for their workplace drug programs.

Substantial Protections for Marijuana Users

New Jersey has afforded recreational marijuana users some of the most generous protections in the United States. Under NJ CREAMMA, employers are prohibited from refusing to hire or adversely affecting the employment of recreational marijuana users. Specifically, are employers are barred from "refusing to hire or employ an individual, barring or discharging an individual from employment, requiring an individual to retire from employment, or discriminating against an individual in compensation or in any terms, conditions, or privileges of employment" as a result of their marijuana use.

NJ CREAMMA's reach has significant impacts on employers in New Jersey; employers can no longer assert a rational relationship between a worker's marijuana use and its effect on the worker's ability to do a job. Exceptions to NJ CREAMMA are limited. An exception exists where compliance with federal requirements is affected if there is a "provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with federal law, rules, and regulations." As drafted, NJ CREAMMA does not include specific exceptions for workers in safety-sensitive positions. Employers hiring workers in certain safety-sensitive jobs, such as those regulated by the U.S. Department of Transportation, may engage their legal counsel in assessing provisions within the law that assert that "personal use of cannibals shall not be construed…to amend or affect in any way any state or federal law pertaining to employment matters…to require a person to violate a federal law…or to exempt a person from a federal law or

obstruct the enforcement of a federal law, [including prohibiting] a party to a federal contract from…use of cannabis items to the extent necessary to comply with the terms of the contract or to satisfy federal requirements for the contract" when assessing their compliance with federal regulations and NJ CREAMMA.

Employer Impact

Employers in New Jersey are still permitted to maintain a zero-tolerance "drug and alcohol-free workplace" under NJ CREAMMA. Additionally, employers are not required to permit possession, sale transfer, or the use, consumption, or being under the influence of marijuana in the workplace. Employers may only consider a worker's off-premises and off-duty use of marijuana if they are impaired while at the workplace or on the job.

NJ CREAMMA requires that the yet-to-be-formed New Jersey Cannabis Regulatory Commission establish standards for identifying impairment. Employers will be required to engage a Workplace Impairment Recognition Expert "WIRE" when assessing a worker's perceived impairment. The WIRE will be responsible for "detecting and identifying an employee's usage of, or impairment from, a cannabis item or other intoxicating substances, and for assisting in the investigation of workplace accidents."

Employers may continue to require pre-employment drug testing that includes marijuana. However, NJ CREAMMA prohibits an employer from taking adverse employment action against an individual based solely on a positive marijuana result. Reasonable suspicion testing is also permitted if an employer believes a worker is using marijuana during the course of their responsibilities or work hours or identifies "observable signs" of marijuana intoxication. Post-accident testing is also permitted. Employers may conduct periodic or random screening per their policies to determine a worker's marijuana use during work hours. However, the intent of on-the-job periodic or random screening should be to identify impairment and likely to work through the WIRE process once established and not to automatically disqualify an individual who tests positive for marijuana while at work.

Final Thoughts

Many unanswered questions remain for employers. Once the New Jersey Cannabis Regulatory Commission is established, employers can expect to get clarity behind the regulations needed to implement and maintain the state's recreational marijuana program. In the interim, employers should begin revising drug-free workplace policies to align with NJ CREAMMA and, most importantly, assess their adjudication programs so as to not adversely affect a worker's employment based on a positive marijuana test with limited exceptions.

Marijuana Wins Big On Election Day – What This Means For Employers

Alonzo Martinez, Associate Counsel - Compliance

America saw a green wave sweep the country, with voters in three states, Arizona, Montana, and New Jersey, approving recreational marijuana, and voters in Mississippi approving medical marijuana. Voters in South Dakota advanced laws that legalize both medical and recreational marijuana. The result adds to a confusing patchwork of legislation for employers.

Current Marijuana Landscape

While decriminalization of marijuana is currently on the docket at the federal level, marijuana remains an illegal drug under the Controlled Substances Act. Progress within the states has been far swifter. As of Election Day 2020, the number of states that have legalized recreational marijuana increases to 15 plus Washington, D.C., and the number of states that have legalized medical marijuana increases to 35 plus D.C.

