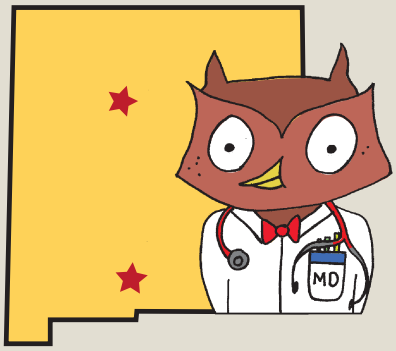
NEW MEXICO
Lawyer
February 2015 Volume 10, No. 1 www.nmbar.org

The hazy issue of **medical marijuana**, and other **hot topics** in Employment Law

Employment and labor laws apply across industries, to businesses large and small, public and private. Yet, keeping up with the frequently changing laws can be a challenge! With this issue of *New Mexico Lawyer*, the Employment and Labor Law Section highlights selected recent case law and legal issues we hope will be of interest to all lawyers, whether representing employers or employees, advising business clients or simply serving as employers themselves.

DOCTORS WITHIN BORDERS



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Medical Marijuana Use and the Workplace: Where Do We Stand?

By Barbara Evans

New Mexico, along with many other states, allows possession and use of marijuana for medical use. Colorado and Washington have taken it a step further and decriminalized possession of marijuana for recreational use. Some New Mexico counties apparently see the logic in the Colorado and Washington laws, and have taken baby steps toward decriminalizing recreational marijuana use. In November 2014, Santa Fe County and Bernalillo County ballots contained a question, seeking voter feedback on decriminalization of marijuana. In both counties, the voters indicated they would be in favor of decriminalization. These ballot questions are non-binding and will not change the law. Nevertheless, they show the growing trend among many New Mexicans in favor of legalization. In addition, the Santa Fe City Council voted to reduce penalties for possession of small amounts of marijuana last August.

Federal law, however, has not changed. Marijuana use, whether for medical or recreational reasons, remains illegal. Given the variations in laws regarding marijuana possession, employers may find themselves uncertain about the legality of their own policies regarding drug use in the workplace. New Mexico employers, in particular, may be faced with making sure their policies comply with three drastically different marijuana use and possession laws: state, federal and local.

Employers can be sure of at least one thing: They can prohibit the use of intoxicating substances during work hours and are not restricted from disciplining an employee for being under the influence of intoxicating substances during work hours. *See Kosmicki v. Burlington Northern & Santa Fe Ry. Co.*, 545 F.3d 649, 650 (8th Cir. 2008); 42 U.S.C. § 12114(c)(3) (employer may require employees to conform with requirements of Drug Free Workplace Act [41 U.S.C. §§ 8101–8106]); 21 U.S.C. § 812(c)(c)(17) (listing THC, a component of marijuana, on schedule I). This hard and fast rule, however, does not govern many other complicated issues that may arise during the hiring process or the course of employment.

> Unlike New Mexico, many states have enacted legislation that specifically prohibits employment discrimination based on an individual's status as a holder of a medical marijuana card.

For instance, does state or federal law require an employer to ignore its drug-free work place policy as a reasonable accommodation for an employee's disability? Thus far, courts to address the issue have decided that medical marijuana use is not a reasonable accommodation required by the Americans with Disabilities Act (or the state equivalent). *See e.g. Casias v. Wal-Mart Stores, Inc.*, 695 F.3d 428, 437 (6th Cir. 2012); *James v. Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012); *Roe v. TeleTech Customer Care Mgmt., LLC*, 152 Wash. App. 388, 398, 216 P.3d 1055, 1060 (2009); *Johnson v. Columbia Falls Aluminum Co.*, 350 Mont. 562, 2009 WL 865308, at *2 (Mont. 2009).

