Five Topics Your Colorado Employee Handbook Should Address

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Counsel and their human resource colleagues should be aware of Colorado and federal changes in employment laws that should be incorporated into their employee handbooks. Specifically, Senate Bill 19-188, the FAMLI Leave Act, is currently pending[1] in the Colorado legislature. This bill, if enacted into law, would provide for up to 12 weeks of paid family medical leave for employees; Colo. Rev. Stat. § 8-2-109, provides current and former employees access to their personnel files; Colo. Rev. Stat. § 8-2-126 limits employers' use of consumer credit information; Colo. Rev. Stat. § 8-2-127 prohibits employers from accessing employees' personal electronic communication devices; and the U.S. Supreme Court decision in *Epic Systems Corp. v. Lewis* upheld the enforceability of arbitration agreements in actions brought under the National Labor Relations Act (NLRA), and as a result employers should consider referencing an arbitration agreement in their employee handbooks. Below, we summarize each of these topics.

Likely Passage of SB 19-188, Enacting Paid Family Medical Leave.

Senate Bill 19-188 would create the family and medical leave insurance (FAMLI) program. It would create a division of family and medical leave insurance in the Colorado Department of Labor and Employment to provide partial wage replacement benefits to an eligible individual who takes leave from work. Covered employers include all employers that did business in Colorado for at least 20 calendar weeks or had a Colorado payroll of $500 or more in any calendar quarter of the prior year.

To be eligible:

- an employee must work 680 hours per year (580 hours for flight crews); and
- the hours worked could be with just one employer or multiple employers.

Leave under FAMLI can be used for the following:

- to care for a new child or family member with a serious health condition;
- if the eligible individual is unable to work due to the individual's own serious health condition or because the individual or a family member is the victim of domestic violence, sexual assault or stalking;
- due to certain needs arising from a family member's active duty service;

[1] It is anticipated that SB 19-188 will pass and Gov. Jared Polis will sign it into law. Currently, this bill is still subject to amendment; thus, specific provisions in this article concerning the bill are subject to change.

- an additional four weeks would be available for complications related to pregnancy and childbirth; and

- eligible employees with multiple qualifying reasons in a 52-week period could take an additional two weeks of leave for a total of 14 weeks.

Employees would receive the following paid benefits:

- Up to 12 weeks of paid leave per year (capped at $1,000 per week); and

- Continued employer-sponsored health insurance benefits.

Employers would be required to:

- collect premiums through payroll deductions (capped at $425.28 per annum) to be submitted to the newly created division of family and medical leave insurance (similar to workers' compensation); and

- post notices and inform employees about the new paid leave benefits.

Significantly, the FAMLI Act differs from the Family and Medical Leave Act (FMLA) with respect to eligibility and what constitutes a covered employer. Under the FMLA an employee must work 1,250 hours in a 12-month period to be eligible, whereas under FAMLI, an employee only has to work 680 hours (580 hours for flight crews). The FMLA only applies to employers with 50 or more employees, but FAMLI applies to basically all Colorado employers that have conducted business in Colorado during the preceding year. In addition, unlike the FMLA, FAMLI applies to same-sex spouses. Under the current version of the bill, employers can designate FAMLI concurrently with FMLA leave. However, employers must remember that even if an employee exhausts their FMLA and/or FAMLI leave, they may still be eligible for additional leave under the Americans with Disabilities Act. Eligible employees can maintain a private cause of action (including attorneys' fees and costs) against their employers for interference and/or retaliation for utilizing FAMLI leave.

FAMLI is funded by payroll deductions, where each employee and employer in the state will pay one-half the cost of a premium. Premiums are based on a percentage (currently 0.64%) of the employee's yearly wages. The premiums will be deposited into the family medical leave insurance fund, and the family medical leave benefits will be paid to eligible individuals.

Since the proposed division of family and medical leave insurance would be established as an enterprise, the premiums paid into the fund are not considered state revenues for purposes of the Tax Payers Bill of Rights (TABOR). If the bill passes, premium payments would begin in 2021 and benefits would be paid out commencing in 2022.

Current and Former Employees Can Access and Obtain Copies of Their Personnel Files.