New Recreational Marijuana Measures

- **Arizona**

  Voters in Arizona passed Proposition 207, The Smart and Safe Arizona Act, with 59.8% of residents approving the Act. While the effective date of the law is unclear, once implemented, individuals who are at least 21 years old will be able to purchase and use one ounce or less of marijuana in its raw form lawfully. The purchase and use of marijuana concentrate limited to five grams. Marijuana users with a green thumb may have up to six marijuana plants at their homes.

  Arizona's new law does not provide anti-discrimination rights for recreational users. Employers can continue to conduct drug testing for marijuana and disqualify candidates who are recreational marijuana users from hire based on a positive result. Employers are also not restricted from maintaining drug-free workplaces and are not required to "allow or accommodate the use, consumption, possession, transfer, display, transportation sale or cultivation of marijuana in a place of employment."

  Employers are reminded that Arizona has an existing medical marijuana law on the books. The Arizona Medical Marijuana Act was passed in 2010 and included an anti-discrimination measure. Therefore employers in Arizona must be cautious concerning the type of marijuana user when assessing drug tests that are positive for the drug.

- **Montana**

  In Montana, Initiative 190 passed, with 56.9% of voters approving recreational marijuana in the state. Montana's new law legalizes the possession and use of one ounce or less of marijuana or eight grams or less of marijuana concentrate by persons over 21 in the state. Residents can also cultivate up to four seedlings and grow up to four mature plants.

  Montana's new recreational marijuana law is employer-friendly. Employers are not required to permit or accommodate recreational marijuana use in the workplace or on the employer's property. Employers may discipline employees who violate their workplace drug policy or are under the influence of marijuana while at work. Employers may also adversely affect a recreational marijuana user's employment. Montana's recreational marijuana law becomes effective on January 1, 2021.

  Montana's medical marijuana law, which became effective in 2004, also does not require an employer's accommodation of a registered cardholder's lawful use of medical marijuana. Much like recreational marijuana, employers may prohibit the use of medical marijuana in the workplace.

- **New Jersey**

  New Jersey's Public Question 1 was passed by an overwhelming majority, with 67.2% of voters approving the amendment to the state's constitution. On January 1, 2021, New Jersey's Constitution will be amended to legalize the purchase and recreational use of marijuana for persons at least 21 years old. Residential cultivation of marijuana is still prohibited under the amendment.

  While Public Question 1 is silent on the issue of employer accommodation of recreational marijuana, to date, no recreational law that has passed has required an employer to permit recreational marijuana use while at the workplace. Employers should expect guidance on this issue from the state's newly formed Cannabis Regulatory Commission and its lawmakers.

With recreational marijuana now available to individuals in the tri-state area, employers, particularly those in New York City, should be cognizant of the possible impact of marijuana on their workforces. Employers in New York City are reminded of a law that became effective on May 10, 2020, that prohibits pre-employment marijuana testing of prospective candidates as a condition of employment.

In 2019 New Jersey's Jake Honig Compassionate Medical Cannabis Use Act was amended such that employers are prohibited from taking an "adverse employment action" against those who use medical marijuana. Additionally, the New Jersey Law Against Discrimination requires that employers provide reasonable accommodation to lawful medical marijuana users for their off-duty use of the drug. Notably, neither measure requires employers to accommodate on-premises or on-duty use of medical marijuana, which may provide insight for employers regarding the scope of the state's new recreational marijuana law.

- **South Dakota**

Voters in South Dakota passed Amendment A, with 53.4 % of voters approving an amendment to the state's constitution to permit the purchase, possession, distribution, and use of up to one ounce of marijuana for individuals 21 years old and older. Residents will be allowed to grow up to six marijuana plants. South Dakota's recreational marijuana law becomes effective on July 1, 2021.

South Dakota's new law does not require that an employer "permit or accommodate" allowed by the legalization of recreational marijuana. It also does not affect an employer's ability to "restrict the use of marijuana by employees."

New Medical Marijuana Measures

- **Mississippi**

Statewide Measure 1 was adopted in Mississippi, with 67.9% of voters deciding to legalize medical marijuana for qualified persons with debilitating medical conditions. Initiative 65 was also passed by 73.9% of voters who approved amendments to the state's constitution to create a medical marijuana program administered by the state health department. Under the state's new law, medical marijuana patients afflicted by any of 22 identified qualifying medical conditions could possess up to 2.5 ounces of marijuana over 14 days. Medical marijuana cards will begin to be issued no later than August 15, 2021.