New Mexico courts may have the opportunity to weigh-in on this issue and determine whether New Mexico law requires employers to permit use of medical marijuana as an accommodation for employees who suffer from a serious medical condition. In June 2014, Donna Smith, a military veteran who used medical marijuana to treat symptoms of post-traumatic stress disorder, filed a lawsuit in the Second Judicial District against Presbyterian Healthcare Services. Smith was a physician assistant, whose employer contracted with Presbyterian to provide services in its facilities. When Smith failed a drug test, Presbyterian informed her and her employer that her services were not needed in Presbyterian facilities. She sued, alleging Presbyterian had violated the New Mexico Human Rights Act's mandate that employers accommodate serious medical conditions such as PTSD. This case squarely pits federal law against New Mexico law.

While Smith argues that state law requires Presbyterian to accommodate her medical condition, Presbyterian maintains that marijuana use is illegal under federal law, and federal law requires it to maintain a drug-free workplace. Currently the case is in the discovery process, and it may be years before the appellate courts rule on this issue, if at all.

In the meantime, employers are not likely to have to worry about the Lynn and Erin Compassionate Use Act, the New Mexico law implementing legalization of marijuana for medical use. A similar act was recently interpreted by the Sixth Circuit court, which found it did not apply to private employers.

continued on page 10

Is 'Right to Work' Right for New Mexico?

By Danny Jarrett

For the first time in 60 years, Republicans control the New Mexico State Legislature. Almost immediately following the election in November 2014, State Senate Minority Leader Stuart Ingle (R-Portales) began advocating for passage of a "right-to-work" bill that would, in short, prohibit the inclusion of provisions in collective bargaining agreements between unions and employers that requires employees to join a labor organization or pay dues as a condition of employment. The torch was quickly picked up by other community and business leaders and by the time you read this article, New Mexico may have become the 25th state with such a law. This article provides an historical background and explanation of what is meant by "right to work" as well as how the existence of such a law, or lack thereof, may affect New Mexico employers.

Historical Context

The National Labor Relations Act (NLRA) was introduced in Congress in 1934 and passed in 1935. The Act was drafted by Sen. Robert Wagner in the midst of the Great Depression. Its purpose was to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing interference by either employers or employees with the legitimate right of the other, to protect the rights of individual employees in their relations with labor organizations, to define and prescribe the practices on the part of labor and management and protect the rights of public in connection with labor disputes affecting commerce. In 1937, the Supreme Court confirmed the constitutionality of the Act in the case of *NLRB v. Jones & Laughlin Steel Corporation*[1], holding that the Commerce Clause of the Constitution gave Congress the power to regulate industrial relations of employers whose activities "affected" interstate commerce. The Act's basic purpose was to serve as a weapon against the disruption of industry by labor-management disputes. Section 1 of the Act lists activities that disrupt commerce. Congress found that denial of the right of employees to organize and the refusal of some employers to accept collective bargaining led to strikes and industrial unrest and had the effect of burdening and obstructing commerce. The Supreme Court concluded, therefore, that Congress acted properly in legislating concerning matters affecting interstate commerce.

… the resurgence of the right-to-work debate comes as unions suffer from waning influence, with approval rates near 75-year lows, and union membership declining in 43 states since 2003.

In order to accomplish its purpose of stopping industrial strife by curbing the disruption of industry by labor-management disputes, the Act created a legally enforceable right for employees to organize, the right to bargain collectively and the right to engage in strikes, picketing and other concerted activities. To enforce these rights, the Act created the National Labor Relations Board (NLRB). It gave the Board exclusive jurisdiction over unfair labor practices it defined and also set forth outlines for Board procedure. The Act also provides for judicial review and court enforcement of Board orders. The initial Board consisted of three members appointed by the president with the advice and consent of the Senate. Not surprisingly, the rolls of organized labor increased by 50 percent between 1941 and 1945 under the oversight of this newly created government agency.

The Taft–Hartley Act

The first amendment to the National Labor Relations Act came in 1947 with the Labor Management Relations Act of 1947, otherwise known as the Taft-Hartley Act. This Act increased the number of members on the National Labor Relations Board from three to five, and established the position of general counsel of the Board who, like the Board members, is appointed by the president with the advice and consent of the Senate. The general counsel has general supervision over all attorneys employed by the Board and over the officers and employees in the regional offices. The Taft-Hartley Act also established the Federal Mediation and Conciliation Service and set forth the functions of that service. It also contained a provision allowing the president to intervene where a threatened or actual strike or lockout will affect an entire industry, or imperil the national health or safety. Significantly, the Taft Hartley Act also confirmed the states' right to pass "right-to-work" laws, pursuant to which collective bargaining agreements that required union membership as a condition of employment would be forbidden.

