WARD AND SMITH, P.A.
ATTORNEYS AT LAW

Attorneys Provide Updates on Rapidly Changing Aspects of Employment Law

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Several Ward and Smith attorneys provided updates on some of the fastest-changing areas of employment law during the firm's 2019 Employment Law Symposium.

In a rapid-fire session, they covered several topics, including:

- Restrictive covenants on employees
- Pregnancy accommodations and discrimination
- Employee use of company technology
- Drug testing in an era of widespread legal hemp and CBD oil use
- "No match" letters from the Social Security Administration

Restrictive Covenants

Jeremy R. "Jerry" Sayre, an employment law counselor and litigator who advises employers, told participants that the law involving restrictive employment covenants, such as non-compete agreements, is always evolving.

Sayre said that there have been 16 reported decisions from courts in North Carolina since 2018 — about once a month. Each decision adds nuances to the law on how employers can or cannot restrict former employees.

Companies considering restrictive covenants, he said, should consider three questions:

1. What do they really need to protect?
2. What consideration is required to support the agreement?
3. Would a "Cost Share" be a better option?

Sayre suggested participants focus on what stresses them most about their business. Sayre advised that they narrowly design their covenants to protect against that first, then honestly consider whether further protection is needed. Sayre cautioned that the law does not allow a business to prohibit all competition—only unfair competition.

“You can't limit competition just for the sake of limiting competition; you need to show some legitimate business interest that requires protection,” he said.

Overly broad covenants, he said, are more likely to be struck down so that the entire agreement is unenforceable.

Restrictive covenants also require the employer to furnish consideration to the employee. The simplest way is to make the covenant a condition of initial employment, but Sayre cautioned that such a condition should be mentioned in the offer letter. Implementing an agreement with current employees requires additional consideration beyond an agreement to continue employment. Under North Carolina law, he said, as little as $100 can satisfy the requirement. Sayre advised: "The bottom line is this is an easy requirement to satisfy, but the consequences of failing to do so are significant."

He also noted that an arrangement called a "Cost Share" might be a better option for some businesses. Under this scenario, an employee is permitted to compete against a former employer but has to pay for the right to do so. Sayre warned that this arrangement is different than a traditional non-compete with a buyout—under a "Cost Share" model there is no restriction on competition.

“You have to be willing to accept competition,” Sayre said. “If you’re willing to accept that, then just getting compensation in exchange for it may be a whole lot better.”

Pregnancy Implications

Labor and employment attorney Emily G. Massey — herself pregnant — joined the symposium via video to give an update on pregnancy-related accommodations and discrimination.

Although pregnancy isn’t a disability, she said, pregnancy can lead to disabilities. Employers are required to accommodate those disabilities in the same way they would any other worker disability.

“Pregnancy accommodations must be provided in the same manner as disability accommodations,” she said. “An employer must engage in an interactive process to determine whether it can or cannot accommodate a pregnancy-related condition.”

The same principle of equality goes for pregnancy-related discrimination.

Massey cited a class action suit filed earlier this year against a large investment bank.

“The primary plaintiff claimed that even though she was the top performer in her division, as soon as she revealed she was pregnant, several accounts were taken away and given to a younger childless employee and upon returning to work she was no longer invited to client meetings,” she said.

As shown in this example, Massey cautioned that employer actions outside of hiring or firing decisions can still constitute discrimination if they are based on the employee’s pregnancy or pregnancy-related conditions.

Company-owned Electronics

Grant B. Osborne, a Ward and Smith labor and employment lawyer, discussed the legal and business challenges that come along with information technology.

“If you have employees that use IT, then you encounter these risks,” he said. All sort of devices — from flash

drives to laptops and smartphones to GPS units — can create potential problems, Osborne said.

Company-owned technology provides workers “a portal into information that’s highly confidential, highly valuable and can be abused, corrupted, stolen, etc.,” he said. “You’ve got to think about the risks.”

Policies, Osborne said, are essential. “You’re going to have conflict with people, possibly expensive conflict, if you don’t tell them what your expectations are,” he said.

Sometimes it’s appropriate to have employees sign written acknowledgments — which aren’t contracts — saying they understand the policies.

The policies should make it clear that the technology belongs to the company, what purposes it can be used for, and what practices employees should follow. This might include, Osborne said, rules on whether public or nontrusted Wi-Fi networks can be used for certain critical tasks or whether users are allowed to download and install software.

They should also lay out what happens to the technology when an employee leaves, whether workers have any expectations of privacy on company devices (usually not). Osborne also cautioned companies to be careful not to run afoul of labor laws that protect employees’ freedom to communicate about their workplace.

Marijuana Testing and Hemp/CBD Products

Allen N. Trask, III talked about some of the issues raised by the rapidly expanding hemp and CBD (cannabidiol) oil. Those industries, and demand for their products, are growing rapidly.

However, companies that drug test for THC, the psychoactive compound in illegal marijuana, may find themselves dealing with tricky issues, Trask said.

It is possible that consumption of full-spectrum CBD oil, in particular, may lead to trace amounts of THC in someone’s blood or urine, even if that person has never used marijuana.

“It’s a negligible amount,” he said, but then noted that there are sources that report that THC is metabolized very slowly and can linger for a long time. “If someone is taking full-spectrum CBD every day, which a lot of people do ... it is entirely possible that they can stack up a level of THC in their body that can render a positive result for a drug test."

In North Carolina, an employer generally cannot refuse to hire an applicant or discipline an employee for engaging in the lawful use of lawful products while on the employee's own time unless the employer adopts specific policies to that effect which are compliant with the relevant statutes.

“The problem is real,” he said. “We are already seeing people failing drug tests because they are using CBD.”

S. McKinley “Ken” Gray, III noted a case he’d been involved with where a truck driver with a commercial driver’s license failed a drug test because he had been using — with a doctor’s prescription — CBD oil.

The company didn’t intend to punish him, but the CDL is governed by the U.S. Department of Transportation, whose regulations say someone who tests positive must go to a rehab program. The employee tried to get into two rehab programs, but they rejected him because he didn’t have a drug problem.

A subsequent appeal to the North Carolina Division of Motor Vehicles failed, and the company ended up terminating the driver’s employment.

“No-match” letters

The Social Security Administration announced this year it would begin again to issue no-match notifications to employers when an employee’s Social Security number doesn’t match what’s in the SSA’s administration.

One participant at the symposium asked how to handle such letters without inadvertently discriminating against an employee.

Gray said the typical approach to handling this is to notify the employee of the no-match letter and then ask for new documentation.

“You put the onus on the employee to get the situation corrected,” he said. “You need to give them plenty of time to do so.”

As the employee, hopefully, works on collecting appropriate documentation, Gray said, employers should stay in touch with them to ensure they’re making progress.

“If we go through this process and we keep advising the employee that their documentation is not turning out to be accurate, then you can get to the point where you can terminate,” he said.

This is one is a series of articles summarizing insights from Ward and Smith's Employment Law Symposium. See additional articles:

- Live Action Role Playing — A Day in the Life of HR
- NC Attorney General Talks Opioid Epidemic at Employment Law Symposium
- EEOC Representative Provides Perspective on Sexual Harassment and Discrimination

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