Employers are not required to accommodate the use of medical marijuana or permit its use at the workplace, which means that an employer may adversely affect a lawful medical marijuana user's employment if it is job-related and consistent with the business's necessity. Drug testing is not affected by Mississippi's new law. Of note, Mississippi's new law's validity is already in question and may be reviewed by the state's Supreme Court. Employers in Mississippi are advised to stay apprised of further developments.

- **South Dakota**

South Dakota's Measure 26 passed, with 69.9% of voters passing a law to allow medical marijuana use by patients who suffer from a debilitating medical condition as certified by a physician. Lawful medical marijuana cardholders are permitted to possess up to three ounces of marijuana compared to one ounce for recreational use. South Dakota's new medical marijuana law becomes effective on July 1, 2021.

Employers in South Dakota are still permitted to conduct drug tests that include marijuana. However, medical marijuana cardholders are afforded the same rights as those prescribed a pharmaceutical medication concerning: employer interactions, employment drug testing, and drug testing required by any state or local law, agency, or government official. South Dakota's medical marijuana law also does not apply to the extent that it conflicts with

an employer's obligations under federal law or regulation or if it would disqualify an employer from a monetary or licensing-related benefit under federal law or regulation. While an employer's accommodation of medical marijuana use is not expressly stated, the construction of Measure 26 lacks clarity.

Employers are not required to permit the use of medical marijuana at the workplace or allow an employee to work while under the drug's influence. However, "a registered qualifying patient may not be considered to be under the influence of cannabis solely because of the presence of metabolites or components of cannabis that appear in insufficient concentration to cause impairment." Therefore, employers in South Dakota should proceed cautiously before adversely affecting a registered medical marijuana user's employment due to evidence of impairment at the workplace.

A Patchwork of Progress

With progress towards marijuana, decriminalization is slowly being made at the federal level, voters in five states signal constituents' desires to drive marijuana legalization at a faster pace. While laws passed by voters in 2020 are generally employer-friendly, new measures in New Jersey and South Dakota lack clarity. Employers should review their drug and alcohol testing, adjudication, and accommodation policies with their legal counsel to ensure compliance with these new laws. Experienced drug and health screening providers are available to work with employers to help craft testing programs that meet their organizations' needs

HireRight National Legislative Summary

HireRight is pleased to provide you with the following summary of bills affecting employment screening under consideration by state or local lawmakers with recent legislative activity.

Bill Number	Jurisdiction	Description
House Bill 3744 (2021 – 2022 Regular Session)	Texas	Relating to the prohibited use or dissemination of certain private or false information; providing a civil penalty; creating a criminal offense; increasing a criminal penalty.
House Bill 3601 (2021 – 2022 Regular Session)	Texas	Relating to automatic orders of nondisclosure of criminal history record information for certain misdemeanor defendants following successful completion of a period of deferred adjudication community supervision.
House Bill 1602 (2021 Regular Session)	Oklahoma	An Act relating to privacy of computer data; enacting the Oklahoma Computer Data Privacy Act; defining terms; providing that this act applies to certain businesses that collect consumers' personal information; providing exemptions; prescribing compliance with other laws and legal proceedings; requiring this act to be liberally construed to align its effects with other laws relating to privacy and protection of personal information; providing that when in conflict federal law controls; providing that when in conflict with state law the law providing the greatest privacy or protection to consumers controls; providing for preemption of local law.
House Bill 3741 (2021 – 2022 Regular Session)	Texas	Relating to the personal identifying information collected, processed, or maintained by certain businesses; imposing a civil penalty.
Senate Bill 893 (2021 Regular Session)	Connecticut	To establish a framework for controlling and processing personal data, to establish responsibilities and privacy protection standards for data controllers and processors, to grant consumers the right to access, correct, delete and obtain a copy of personal data and to opt out of the processing of personal data for the purposes of targeted advertising.
House Bill 2937 (2021 – 2022 Regular Session)	Illinois	Amends the Judicial Privacy Act. Defines "internet data aggregator". Provides that it shall additionally be unlawful for an internet data aggregator to sell, license, trade, purchase, or otherwise provide or make available for consideration a judicial officer's personally identifiable information, regardless of intent, if the judicial officer has properly made a written request to not disclose the personal information.