According to the National Congress on State Legislatures, "The first right-to-work laws were passed in the 1940s and 1950s, predominantly in Southern states. Most right-to-work laws were enacted by statute but 10 states adopted them by constitutional amendments. There was a surge of interest in the issue in the 1970s and again in the 1990s …" More recently, Ohio, Wisconsin, Indiana and Michigan joined the "right to work" ranks bringing the total number of states with some form of the law to 24 by the end of 2014.

"Right to Work" in New Mexico

So, what could becoming a "right-to-work" state mean for New Mexico? Proponents of its passage say that being

a "right-to-work" state signifies the state is friendly to businesses and provides workers the fundamental freedom to decide whether they want to join a union or pay dues, or not. Opponents claim "right-to-work" laws can weaken collective bargaining power, inhibit worker wage growth, and generally take the position that such a law is unnecessary here because New Mexico has a relatively low percentage of unionized workers.

The *Washington Post* reported this past November that, nationally, "the resurgence of the right-to-work debate comes as unions suffer from waning influence, with approval rates near 75-year lows," and union membership declining in 43 states since 2003. According to the U.S. Bureau of Labor Statistics, of roughly 751,000 total workers, New Mexico had about 46,000 union members in 2013. That 6.2 percent union membership rate was lower than the national average of 11.3 percent.[2] Of those, most are government employees, prompting some right-to-work advocates to suggest a possible exception for these public sector union workers, such as those who participate in the Educational Retirement Plan and the Public Employees Retirement System. However, private-sector industries like carpentry, plumbing, healthcare, manufacturing and communications jobs are also represented within the statistics—trades and industry sectors which, according to proponents of right-to-work legislation, would benefit via new company operations vis-à-vis its passage.

Since 1981, 19 right-to-work bills have been introduced in New Mexico, according to Legislative Council Service records. Governors Toney Anaya and Bruce King, both Democrats, vetoed right-to-work bills. But with Republican Gov. Susana Martinez at the helm, and the historic GOP takeover of the House, the result could be different in 2015. ■

Endnotes

[1] 301 U.S. 1, 57 S.Ct. 615 (1937)

[2] http://www.bls.gov/news.release/union2.t05.htm

Right to Work v. At-Will

Q: I've heard the terms "right to work" and "employment at will," but I'm not sure what the difference is. Can you help?

A: While many people use the terms interchangeably or confuse them for one another, in fact they have entirely different meanings. As described above, "right to work" refers to the right to work without being required to join a union as a condition of employment, even if a union represents the employees at a particular facility.

"At-will" defines an employment relationship between an employer and employee in which the employer has the right to terminate the employee at any time with or without cause and for any reason. Similarly, the employee is free to quit employment at any time without cause or for any reason. Every state except Montana is an "at-will" state.

Of course, the "at-will" doctrine is limited by federal and state employment regulations that protect workers from discriminatory treatment based on protected classes and protects employees against adverse employment actions that violate a public policy interest. The at-will presumption also may be modified by contract. For example, a contract may provide for a specific term of employment or allow termination for cause only. Typically, U.S. companies negotiate individual employment agreements only with high-level employees. In addition, collective bargaining agreements usually provide that represented employees only may be terminated for just cause. Finally, New Mexico courts also have held that provisions of a handbook or personnel policy, or even statements of a company CEO or president, may create an implied contract if they are specific enough to create a reasonable expectation of a contractual right on the part of employees.

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Independent Contractor or Employee?

The Difference Is Not Merely a Matter of Labels

By Marshall Ray

Employee misclassification occurs when employers improperly label an employee as an independent contractor. There are several costs associated with hiring employees that lead some businesses to obtain services from independent contractors rather than employees. Aside from salaries, those costs include federal and state payroll taxes, the costs associated with complying with wage and hour laws, and other protections for employees, such as rights under employee benefit plans and protections under the Affordable Care Act.

