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Opioid Crisis: Drug Addiction and a Tight Labor Market

By Ami J. Patel*

Following years of consecutive job growth, the unemployment rate dropped to 3.7% in September. Despite the decreasing unemployment rate, labor market participation remains low. Men ages 25 to 54 currently have an 88.4% labor participation rate. According to a recent report, of those males not participating, one in five is out of the workforce because of drug addiction. Drug abuse coupled with the current economy has made the tight labor market even tighter. According to the Ohio Chamber of Commerce, one-half of Ohio businesses report suffering consequences from substance abuse.

Ohio ranks among the hardest hit states in the ongoing battle against opiate addiction. The increased use of opiates and other more-accepted drugs like marijuana combined with a tight labor market has left many employers reevaluating their hiring and drug procedures.

Ohio is taking direct action to help employers struggling with drug-use issues. Ohio's Chamber of Commerce created an Opiate Toolkit (available here) to help employers to manage risk, prevent drug abuse, and respond to issues affecting the workplace. The toolkit contains several modules to educate employers about workplace drug policy, employee drug testing, and responding to employee drug use. The toolkit also contains an hour-long employee education course designed to help foster understanding of prescription drug abuse.

Employers understandably wish to avoid or reduce the impacts of drug abuse on their workplaces. Drug abuse affects employers by causing increased liability, productivity problems, and financial loss. In seeking to protect their interests, however, employers must ensure that their policies and practices do not conflict with the Americans with Disabilities Act ("ADA") or related state laws.

The ADA protects qualified individuals with disabilities. The ADA's definition of "qualified individual with a disability" specifically excludes employees and applicants who are currently engaging in the illegal use of drugs. However, the ADA does not exclude from its protection: (a) successfully rehabilitated individuals who no longer engage in the illegal use of drugs; (b) those who are currently participating in a rehabilitation program and no longer engage in the illegal use of drugs; and (c) those who are regarded by an employer, erroneously, as illegal drug users. Accordingly, employers who discriminate against these groups of individuals may face liability under the ADA and similar state laws.

For example, the Equal Employment Opportunity Commission ("EEOC") recently filed suit against an employer that fired a recovering opioid addict who was on a methadone treatment program. According to the EEOC, on the employee's first day of work, he took a drug test and proceeded to work the rest of the week. The next week, he learned that his test came back "positive" as a result of his prescribed methadone treatment. After the employee provided the testing laboratory with verifying information regarding his treatment, the laboratory cleared him to work. Nonetheless, the employer refused to return the

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ICE Raids: Cold Shouldering Employees, Employers, and Local Law Enforcement

By Lauren M. Drabic*

The Trump administration has taken a hard stance against undocumented workers. The impact of this stance is far-reaching, especially in Ohio, which recently was called the "Ground Zero" for Immigration and Customs Enforcement ("ICE") workplace raids. Two of the country's largest raids occurred in Ohio over the summer and resulted in over 250 arrests.

The administration's efforts regarding undocumented and foreign labor are two-pronged – arresting and deporting undocumented workers and prosecuting violating employers. Regarding the latter, the Department of Justice ("DOJ") recently settled claims with a landscaping company for its alleged discriminatory practices in hiring foreign workers under the H-2B visa program. The DOJ claimed that the company favored foreign labor and improperly failed to make its job postings visible to those applying in the U.S. Under the settlement agreement, the company is required to pay over $100,000 in back pay and penalties, must engage in recruitment activities to attract U.S. workers, and is subject to three years of DOJ monitoring.

Employee Work Authorization

Most employers know they cannot hire workers without proper work authorization. Employers are responsible for ensuring completion of Form I-9, the Employment Eligibility Verification form used by U.S. Citizenship and Immigration Services ("USCIS"). This is true even with respect to employees who are citizens and, therefore, are automatically eligible for employment. Employers must retain each employee's completed I-9 for three years after the date of hire or for one year after termination of employment, whichever occurs later. Employers should correct mistakes on an I-9 form to ensure they are compliant. However, employers may only edit sections two and three of the I-9 form. Only the employee may correct mistakes made in section one.

While citizenship is not a requirement for employment, employees must have the necessary work authorization. USCIS requires that the worker be a member of one of four classes: U.S. citizens; noncitizen nationals; lawful permanent residents; and aliens authorized to work. An alien is any foreign citizen living in the U.S. An employer also can petition for a nonimmigrant worker to receive work authorization on a temporary basis by completing an I-129 form. Upon approval of the I-129 form, the worker must apply for admission to the U.S.