Bill Number	Jurisdiction	Description
House Bill 3910 (2021 – 2022 Regular Session)	Illinois	Creates the Consumer Privacy Act. Provides that a consumer has the right to request that a business that collects the consumer's personal information disclose to that consumer the categories and specific pieces of personal information the business has collected. Requires a business to, at or before the point of collection, inform a consumer as to the categories of personal information to be collected and the purposes for which the categories of personal information shall be used. Requires the business to provide notice when collecting additional categories of personal information or when using a consumer's personal information for additional purposes. Provides that a consumer has the right to request that a business delete any personal information about the consumer which the business has collected from the consumer, with some exceptions. Requires a business that collects or sells a consumer's personal information to make certain disclosures to the consumer upon receipt of a verifiable consumer request. Provides that a consumer has the right, at any time, to opt out of the sale of his or her personal information to third parties. Prohibits a business from discriminating against a consumer who exercises any of the rights established under the Act by denying goods or services or charging the consumer different prices or rates for goods or services.
Senate Bill 1480 (2019 – 2020 Regular Session)	Illinois	Amends the Illinois Human Rights Act. Provides that it is a civil rights violation for any employer, employment agency or labor organization to use a conviction record as a basis to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment. Specifies further requirements concerning conviction records. Amends the Business Corporation Act of 1983. Provides that for those corporations required to file an Employer Information Report EEO-1 with the Equal Employment Opportunity Commission, information that is substantially similar to the employment data reported under Section D of the corporation's EEO-1 in a format approved by the Secretary of State shall be reported. Amends the Equal Pay Act of 2003. Provides for equal pay registration certificate requirements. Makes conforming and other changes. Effective immediately.
Senate Bill 1608 (2021 – 2022 Regular Session)	Tennessee	Enacts the "Personal Privacy Protection Act," which prohibits the release of certain personal information by a public agency, makes certain personal information confidential and not an open record, and creates a civil cause of action and criminal offense for violations. - Amends TCA Title 2; Title 3; Title 4; Title 5; Title 6; Title 7; Title 10; Title 12; Title 39; Title 40 and Title 41.
House Bill 159 (2021 – 2022 Regular Session)	Tennessee	Enacts the "Personal Privacy Protection Act," which prohibits the release of certain personal information by a public agency, makes certain personal information confidential and not an open record, and creates a civil cause of action and criminal offense for violations. - Amends TCA Title 2; Title 3; Title 4; Title 5; Title 6; Title 7; Title 10; Title 12; Title 39; Title 40 and Title 41.
Senate Bill 844 (2021 Regular Session)	Florida	Authorizing certain persons to access information recorded in the Official Records of a county which is otherwise exempt from public records requirements, if specified conditions are met; authorizing clerks of the circuit court to enter into limited access licensing agreements to allow electronic access to official records for specified parties; prohibiting a county recorder or a clerk of the court from placing information subject to specified public records exemptions on a publicly available website; providing procedures for the restoration of previously redacted information, etc.
Assembly Bill 13 (2021 – 2022 Regular Session)	California	This bill would enact the Automated Decision Systems Accountability Act of 2021. The bill would require a business in California that provides a person, as defined, with a program or device that uses an automated decision system (ADS) to take affirmative steps to ensure that there are processes in place to continually test for biases during the development and usage of the ADS, conduct an ADS impact assessment on its program or device to determine whether the ADS has a disproportionate adverse impact on a protected class, as specified, examine if the ADS in question serves reasonable objectives and furthers a legitimate interest, and compare the ADS to alternatives or reasonable modifications that may be taken to limit adverse consequences on protected classes. The bill would require a business, by March 1, 2023, and annually thereafter, to submit a report to the Department of Financial Protection and Innovation providing specified information about its ADS impact assessment. The bill would also require a business, if it makes any significant modification to an ADS, to reconduct an ADS impact assessment under these circumstances.