Unfortunately, many businesses and workers incorrectly believe that the difference between an employee and an independent contractor is a matter of labels, or that parties can agree to designate the individual as an independent contractor rather than an employee. Under this thinking, a business will deem individuals providing personal services to be contractors and will issue them a 1099 form come tax season.

This practice, however, is only appropriate if the individual being paid for services is actually a "contractor" as defined by law. Misclassification can have serious consequences for employers, including retroactive tax liability, penalties, fines, liability to workers for actual and liquidated damages and attorneys' fees and costs, and additional premium costs, lost benefits and lost tax breaks for employers with benefit plans. Misclassification also hurts workers because it shifts tax liability to them and deprives them of many legal protections that employees receive under state and federal laws, such as wage and hour protections and unemployment benefits. Businesses must therefore understand the limits of their ability to treat individuals as contractors, and workers should understand what they lose when they are misclassified.

In New Mexico, four of the main legal frameworks under which employee or contractor status is relevant are federal payroll taxes, federal wage and hour law, state unemployment compensation law and state wage and hour law. The administrative agencies responsible for enforcing and implementing these laws are the Internal Revenue Service (IRS), the United States Department of Labor (DOL) and the New Mexico Department of Workforce Solutions (NMDWS). Each agency can audit a business and administratively determine whether an individual providing personal services is an independent contractor or employee. Workers also have the right to sue businesses under statutes such as the Fair Labor Standards Act (FLSA) and the New Mexico Minimum Wage Act (NMMWA).

Because multiple regulatory entities with separated policy missions enforce misclassification, businesses are subject to different tests depending on the relevant substantive area of law. Not counting workers in certain occupations who have been statutorily designated as employees or contractors, the IRS employs a 20-factor test that examines facts under three categories: (1) behavioral facts which examine the extent to which the company controls or has the right to control what the worker does and how the worker does his or her job; (2) financial facts such how the worker is paid, whether expenses are reimbursed, and whether the company furnishes tools, supplies, workspace, etc.; and (3) relationship facts such as whether there are written contracts or employee-type benefits such as pensions or vacation time. (IRS Pub. 15-A; IRS Revenue Ruling 87-41.)

The IRS test does not apply in the context of the FLSA, New Mexico's Unemployment Compensation Law or New Mexico's wage and hour laws. Nevertheless, the tests that guide the determination of independent contractor or employee status in these distinct areas of the law examine similar factors:

- For the FLSA, the 10th Circuit has articulated a test that "focuses on the economic realities, and the focal point is whether the individual is economically dependent on the business to which he renders service … or is, as a matter of economic fact, in business for himself." *Johnson v. Unified Gov't of Wyandotte Cnty./ Kansas City, Kansas*, 371 F.3d 723, 729 (10th Cir. 2004) (internal

continued on page 8

Distinguishing Legal Advice from Business Advice
after *Bhandari v. Artesia General Hospital*

By Victor P. Montoya

The fine line between legal and business advice for in-house counsel can be fraught with pitfalls. Just because an attorney is involved in a communication does not make the communication attorney-client privileged. The attorney-client privilege protects legal advice, not business advice. As the scope of duties performed by in-house counsel continues to expand, protecting the attorney-client privilege is becoming more difficult and may lead to the inadvertent waiver of the privilege. The New Mexico Court of Appeals recently addressed this issue in *Bhandari v. Artesia General Hospital*, 2014-NMCA-018, 317 P.3d 856.

The *Bhandari* opinion involved the following underlying facts. Dhitra Bhandari ("Bhandari") and her husband both worked as physicians at Artesia General Hospital (the "Hospital"). At a meeting to terminate her husband from his employment for violating his contract, the Hospital told Bhandari that her husband would be allowed to resign from his position if she also resigned. If she did not resign, her husband would be fired. Bhandari was not the subject of any personnel action by the Hospital. Before the meeting with Bhandari, the Hospital's general counsel had prepared a memo regarding the termination process and a script for forcing Bhandari's resignation along with her husband's resignation. At trial, the district court ruled that the memorandum was not privileged, was discoverable and admitted it into evidence. Relying on the memorandum, the district court also found the Hospital had acted maliciously and willfully breached Bhandari's contract by using her husband's situation to pressure her to resign. The court awarded Bhandari both compensatory and punitive damages, and the Hospital appealed.