Colorado employers are required to allow current and former employees to access and obtain a copy of their personnel file. *See* Colo. Rev. Stat. § 8-2-129. This statute allows

employees on an annual basis (or former employees one time after their termination) to inspect and obtain a copy of any item contained in their personnel file at a date and time that is convenient for both the employee and employer. Although the statute permits an employer to collect a "reasonable fee" for making copies of any documents in the employee's file, from an employee relations standpoint, employers should consider whether it is a good business practice to charge current and even former employees for a copy of their personnel file. A plaintiff's employment lawyer would likely exploit the "reasonable fee" issue during trial—"*the employer is so vindictive that it charged the sexually harassed employee for a copy of their file*."

Importantly, personnel files do not include:

- documents or records required to be placed or maintained in a separate file from the regular personnel file by federal or state law or rule;

- documents or records pertaining to confidential reports from previous employers of the employee; or an active criminal investigation, an active disciplinary investigation by an employer, or an active investigation by a regulatory agency; or

- any information in a document or record that identifies any person who made a confidential accusation, as determined by the employer, against the employee who has requested access to their personnel file.

This Act does not:

- create a private cause of action for alleged violations;

- require an employer to create, maintain or retain a personnel file on an employee or former employee; or

- require an employer to retain any documents that are or were contained in an employee's personnel file for any specified period of time.

This Act does not apply to banks, trust companies, savings and loans companies or credit unions.

Employer Use of Consumer Credit Information.

This Act limits how an employer can use consumer credit information for employment purposes. *See* Colo. Rev. Stat. § 8-2-126. Employers can only use consumer credit information if it is substantially related to an employee's current or potential job. The employer or employer's agent cannot require an employee to consent to a request for a credit report that contains information about the employee's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers as a condition of employment unless:

- the employer is a bank or financial institution;

- the report is required by law; or

- the report is substantially related to the employee's current or potential job and is disclosed in writing to the employee.

If the consumer credit information is substantially related to the employee's current or potential job, an employer may ask the employee to explain any unusual or mitigating circumstances where the consumer credit information may not reflect money management skills but is attributable to some other factor.

Employers are Prohibited from Requiring Access to an Employee's Personal Electronic Communication Device.

Colorado employers may not require an employee or applicant to disclose any user name, password or other means for accessing the employee's or applicant's personal account or service through the employee's or applicant's personal electronic communications device. *See* Colo. Rev. Stat. § 8-2-127. Nor may the employer compel an employee or applicant to add anyone, including the employer or its agent, to the employee's or applicant's list of contacts associated with a social media account or require, request, suggest or cause an employee or applicant to change privacy settings associated with a social networking account. An employer cannot discharge, discipline or threaten to discharge, discipline or penalize an employee or refuse to hire an applicant for an employee's or applicant's refusal to disclose their personal social media information.

However, an employer is not prohibited from conducting an investigation to ensure compliance with applicable securities or financial law or regulatory requirements based on the receipt of information about the use of a personal website, internet website, web-based account or similar account by an employee for business purposes. Moreover, employers are not prohibited from investigating an employee's electronic communications based on the receipt of unauthorized downloading of an employer's proprietary information or financial data to a personal website, internet website, web-based account or similar account by an employee. Employees cannot maintain a private cause of action against employers for violations of this statute.

U.S. Supreme Court Holds that Arbitration Agreements Trump the Concerted Activity Provision of the NLRA.

In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), the Supreme Court held that the concerted activity provision of the NLRA, which guarantees workers the right to engage in concerted activities for the purposes of collectively bargaining or other mutual aid or protection, does not reflect a clearly expressed and manifest congressional intention to displace the Federal Arbitration Act (FAA) and to outlaw class and collective action waivers. The Court went on to hold that the NLRA does not express approval or disapproval of arbitration.

As a result, employers should consider referencing arbitration in their employee handbooks, but the arbitration agreement should be separate from the employee handbook. In addition, employers should ensure that the disclaimer in their employee handbook does not vitiate the enforceability of an arbitration agreement or any other agreements, e.g., confidentiality and nondisclosure agreements.