Bill Number	Jurisdiction	Description
House Bill 969 (2021 Regular Session)	Florida	Requires certain businesses to provide notice to consumers about data collection & selling practices; provides consumers right to request that certain data be disclosed, deleted, or corrected & to opt-in or opt-out of sale or sharing of such data; provides nondiscrimination measures, methods for requesting data & opting-in or opting-out of sale or sharing of such data, exemptions, applicability, contracts, & private cause of action, & enforcement & implementation; authorizes DLA to adopt rules.
Senate Bill 1734 (2021 Regular Session)	Florida	Citing this act as the "Florida Privacy Protection Act"; providing that consumers have the right to direct certain businesses not to sell their personal information; prohibiting businesses from selling the personal information of consumers younger than a specified age without express authorization from the consumer or the consumer's parent or guardian under certain circumstances; providing that consumers have the right to submit a verified request for businesses to delete or correct personal information the businesses have collected about the consumers; prohibiting businesses from taking certain actions to discriminate against consumers who exercise certain rights, etc.
Senate Bill 5062 (2021 – 2022 Regular Session)	Washington	This act is concerning the management, oversight, and use of data. This act gives consumers the ability to protect their own rights to privacy by explicitly providing consumers the right to access, correct, and delete personal data, as well as the rights to obtain data in a portable format and to opt out of the collection and use of personal data for certain purposes. These rights will add to, and not subtract from, the consumer protection rights that consumers already have under Washington state law.
Senate Bill 15 (2021 – 2022 Regular Session)	Texas	Relating to the Texas Consumer Privacy Act Phase I; creating criminal offenses; increasing the punishment for an existing criminal offense.

Content From Our Partners

Background Screening Ordinances

Philadelphia Enacts Amendments to and Expands Coverage of its Background Screening Ordinances

Littler, 1/26/2021

For years, Philadelphia has maintained ordinances substantially restricting employers' use of criminal record and credit histories in employment screening. These regulations are in addition to, not in lieu of, the federal Fair Credit Reporting Act (FCRA) restrictions applicable nationwide and Pennsylvania's state-wide Criminal History Record Information Act (CHRIA). The FCRA governs the process for ordering background reports, including criminal background reports, from background check companies (known as "consumer reporting agencies").

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Illinois Imposes New Criminal History Check Requirements on Employers

Littler, 3/26/2021

On March 23, 2021, Governor J.B. Pritzker signed a bill (SB1480) that—effective immediately—amends the Illinois Human Rights Act (IHRA) to, among other things, impose new requirements on employers that perform criminal history checks on their employees.

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Pay Equity

Illinois Will Require EEO-1 Transparency and Equal Pay Data

Littler, 3/29/2021

Illinois recently enacted SB 1480, which amends several laws including the Illinois Business Corporation Act and the Illinois Equal Pay Act. While employers have significant lead time to begin their compliance efforts, SB 1480 will render employers' diversity efforts more transparent by making public their EEO-1 reports, which will be published on a state website beginning in early 2023).

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I-9

After Brief COVID-Related Hiatus, Employers Face Return of Social Security Administration "No-Match" Letters

Littler, 1/12/2021

During the early months of the pandemic, the Social Security Administration (SSA) took a break from issuing "no-match" letters to employers. It appears that towards the end of 2020, however, the SSA has resumed this practice.

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Litigation/Regulatory Enforcement

Fifth Circuit Announces More Rigorous Standard for Certification of Collective Actions

Littler, 1/13/2021

On January 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a long-sought opinion on the collective certification process under the Fair Labor Standards Act. In its opinion, the Fifth Circuit expressly rejected the lenient standard employed by almost every federal district court across the country in deciding whether notice should issue to potential opt-in plaintiffs.

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Form U5 Defamation Claims on the Rise at FINRA: Be Prepared!

Littler, 3/25/20211

Under Financial Industry Regulatory Authority's (FINRA) rules, whenever broker-dealers, registered investment advisers, or issuers of securities (FINRA member) terminate the employment of a FINRA-registered representative, including a licensed broker or financial advisor (an associated person) the member firm must file a Form U5 (the Uniform Termination Notice for Securities Industry Registration). The standard Form U5 must also be filed for current employees if the firm decides to terminate their registration with FINRA.

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California DFEH Ramps Up Enforcement of FEHA's Protections Against Criminal Record Discrimination

Littler, 3/8/2021

Employers with operations in California should be vigilant about compliance with the protections against criminal record discrimination in the California Fair Employment and Housing Act (FEHA). The FEHA prohibits employers from inquiring into and using specific criminal record information. The FEHA also mandates procedures for evaluating such information and providing notice to applicants. The Department of Fair Employment and Housing (DFEH) is ramping up its efforts to enforce these protections.

