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Medical Marijuana Soon To Be Allowed in Ohio

By Brad E. Bennett*

Ohio recently became the 25th state to legalize medical marijuana. Effective September 8, 2016, doctors may prescribe medical marijuana to individuals diagnosed with HIV/AIDS, Alzheimer's, cancer, epilepsy, glaucoma, and other specified qualifying medical conditions or diseases.

Ohio's legalization of medical marijuana comes with restrictions. Under the law, House Bill 523, the Department of Commerce and State Board of Pharmacy will administer a medical marijuana control program. Collectively, these agencies will regulate retail dispensaries, medical marijuana growers, and doctor registration.

In addition, the law provides a number of specific protections for employers to enable them to maintain safe workplaces and enforce reasonable human resource policies, including:

- Employers do not have to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- Employers may refuse to hire or may discharge, discipline, or otherwise take an adverse action against an applicant or employee because of that person's use, possession, or distribution of medical marijuana;
- Employers may establish and enforce drug testing policies, drug-free workplace policies, or zero-tolerance drug policies;
- Employees discharged for violating formal drug-free programs or policies are considered discharged for just cause under Ohio's unemployment compensation laws (rendering those employees ineligible for unemployment compensation);
- Employee use of medical marijuana cannot interfere with any federal restrictions on employment (e.g., CDL license regulations); and
- Employers still may defend against workers' compensation claims on the basis that marijuana use contributed to or resulted in an injury.

The law prohibits applicants or employees from bringing a cause of action against an employer based on the employer's failure to hire, discharge, discipline, discrimination, retaliation, or taking an adverse action against the applicant or employee for reasons related to his or her medical marijuana use. Nonetheless, employee use of medical marijuana likely will raise questions and complicate employment decisions under state and federal disability discrimination laws. For example, an employee's use of medical marijuana may signal that the employee has a disability, which may require an employer to engage in the interactive process with the employee or to provide some form of reasonable accommodation. In addition, employees suffering or recovering from cancer (or other allowed conditions) who are disciplined for medical marijuana use still could raise a legal claim (e.g., retaliation or disability discrimination).

With the law's effective date fast approaching, employers should determine how to best manage employee medical marijuana use. Considerations will vary based on the nature of the employer and positions affected. Employers with policies referencing drug use should review and consider amending those policies to include provisions specific to Ohio's new law in order to expressly address medical marijuana use.

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Are Insurance-Style Programs the Future of Paid Family and Sick Leave?

By Drew C. Piersall*

Paid family and sick leave is a hotly contested issue, with employee rights advocates pushing for financial security for employees who need such leave and employers voicing concerns over costs and leave abuse. In April 2016, New York became the latest state to enact a law providing eligible employees with paid leave to care for family members and newborn children. The New York law is somewhat unique, as the leave payments are funded through an insurance-style system in which the funds are generated from $1 weekly deductions from employee paychecks. Ostensibly, this approach is aimed at appeasing employer qualms over the expense of having to pay their employees while on family and medical leave.

Under the New York law, employees who have been employed for more than 26 weeks are entitled to partially paid leave under certain circumstances. Such circumstances include providing care for a family member with a serious health condition as defined in the federal Family and Medical Leave Act ("FMLA"), a qualifying exigency relating to a family member's active duty in the Armed Forces as set forth in the FMLA, or time to care for and bond with a child during the first 12 months after birth, adoption, or foster care placement. Funds generated through the $1 weekly deductions from employee pay will compensate employees on leave with a percentage of their wages. The payment percentages and amount of leave entitlement are set to increase over time. When the law is fully implemented in 2021, eligible employees will receive 12 weeks of leave and receive 67% of their average weekly wage (capped at 67% of the state-wide weekly average for wages).

Ohio does not have a law providing for paid family and medical leave. In April, Democrats in the Ohio House of Representatives sponsored House Bill 511, which, if enacted, would create a state-administered, insurance-based paid family and medical leave program somewhat similar to the New York law. Under the bill, premiums would be withheld from employee wages, and eligible employees would be entitled to leave payments based upon their income level. The bill also prohibits retaliation by employers and provides employees with a private cause of action against employers.

On a local level, the Village of Newburg Heights, Ohio recently made national news when it enacted an ordinance providing employees of the Village with maternity/paternity leave. Under the ordinance, full-time Village employees can receive up to six months of maternity/paternity leave with full pay.