TWO OF THE COUNTRY'S LARGEST RAIDS OCCURRED IN OHIO OVER THE SUMMER AND RESULTED IN OVER 250 ARRESTS

Employers must ensure they are hiring foreign workers properly without discriminating based on protected class, such as citizenship, immigration status, or national origin. Treating individuals differently based on their membership in a protected class could violate the Immigration and Nationality Act or Title VII of the Civil Rights Act, among other laws. Similarly, according to USCIS, it may be discriminatory for employers to consider future expiration dates on visas and employment authorization documents.

An employer unable to fill open positions may seek a Foreign Labor Certification from the Department of Labor. The process can take months and involves several government agencies. Several different visas and programs exist to fill persistent employment vacancies. However, the employer must verify that the open position meets the criteria set by the Department of Labor.

Criminal and Civil Penalties

Under the Immigration and Nationality Act, it is illegal for any person or entity to knowingly hire an undocumented or illegal alien. "Knowing" includes constructive knowledge, i.e., knowledge which may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know that an alien is unauthorized. Simply not checking for authorization is not a valid means to avoid this requirement. Anyone who employs or contracts with an illegal alien without verifying his or her work authorization commits a misdemeanor offense.

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ICE is authorized to conduct investigations to determine whether employers knowingly employed unauthorized aliens or failed to properly complete and retain I-9 forms for newly-hired individuals. The Director of ICE has noted plans to dramatically increase the number of I-9 audits and workplace raids ICE conducts.

Employers who violate these laws can face substantial fines and criminal prosecution. Those who knowingly hire and employ workers without work authorization may be penalized from $375 to $16,000 per violation, whereas substantive and technical violations, such as failing to produce the I-9 form, can range from $110 to $1,100 per violation.

While ICE and Customs and Border Patrol cannot commandeer local law enforcement, many local agencies opt to work with the federal agencies by sharing information, conducting joint investigations, and contracting to detain arrested aliens. Immigration officers and police must have a valid warrant or an employer's consent to enter their facilities.

Employers must take care not only to follow the various federal and state laws as they pertain to hiring foreign labor, but also must not discriminate against U.S. citizens when seeking out foreign labor. Likewise, employers must not discriminate based upon an employee's protected class, including citizenship, immigration status, or national origin. Employers should contact counsel if they have any questions or are unsure how to navigate the complex legal landscape relating to foreign workers.

***Lauren Drabic** recently joined Z&R's Cleveland office and practices in all areas of employment law. If you have questions regarding I-9 form compliance or any other employment-related matter, please contact Lauren at lmd@zrlaw.com or 216.696.4441.

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employee to his position, even after he provided a letter from his doctor regarding his treatment. Based upon the employer's refusal, the EEOC is seeking a permanent injunction barring the employer from engaging in any future disability discrimination and compensatory and punitive damages on behalf of the employee.

In the midst of the opioid crisis, employers continue to face the practical and legal impacts of drug addiction. In addition to its effect on the labor market, this crisis also has important legal implications on employers' management of their workforces, including employees and applicants who are in recovery from opioid addiction. Employers should proceed cautiously in addressing these complicated issues and contact counsel with questions.

***Ami J. Patel**, an OSBA Certified Specialist in Labor and Employment Law, practices in all areas of labor and employment law. For more information about workplace issues relating to opioids, the ADA, or any other employment-law questions, please contact Ami at ajp@zrlaw.com or 216.696.4441.

CONGRATULATIONS

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By the Book: Ohio Courts Look to Employee Handbooks to Determine Terminated Employees' Entitlement to Payment for Unused PTO

By Christopher D. Caspary*

Does an employer have to pay an employee's accrued paid time off when it discharges the employee? As one Ohio court recently explained, it depends on the terms of the employer's policies. *See Richardson v. MYCAP,* 7th Dist. Mahoning No. 17 MA 0021, 2018-Ohio-2776. In *MYCAP,* the court granted summary judgment in favor of a group of laid-off employees, awarding them payment for accrued paid time off ("PTO"). This is the latest decision in a string of Ohio cases that look to the terms of employer policies when determining an employee's entitlement to a payout of accrued PTO at the time of the employee's discharge.

The *MYCAP* Decision

In *MCYAP*, the employer provided its employees with handbooks informing them of its employment practices and policies. The handbook stated "at the end of employment with MYCAP, unused PTO balance hours will be paid" in accordance with a payment schedule set forth in the handbook. After the employer laid off a number of employees, it did not pay them their accrued, unused PTO in accordance with the terms of the handbook. The employees then filed suit seeking payment of their PTO.