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Privacy

Illinois Legislature Considers a Bill Designed to Slow the Flood of Biometric Privacy Class Actions

Littler, 3/15/2021

In the two years since the Illinois Supreme Court ruled that a failure to obtain written consent prior to collecting an individual's biometric data is enough to maintain an action under the Illinois Biometric Information Privacy Act (BIPA), over 800 class actions have been filed against Illinois employers. With the question of liability unsettled and the case law stacked in favor of employees, employers that have implemented biometric timekeeping systems, access controls, and temperature scanners have almost universally agreed to settle BIPA class actions.

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Worker Classification

Minneapolis Increases Protections for Freelance Workers

Littler, 1/6/2021

The growth of freelance work has exploded in recent years and shows no signs of stopping. Effective January 1, 2021, a new ordinance that could have a significant impact on independent contractors and the companies with which they work took effect in the City of Minneapolis after the Minneapolis City Council and Mayor Jacob Frey unanimously approved it. The Minneapolis Freelance Worker Protections Ordinance requires businesses, and even some individuals, to enter into written agreements with particular requirements with most freelance workers.

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DOL Simplifies Independent Contractor Analysis in Final Rule

Littler, 1/7/2021

On January 6, 2021, the U.S. Department of Labor (DOL) finalized its highly anticipated independent contractor rule. The rule delivers on the DOL's promise to simplify, clarify and harmonize the factors for determining when a worker is an independent contractor versus an employee under the Fair Labor Standards Act (FLSA). It is meant to be the sole and authoritative interpretation for this analysis.

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California Supreme Court Reaffirms that ABC Test is Retroactive

Littler, 1/19/2021

On January 14, 2021, the California Supreme Court held in *Vazquez v. Jan-Pro Franchising Int'l, Inc.* that the ABC test for determining worker classification fashioned in its groundbreaking decision, *Dynamex v. Superior Court*, applies retroactively. The court relied on its position that independent contractor classification under the California wage orders was unsettled law until 2018. The decision surprised few in the legal industry, given the court's prior reasoning in the unanimous *Dynamex* decision.
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Bill Proposes Sweeping Expansion of Colorado Anti-Discrimination Statute

Littler, 3/15/2021

The Colorado Legislature has formally introduced Senate Bill 21-176, the Protecting Opportunities and Workers' Rights (POWR) Act, which would impose sweeping changes to Colorado's anti-discrimination law. Among other amendments, the proposal includes coverage of independent contractors, prohibits confidential settlements, eliminates administrative pre-requisites to suit and extends the timeframe to bring claims, and expands liability and limits defenses to harassment claims.
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EEOC

Annual Report on EEOC Developments – Fiscal Year 2020

Littler, 2/28/2021

This **Annual Report on EEOC Developments—Fiscal Year 2020** (hereafter "Report"), our tenth annual publication, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.
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Marijuana & Employers

Off-Duty Recreational Cannabis Use to be Protected in New Jersey

Littler, 2/24/2021

After contentious negotiations, Governor Phil Murphy has signed the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the Act) implementing the constitutional amendment embracing recreational marijuana ratified in November 2020. When the framework created by the Act is in place, New Jersey will be the first state in the nation to protect employees from almost any adverse employment action triggered by off-work recreational marijuana activity.
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COVID-19

Virginia Becomes the First State to Adopt a Permanent COVID-19 Standard

Littler, 1/29/2021

On January 27, 2021, Virginia Governor Ralph Northam announced that he had approved a Final Permanent Standard (Permanent Standard) for preventing COVID-19 in the workplace, making Virginia the first state in the nation to implement a permanent COVID-19 workplace safety and health standard. The Permanent Standard, which applies to all employers in the Commonwealth, supersedes the Emergency Temporary Standard that had been in place since July 2020 but expired on January 26, 2021.

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Michigan Alters its Worker Quarantine Requirements Related to COVID-19

Littler, 2/4/2021

Last October, Michigan Governor Gretchen Whitmer signed HB 6032 to protect workers who do not report to work because they were exposed to, displayed symptoms of, or tested positive for COVID-19. On December 30, 2020, and likely in response to the recent changes in the U.S. Centers for Disease Control and Preventions (CDC) guidelines regarding COVID-19, the governor signed Senate Bill 1258 (SB 1258) into law, modifying COVID-19 worker quarantine requirements.