As public attention increases and more legislatures focus on paid family and medical leave, employers may find themselves dealing with laws, regulations, expenses, and litigation beyond those associated with the FMLA. The newer, insurance-style approach takes some of the financial burden off employers, as the benefits are funded through employee payroll deductions. However, employers still will incur costs associated with compliance and administration, leave abuse, workforce management to cover for employees on leave, and potential litigation.

New York employers should take action to comply with the new statute. Ohio employers should recognize that paid family and medical leave is on the horizon.

INSURANCE-STYLE APPROACH TAKES SOME OF THE FINANCIAL BURDEN OFF EMPLOYERS, AS THE BENEFITS ARE FUNDED THROUGH PAYROLL DEDUCTIONS

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Public Sector Alert: Sunshine Laws May Now Cover Your Email Communications

By Jonathan J. Downes* and George S. Crisci**

As Zashin & Rich first reported, the Ohio Supreme Court recently expanded the application of Ohio's Sunshine Laws by broadening its interpretation of the Open Meetings Act. In *White v. King*, the Ohio Supreme Court held that Ohio Revised Code 121.22 "prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication." 2016-Ohio-2770.

Generally, R.C. 121.22 requires that public officials take official action and conduct deliberations upon official business in meetings open to the public. The Act defines meetings to include "any prearranged discussions" by a majority of a public body's members concerning pubic business. All of a public body's meetings are considered public meetings and open to the public at all times.

However, R.C. 121.22 contains exceptions to these open meetings requirements. Public bodies may hold executive sessions for specific purposes. Those include, but are not limited to: (1) "the appointment, employment, dismissal, discipline, promotion, demotion... or the investigation of charges or complaints against a public employee;" (2) considering the purchase or sale of public property; (3) conferences with an attorney regarding pending or imminent court action; and (4) "preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees."

The dispute in *White v. King* centered on a school board's actions. After the school board changed its internal communications policy, a newspaper praised the lone board member who opposed the change. In a series of email exchanges, the other board members and school board staff drafted a response to the article. The school board president submitted the response to the newspaper with the consent of the other board members (excluding the member who the article praised), and the school board later ratified its response. The lone board member filed a lawsuit, claiming the school board's actions violated Ohio's Sunshine Laws.

The school board asserted two primary arguments in defense: (1) the law does not apply to emails because the Act does not mention electronic communications; and (2) the school board's discussions did not involve public business because only private deliberations on a pending rule or resolution can violate R.C. 121.22. The Ohio Supreme Court rejected both arguments. Construing the statute liberally, the Court determined that the difference between in-person and email communications "is a distinction without a difference." The Court emphasized that discussions of public bodies are to be conducted in a public forum. Further, the Court found that the school board's ratification of its prior action (the response) constituted "public business" under the statute. As such, the email discussion qualified as a discussion of public business by the school board and the school board violated Ohio's Sunshine Laws.

PUBLIC AGENCIES SHOULD EXAMINE THEIR COMMUNICATIONS POLICIES AND CONTACT COUNSEL WITH QUESTIONS

Given the widespread use of electronic communications among public sector legislators, this decision requires a reassessment of how legislators can and should use email or other means of electronic communications. Absent an amendment by Ohio's General Assembly, legislators should restrict significantly electronic communications. Further, all public agencies should examine their communications policies and contact counsel with questions.

***Jonathan J. Downes**, an OSBA Certified Specialist in Employment and Labor Law and a Best Lawyer in America, has over 30 years of experience advising public sector clients regarding the requirements under Ohio's Sunshine Laws. He represents cities, townships, counties, school districts, and public officials throughout the State of Ohio. If you have any questions about Ohio's Sunshine Laws or their application, please contact Jonathan (jjd@zrlaw.com), in the Columbus office, at 614.224.4441.

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What Do Background Checks Have To Do With 'Fair Credit Reporting'?!

And Other Burning Questions About the Un-employment Law That has Employers on Edge

By Helena Oroz*

The Fair Credit Reporting Act, or FCRA (15 U.S.C. § 1681 *et seq.*), is a federal law that governs the collection, assembly, and use of information about people – "consumers" in statutory talk.

FCRA is funny: it doesn't sound like an employment law, because it's not; it sounds like an arcane consumer protection law (which it is). It applies to employers, but it's not written for employers. Its name is confusing because it uses the term "credit reporting" while the law itself is all about "consumer reports," both of which feed misperceptions about what the law covers.