At trial, the district court ruled that the memorandum was not privileged, was discoverable and admitted it into evidence.

On appeal, Bhandari argued that the general counsel's role in her separation from the Hospital was not to provide legal advice, but solely to provide business advice. The court noted that there is scant New Mexico law that distinguishes legal advice from business advice, leading to difficulty in applying the privilege. Citing authority from other jurisdictions, the court stated that those jurisdictions had found that if the primary purpose of the communication is to solicit or render advice on a non-legal matter, the communication is not within the attorney-client privilege. If the primary purpose of the communication is to solicit legal advice, an incidental request for business advice does not vitiate the attorney-client privilege.

Adopting that analysis, the court held that an in-house counsel's communications regarding business matters, management decisions and business advice, which neither solicit nor predominately deliver legal advice, are not privileged. The court specifically noted that it was Bhandari's husband who was being terminated. The Hospital nonetheless summoned Bhandari to a meeting at which it planned to force her to resign, so as to terminate both her and her husband's employment. Although the general counsel's memorandum had a heading designating it as confidential and subject to attorney-client privilege, it was essentially a script for securing Bhandari's resignation, albeit couched as talking points for the termination interview with Bhandari and her husband.

The court noted that the district court admitted the general counsel's memorandum into evidence based on its finding that his role vis-a-vis Bhandari was primarily business-related, while his role relating to her husband was legal. The court stated that the district court findings reflected the delicate problem for the Hospital posed by the two doctors being husband and wife, which was not a legal concern, but a management problem. The court therefore held that the general counsel's memorandum constituted unprivileged business advice, that the district court did not err in admitting it and affirmed the district court's judgment, including the punitive damages award.

The *Bhandari* decision reveals that attorneys need to carefully consider whether their communications constitute business advice, attorney-client privileged communications or a combination of the two. Some practice tips to help avoid these pitfalls include the following:

- Attorneys should create a record of their communications sufficient to show that the communication constitutes legal advice.

continued on page 8

Distinguishing Legal Advice from Business Advice *continued from page 7*

- E-mails and other communications containing legal advice should be clearly labeled as such.
- Attorneys should avoid mixing communications containing business and legal advice, when possible.
- If attorneys do engage in mixed communications, they should delineate clearly which sections of the communication contain business advice versus privileged information.
- Attorneys should advise their clients not to copy their in-house counsel on routine communications in an effort to protect those communications. Over-designating communications as privileged could lead to the inadvertent waiver of legitimate privilege claims.
- Clients should, however, be counseled to copy their attorneys on discussions related to major business issues and decisions, so that their attorney may review them for potential legal issues. Even then, the initial discussion may be not be privileged, but any subsequent communications from the attorney containing legal advice will be privileged.

> The court stated that the district court findings reflected the delicate problem for the Hospital posed by the two doctors being husband and wife, which was not a legal concern, but a management problem.

- Finally, in-house counsel should use their legal title as opposed to their corporate or business title, if any, when engaging in legal communications to help establish the privileged nature of their communications.

While the line between business and legal advice is fine, if considered carefully, it can be managed so as to protect the attorney-client privilege. ■

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Independent Contractor or Employee *continued from page 6*

quotation marks and citations omitted) (ellipses in original). This "economic realities" test contains six factors: (1) the degree of control exerted by the alleged employer over the worker; (2) the worker's opportunity for profit or loss; (3) the worker's investment in the business;(4) the permanence of the working relationship; (5) the degree of skill required to perform the work, and, in many instances, (6) the extent to which the work is an integral part of the alleged employer's business. *See id.*

- To determine liability for unemployment contributions and eligibility for unemployment claims, NMDWS employs the "ABC Test" from NMSA 1978, § 51-1-42(F)(5). Under the ABC Test, so named because the statute contains sub-parts (a), (b), and (c), a worker is an independent contractor if it is established by a preponderance of the evidence that: (a) the individual has been and will continue to be free from control or direction over the performance of the services both under the individual's contract of service and in fact; (b) the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and (c) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service.