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OSHA Issues New COVID-19 Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

Littler, 2/9/2021

On January 29, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) released guidance for employers: *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*. This guidance contains recommendations as well as descriptions of mandatory safety and health standards. It does not create new legal obligations for employers. Instead, as OSHA states, "[t]he recommendations are advisory in nature, informational in content, and are intended to assist employers in providing a safe and healthful workplace."

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What to do about "Global COVID Nomads" and Other Wandering Workers Who Telecommute from Abroad for Personal Reasons

Littler, 2/8/2021

Technology facilitates remote work in ways that, years ago, just were not possible. Take telecommuting. These days, all kinds of jobs that had to be performed at an employer site are now performed remotely. Some call center workers, for example, now work from home using home telephones — no brick-and-mortar call center needed. Some secretaries now telecommute using laptops and the internet. Some teachers now teach remotely using laptops and video links. There are architects, doctors, lawyers and judges who, these days, use the internet and video to transmit blueprints, diagnose patients, and try lawsuits from home.

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New Wisconsin Law Provides Immunity from COVID-19 Liability, With Limited Exceptions

Littler, 3/1/2021

On February 25, 2021, Wisconsin enacted a new law designed to help reduce ambiguity regarding COVID-19-related liability. The statute (Wis. Stat. § 895.476), which became effective on February 27, 2021, gives certain entities broad immunity from civil liability related to COVID-19 unless they acted recklessly or engaged in wanton conduct or intentional misconduct. The immunity applies to lawsuits filed after February 27, 2021, asserting claims that accrued on or after March 1, 2020. The immunity is in addition to any other applicable immunities that may be provided by law.

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International

Ontario, Canada: New and Updated Guidance for Businesses Required to Have a Written COVID-19 Safety Plan

Littler, 2/9/2021

In its January 2021 newsletter, What's New, Ontario's Ministry of Labour, Training and Skills Development provides new and updated guidance for businesses that are required to have a written safety plan, including all businesses operating during a lockdown or shutdown.

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Ontario, Canada: Requirements for Mandatory Policies, Training and Postings

Littler, 2/24/2021

Employers subject to provincial legislation (i.e., not federal employers) that have employees in Ontario often ask about legislative requirements under various employment statutes, including mandatory policies, training and postings under the *Employment Standards Act, 2000*, the *Workplace Safety and Insurance Act, 1997*, the *Occupational Health and Safety Act, the Accessibility for Ontarians with Disabilities Act, 2005*, the *Pay Equity Act*, and the *Smoke-Free Ontario Act, 2017*.

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It is Now Easier for Organizations in Ontario, Canada to Offer Private Rapid COVID-19 Testing of Asymptomatic Employees

Littler, 3/25/2021

In a News Release dated March 17, 2021, Ontario announced it was removing regulatory restrictions to make it easier for organizations to conduct on-site COVID-19 testing in the workplace. Asymptomatic employees can now voluntarily self-swab for a rapid antigen point-of-care test under the supervision of a trained individual.

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COVID-19: EMEA Lockdown Restrictions

Littler, 3/3/2021

We have created a high-level guide that gives an "at a glance" snapshot of the severity of lockdown restrictions in 28 countries across Europe, the Middle East and Africa (EMEA) (now including Estonia).

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COVID-19: APAC Lockdown Restrictions

Littler, 3/3/2021

Due to the effects of the COVID-19 pandemic, governments across Asia have implemented various measures to slow the spread of the virus. Littler's APAC team is pleased to provide you with its "**APAC At a Glance: COVID-Related Restrictions**" guide, to help employers adapt their operations to the different measures (and timetables) happening in the region.
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Ontario, Canada Court Denies Employer's Request to Remove Allegedly Defamatory Social Media Posts Pending Defamation Trial

Littler, 3/1/2021

A recent Ontario Superior Court of Justice decision indicates that it is challenging for employers to obtain an interim injunction requiring an employee to remove allegedly defamatory social media posts pending resolution of an action for defamation.
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Littler, 2/22/2021

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