And those misperceptions abound:

- "FCRA is about *credit reports*. We don't care if our job applicants have bad credit. We just don't want any criminals around the office. So we're good, right?"
- "We don't really deal with 'consumer' reports. Just applicant reports. And then sometimes employee reports. So that's different."
- "Of course we disclose to applicants that we're requesting consumer reports. Just read our employment application."
- "I already know all about this FCRA stuff. Our 10-page packet includes everything we're supposed to have, plus our release of liability, permission for third parties to disclose information to us, state-specific information..."
- "Adverse action notices? *Two* of them? Is that a new thing?"
- "This guy's background check was hilarious. Public intox and indecency?! I can't believe he applied here. And that's exactly what I told him when he called asking about the status of his application."
- "My background check company handles all of my company's FCRA compliance. I can count on them."

Okay, full disclosure: these are not real quotes. But they do represent real misunderstandings and confusion about employer obligations under FCRA.

Quick and dirty: FCRA history. FCRA has been around since 1970, but its look has changed over the years. The law was originally enacted for objectively good reasons: to prevent misuse of consumer information, to improve the accuracy of consumer reports, and to promote the efficiency of the nation's banking and consumer credit systems.

In enacting FCRA, Congress found that consumer reporting agencies, or CRAs – the companies that compile the information into a "consumer report" and sell it – had "assumed a vital role in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. §1681(a)(3). As a result, CRAs have been on the government's hot seat for years, first under the enforcement authority of the Federal Trade Commission ("FTC") and since 2010 under the joint enforcement authority of the FTC and Consumer Financial Protection Bureau ("CFPB").

In 1996, things got interesting for employers that used consumer reports for employment purposes. Up to that point, employers had limited responsibilities as users of consumer reports. FCRA's 1996 amendments upped the ante, adding the employer disclosure, authorization, and pre-adverse action requirements that we all (should) know about these days.

Why employers are on their own when it comes to FCRA compliance. These days, FCRA – the actual statute – seems deceptively simple. Even using the statutorily-required notices may not be enough. Those notices still may not be *technically* compliant if, for example, they contain extraneous language, like a release of liability, or too much information.

But – says who? Explanatory regulations? Model forms? The FTC or CFPB? That would be nice, but the first two don't exist, and the second two are mute. The only existing interpretive guidance consists of stale FTC Informal Staff Opinion Letters that do not have the force of law.

The CFPB has been the primary agency responsible for interpreting FCRA for more than five years, yet it has not issued a single piece of guidance regarding employer FCRA obligations during that time. I actually tried to hit the CFPB up for some information via email, and most recently, on Twitter, to no avail. As for recent FTC activity, if this blog post is any indication, don't look to government agencies to fill the guidance vacuum anytime soon.

Instead, that vacuum is being filled, slowly but surely, with court decisions from the deluge of recent FCRA class actions

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across the country. From Whole Foods to Michaels Stores to Amazon, to recently Sprint, even the giants are getting hit for alleged FCRA violations. In Sprint's case (and many others just like it), a job applicant claims the company's "Authorization for Background Investigation" violates FCRA because "it contains extraneous information," including third party authorizations, state specific information, and other statements. *Rodriguez v. Sprint/United Mgmt. Co.*, N.D. Illinois No. 1:15-cv-10641. The plaintiff claims that FCRA's "unambiguous language" and that old FTC guidance provide support for his claims.

Even if that's true, think about this: if the CFPB simply issued a model Disclosure and Authorization Form, use of which would constitute compliance with FCRA, this entire conversation would be moot.

Quick and dirty: FCRA requirements. In the meantime, we have to work with what we have. Knowing even a little about FCRA may help clients or others who don't. (P.S.: Some special rules, not discussed here, apply to the transportation industry).

1. **If an employer uses a third party to obtain virtually any kind of background information, FCRA applies.** If an employer requests any information about an applicant (or current employee) from a third party in order to make an employment decision, the employer has requested a "consumer report" and must comply with FCRA's disclosure, authorization, and adverse action notice requirements. If an employer uses its own employees to vet its applicants, for example, FCRA would not apply.

2. **For all intents and purposes, "background check" means the same thing as "consumer report."** Common "consumer reports" that employers use to vet applicants include criminal history reports, education records, employment history, and credit history.

3. **An employer must provide a disclosure and obtain authorization before requesting a background check.** Before requesting a consumer report, an employer always must do two things: (a) make a clear, conspicuous written disclosure to each applicant/employee that a consumer report may be obtained about them for employment purposes; and (b) obtain each applicant's/employee's written authorization to obtain a consumer report.