- The NMMWA's definition of employee is "an individual employed by an employer" with some statutory exceptions. *See* NMSA 1978, § 50-4-21. Given the absence of regulations and controlling state court judicial decisions delineating a formal test for independent contractor status, NMDWS follows the guidance of courts interpreting the FLSA. To resolve disputes regarding a worker's status, NMDWS' Labor Relations Division accordingly employs the factors enumerated in the 10th Circuit's "economic realities" test discussed above.

The existence of overlapping multifactor tests may appear confusing at first glance, but a common thread underlies them all. The tests attempt to determine whether the worker is independent and in business in his or her own right rather than dependent on an employer. The factors in all tests therefore analyze the level of control over the worker, and whether the worker holds herself out as engaged in business or acts like an employee under the business' control. By keeping these core concepts in mind, businesses can generally make correct determinations without repeatedly referring to the lists of factors, and workers can understand their relationship and therefore their rights.

When in doubt, potential employers should consult legal counsel about their business practices. Businesses with ongoing needs might be advised about the possibility of contracting with a company for temporary service employees. Attorneys representing worker interests should also advise workers of their ability to challenge an employer's designation with the appropriate agency or through litigation if necessary. In all instances, expert legal advice can help protect a business from unwanted exposure and workers from unfair treatment. ■

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Top 5 Tips for Employers Regarding Employee Use of Social Media

By Alana M. De Young

Odds are that you, or at least one person you know, have at least *some* presence on social media, be it a Facebook or Instagram profile, a Twitter handle, a LinkedIn page, or a personal blog. Employers, too, are engaging more in social media in terms of marketing to clients, recruiting and hiring employees and even connecting with employees in different offices locally, nationally or globally. Such prevalent use of social media has a range of direct and indirect consequences for employers, ranging from the multiple business impacts of employee social media use, the development and maintenance of appropriate workplace social media policies and maintaining compliance with discrimination, labor and privacy laws.

Below are the top five tips for 2015 for employers to keep in mind when navigating employment issues involving social media.

Tip 1: Remember that traditional workplace claims still apply in the social media realm.

Claims of harassment, discrimination and retaliation are all affected by employee use of social media. The key is *how* the employer uses and regulates the use of social media. For instance, "personal information-such as that gleaned from social media postings-may not be used to make employment decisions on prohibited bases, such as race, gender, national origin, color, religion, age, disability or genetic information." Equal Employment Opportunity Commission Press Release, *Social Media Is Part of Today's Workplace but its Use May Raise Employment Discrimination Concerns*, (March 12, 2014), available at http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm. Employers must be aware of—and be able to address—social media's impact on employee claims of hostile work environment, harassment and retaliation. For example, if Employee A is posting harassing or derogatory posts about Employee B on his personal social media account, his employer may be held liable for that conduct. *See Espinoza v. County of Orange*, No. G043067, 2012 WL 420149 (Cal. Ct. App. Feb. 9, 2012). Social media posts by a manager about a fired employee could also be used to find the employer liable for a retaliation claim. *Stewart v. CUS Nashville, LLC*, 2013 WL 456482 (M.D. Tenn. Feb. 6, 2013).

Tip 2: Maintain updated social media policies.

It is imperative for employers to develop social media policies that address the various social media-related issues that may arise in the workplace. Implementing policies concerning social media and related technologies (such as Internet use and employee devices) is important for at least two reasons. First, from a business perspective, such policies can serve to limit productivity lost due to employee time spent on social media; such policies should, therefore, be sufficiently clear as to what Internet and social media use (if any) is permissible in the workplace. Second, appropriate policies can serve to reduce a company's exposure to legal claims by both employees and third parties based on employees' statements and conduct on social media.