Finding in favor of the employees, the *MYCAP* Court citied to existing Ohio case law, which states "[a]lthough employee handbooks and policy manuals are not in and of themselves contracts of employment, they may define the terms and conditions of an at-will employment relationship if the employer and employee manifest an intention to be bound by them." Accordingly, the *MYCAP* Court held that the employees were entitled to the PTO payments under the plain language of the handbook and that it would be unjust for the employer to retain those payments.

What Does This Mean For Employers?

Ohio courts' continuing deference to the terms of employee handbooks and employer policies is favorable for employers with carefully drafted policies. Effectively written handbooks and policies protect employers from liability. For example, one Ohio court found that the following policy language – "All unused [PTO] will be forfeited upon an employee's resignation or termination" – was clear and unambiguous and did not require the employer to pay out the employee's PTO. *See Majecic v. Universal Dev. Mgt. Corp.*, 11th Dist. Trumbull No. 2010-T-0119, 2011-Ohio-3752, ¶ 10. Likewise, another Ohio court determined that the plaintiffs were not entitled to PTO, because the employer's policy clearly precluded its employees from collecting any payment for PTO upon discharge. *See Sexton v. Oak Ridge Treatment Ctr. Acquisition Corp.*, 167 Ohio App. 3d 593, 856 N.E.2d 280, 2006-Ohio-3852, ¶ 13 (4th Dist.).

Accordingly, employers should address the payment of PTO upon discharge directly in their employee handbooks and policy manuals. The following is a list of tips for employers to consider when drafting or revising employee handbooks and policies addressing PTO:

1. Do Not Remain Silent

It is better for an employer to have a written PTO policy than to remain silent. As some Ohio courts have held, an employee may be entitled to unused PTO if the employer's policies do not state otherwise. The rationale behind this is that such payments are not merely gratuitous but are deferred payments of earned benefits. Therefore, it is better to have a defined policy than nothing addressing this topic.

2. Say What You Mean

In *MYCAP* and other recent Ohio cases, the courts adhered to the language set forth in the applicable handbooks and policies. Ohio employers are not required by law to provide their employees with PTO. However, if an employer decides to provide this benefit and wishes to restrict it in any way, then the employer should do so explicitly and clearly in its written policies.

3. Follow the Policy

The employer should abide by its policies. Failure to do so may suggest that the employer's actual practice is different than what it has set forth in writing, or that it may be treating some employees more favorably than others.

Employee handbooks and employer policies are important tools for employers, and the terms set forth therein have legal implications. Employers should consult with counsel to assess whether their handbooks and policies clearly state their intentions and to ensure they are taking the proper steps to abide by them.

***Christopher Caspary** works in Z&R's Cleveland office and practices in all areas of employment law. For more information about developing employee handbooks and policies or any other employment-related matter, please contact Chris at cdc@zrlaw.com or 216.696.4441.

Rolled up and Rolled Out: An Update on Ohio's Medical Marijuana Law

By Patrick M. Watts*

Although marijuana remains a Schedule I controlled substance under federal law, numerous states have legalized the use of marijuana for medical and, in eight states and the District of Columbia, recreational purposes. As Z&R previously reported, Ohio (puff, puff) passed its medical marijuana law in 2016 and set the basic framework for Ohio's Medical Marijuana Control Program ("MMCP"). Following delays in the MMCP's implementation process, approved cultivators have now begun growing their first crop of state-sanctioned marijuana. Based upon growing and production timeframes, estimates suggest that patients may purchase medical marijuana in Ohio as early as the end of this year.

As the smoke clears, many Ohio employers are rightfully concerned and confused about the MMCP and its potential implications for their businesses and workforces. In an apparent attempt to put employers at ease, Ohio's General Assembly included a number of pro-employer provisions in the MMCP. Specifically, the MMCP (which is codified at Ohio Revised Code Chapter 3796) provides that:

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana;
- Employers are not prohibited from refusing to hire, discharging, disciplining, etc., a person because of that person's use, possession, or distribution of medical marijuana;
- Employers are not prohibited from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy;
- The MMCP does not interfere with any federal restrictions on employment, e.g., Department of Transportation regulations; and
- The MMCP does not permit a person to pursue a lawsuit against an employer "for refusing to hire, discharging, disciplining, discriminating, retaliating, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment related to medical marijuana."