4. **The disclosure and authorization must be FCRA-compliant.** Both items may be combined into one document, but the document cannot contain any other information. Currently, this is an area of great controversy. FCRA says only that the disclosure must be made "in a document that consists solely of the disclosure," although the authorization may appear on the same document. 15 U.S.C. §1681b(b)(2)(A). According to that old FTC guidance, this means that a disclosure and authorization may include only minor additional items and cannot be part of an employment application.

5. **Employers taking "adverse action" against an applicant/employee based on information in a consumer report must follow a two-step process.** This process is intended to give the person an opportunity to review the information and dispute it with the CRA reporting it if the information is incorrect (which can and does happen). "Adverse action" means any decision that adversely affects a current or prospective employee, including not hiring or firing someone, but also disciplinary action, denial of a promotion, or the like.

   First, before taking adverse action, the employer must provide the applicant/employee with a copy of the report at issue and a summary of their FCRA rights (available on the CFPB website). Most employers provide this "pre-adverse action notice" in the form of a letter (not technically required by statute, but makes sense) that includes these required enclosures.

   Second, after taking adverse action, the employer must provide the applicant/employee with notice of the adverse action that also includes: contact information for the CRA that provided the report; a statement that the CRA did not make the decision to take the adverse action; notice of the applicant's/employee's right to obtain a free copy of the consumer report from the CRA within 60 days; and notice of the applicant's/employee's right to dispute the accuracy or completeness of any information in the report. Again, most employers provide this "post-adverse action notice" in the form of a letter.

FCRA is silent on how much time should elapse between these two steps, but that old FTC guidance says five business days might be reasonable, depending on the circumstances.

Employers can take a number of steps in the right direction toward FCRA compliance, even in this murky landscape:

- Employers who use third parties for background checks should ensure that they are using FCRA-compliant disclosures and authorizations and completing the two-step adverse action process.

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- Employers who think they are already FCRA-compliant should review their disclosures, authorizations, and adverse action notices. Including extra information in a disclosure, particularly release language, could jeopardize their compliance efforts. Additionally, employers who use "investigative reports" (reports based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle) have additional obligations under FCRA.
- Employers who operate in more than one state should be aware that a number of states have "mini-FCRAs" with separate disclosure, authorization, and/or adverse action requirements.
- Finally, employers should not rely exclusively on background check providers for FCRA compliance. They may offer 100% compliance, but the employer retains ultimate responsibility for FCRA violations. Chances are the provider's service contract specifically denies any liability for such violations. Employers should ask questions and ensure they understand what is being done on their behalf.

So what does FCRA have to do with employer background checks? Everything!

***Helena Oroz**, an OSBA Certified Specialist in Employment and Labor Law, practices in all areas of employment law, including FCRA and state fair credit reporting and background check law compliance. If you have any questions about the FCRA, please contact Helena (hot@zrlaw.com) at 216.696.4441. This article originally was published in the Cleveland Metropolitan Bar Journal.

Z&R SHORTS

Please join Z&R in welcoming Brad Meyer to its Employment and Labor Groups.

Brad S. Meyer's practice focuses on all areas of private and public sector labor and employment law and litigation. Brad has worked with public and private employers on issues of contract interpretation, collective bargaining and discipline issues. Prior to joining Zashin & Rich, Brad represented the State of Ohio and Cuyahoga County for over ten years at both the trial and appellate court level. He also was involved in community outreach efforts throughout Cuyahoga County. As a law student at The Penn State – Dickinson School of Law, Brad focused his studies on labor and employment law. He led the school's Wagner National Labor and Employment Moot Court team to competition in New York City.

Upcoming Speaking Engagements

Monday, August 15, 2016

George S. Crisci presents "Conducting an Effective Internal Investigation" and "National Labor Relations Board Decisions Affecting Unionized and Non-Unionized Workplaces" at the National Business Institute's Seminar on Advanced Employment Law at the Hilton Akron Fairlawn in Akron, Ohio.

Thursday, September 22, 2016

Stephen S. Zashin presents "Best Hiring Practices" at the 2016 Summit on Making Ohio Communities Safer to be held at the Word Church in Warrensville Heights, Ohio.

Monday, November 7, 2016

George S. Crisci presents "Other Employment Laws You Need to Know" and "The National Labor Relations Board – Obligations and Compliance" at the National Business Institute's Seminar on Human Resources from Start to Finish in Cleveland, Ohio.