See Ohio Revised Code 3796.28(a)(1)-(5). Furthermore, Ohio's unemployment compensation law considers a person discharged for using marijuana "in violation of an employer's drug-free workplace policy, zero-tolerance policy, or other formal program or policy regulating the use of medical marijuana" as discharged for "just cause." *See* Ohio Revised Code 3796.28(b).

Nevertheless, even with these pro-employer provisions, Ohio employers still may face the prospect of litigation arising out of employees' use of medical marijuana. For example, it is possible that employees may attempt to bring a disability discrimination claim under Ohio's anti-discrimination law (Ohio Revised Code Chapter 4112), which the MMCP does not expressly reference, claiming that their rights under Ohio's anti-discrimination law are unaffected by, and independent of, the MMCP's pro-employer provisions.

Given the nascency of the MMCP, there currently are no court decisions addressing Ohio's medical marijuana law in the employment context. However, courts in other states have addressed employees' marijuana-related claims. It is important to note that medical marijuana laws vary by state and, depending on the state, may provide greater protection to employees than Ohio's law. Still, these cases provide some insight as to how courts are addressing the issue of medical marijuana in the employment context. For example, as Z&R reported last year, the Massachusetts Supreme Judicial Court reversed the dismissal of an employee's claim and held the employee could pursue a disability discrimination claim under Massachusetts law after her employer discharged her for testing positive for medical marijuana. *See Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37 (Mass. Jul. 17, 2017).

Similarly, in September, a Federal court in Connecticut addressed a case where a nursing home rescinded a job offer to an applicant who tested positive for marijuana during a pre-employment drug screen. *See Noffsinger v. SSC Niantic Operating Co., LLC, d/b/a Bride Brook Health & Rehab. Ctr.*, No. 3:16-cv-01938, 2018 U.S. Dist. LEXIS 150453 (D. Conn. Sept. 5, 2018). The applicant accepted an offer for a position, which was conditioned upon her completion of a drug screen. Prior to the drug screening, the applicant explained that she used medical marijuana to treat her post-traumatic stress disorder. Upon obtaining the drug screen results, the nursing home decided not to hire the applicant. The applicant filed a complaint, alleging a violation of Connecticut's medical marijuana law,

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which provides, "[n]o employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient." In addressing the applicant's claims, the court held she was entitled to judgment, as a matter of law, on her claim of employment discrimination under the state medical marijuana law. Notably, the court rejected the employer's arguments that it was required by federal laws (i.e., the Drug Free Workplace Act and the False Claims Act) to rescind the applicant's job offer.

In sum, the legal landscape regarding medical marijuana in the employment context is evolving. Ohio's medical marijuana law provides a number of important protections for employers regarding employment-related actions based on employees' use, possession, or distribution of medical marijuana. With medical marijuana available in potentially as little as a couple of months, employers need to get prepared. This includes establishing policies that expressly address the employer's stance on medical marijuana and determining how the employer intends to handle medical marijuana use in all aspects of its business, including hiring, drug testing, and discharge. Employers should contact counsel with any questions relating to the MMCP or its impact on their practices and workforces.

*__Patrick M. Watts__, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience advising employers regarding medical marijuana and related issues. For more information about Ohio's medical marijuana law or any other employment-related matters, please contact Patrick at pmw@zrlaw.com or 216.696.4441.

Z&R SHORTS

Please join Z&R in welcoming Lauren Drabic to its Employment and Labor Groups

Lauren Drabic's practice encompasses all areas of labor and employment law. Prior to joining Zashin & Rich, Lauren practiced employment law in Washington, D.C., where she litigated cases in federal court and before administrative agencies that arose under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Whistleblower Protection Act, and other federal employment statutes. Lauren graduated from Allegheny College and received her law degree cum laude from the American University Washington College of Law. While at American, she served on the senior editorial board of the American University Law Review.

Upcoming Speaking Engagements

November 14, 2018

Brad E. Bennett presents *"Epic Fails! Top Supervisor Errors in the Workplace"* at the Ohio Recorders' Association Winter Conference to be held at the Polaris Hilton in Columbus, Ohio.

December 4, 2018

George S. Crisci presents *"Murphy Oil/Epic Systems"* at the Ohio State Bar Association's Back to the Future? NLRB Update seminar in Columbus, Ohio.

December 10, 2018

George S. Crisci presents *"NLRB Rules and Decisions"* at the National Business Institute's Ohio Employment Law seminar in Independence, Ohio.