Tip 3: Craft policies that are specific, precise and narrowly tailored to the company's business interests.

In recent years, the National Labor Relations Board (NLRB) has increasingly addressed the issue of workplace policies that, both directly and indirectly, involve social media. In 2014, the NLRB issued several decisions relating to social media, many of which found that workplace policies involving social media and technology that are too broad, vague, overly subjective, not consistently applied or not narrowly tailored to the employer's defined and specific business interests unlawfully chilled employees' rights to engage in protected concerted activity. *See* Schmidt, Michael C., *The Latest Do's and Don'ts With Social Media Policies,* Social Media Law & Policy Report, Bloomberg BNA (July 15, 2014).

The main takeaway from these NLRB decisions is to develop and maintain social media policies that are specific, precise and narrowly tailored to defined business interests. A policy that generally prohibits employees from making "offensive," "inappropriate" or "disparaging" remarks on social media platforms, for example, could reasonably be interpreted to prohibit protected criticisms of the employer's policies, in violation of the National Labor Relations Act, 29 U.S.C. § 157. In contrast, a policy prohibiting employees from engaging in harassment or discrimination of co-workers both in the workplace and after hours outside the workplace would likely be permissible if it is sufficiently precise and narrowly tailored to an employer's interest of protecting its employees from unlawful harassment and discrimination. Thus, policies that specifically outline what is prohibited, define key terms, and protect, in a narrow fashion, an employer's valid business interests, likely will be upheld.

Tip 4: Do not require or request job applicants to provide access to their personal social media accounts.

In 2013, New Mexico enacted legislation prohibiting prospective employers from requesting or requiring that applicants provide their user names and passwords to their personal social media accounts.

continued on page 10

Top Five Tips for Employers *continued from page 9*

NMSA 1978, § 50-4-34(A). This legislation does not, however, preclude an employer from obtaining information about prospective employees that is in the public domain. Section 50-4-34(C). Nor does it preclude an employer from implementing appropriate policies regarding workplace use of the Internet, social networking sites and e-mail and from monitoring use of an employee's electronic equipment and email. Section 50-4-34(B). As discussed above, an employer should develop policies with regard to social media use by its current employees, including with regard to such use in the recruiting and hiring process.

Tip 5: Use a third-party service or designated employee without hiring authority to conduct social media searches in the public domain.

Social media may be a vital tool in terms of recruitment and casting a wide net for potential job applicants. Yet it also raises potential discrimination issues given that most individuals' social media sites include personal information, such as a person's gender, age, ethnicity, or religious beliefs, which could be used in violation of state and federal discrimination laws. Therefore, to the extent your company wishes to conduct social media searches of prospective employees, the EEOC recommends such be done by either a third-party recruiter or a designated person within the company who does not have hiring authority. *See* EEOC Press Release, http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm. In addition, the searches should only consist of publicly available information. *Id.*

While social media can be a powerful and valuable tool for employers, these top five tips suggest employers must be cognizant of and take steps to address the varied impacts social media has upon workplace issues. Employers must keep in mind that use of social media—both by employees for business purposes such as recruiting, hiring, and marketing, as well as by employees for their own personal use—must comport with state and federal discrimination, labor and privacy laws. As such, it is essential that employers not only develop social media policies that are precise and narrowly tailored to concrete business interests, but also that employers stay up-to-date with the recent trends in this ever-changing area. ■

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Medical Marijuana Use and the Workplace *continued from page 3*

In *Casias v. Wal-Mart Stores, Inc.*, 764 F. Supp. 2d 914, 921-22 (W.D. Mich. 2011), later affirmed by the Sixth Circuit, 695 F.3d 428 (6th Cir. 2012), the court decided that Michigan's Medical Marihuana Act (MMMA) did not regulate private employment. Like the MMMA, New Mexico's Compassionate Use Act does not refer to employment. Instead, both laws prohibit the government from taking adverse action against medical marijuana users and their caretakers. As noted by the Sixth Circuit, extending the medical marijuana law to impose duties on private employers is contrary to other state statues that clearly and expressly impose duties "when the duties imposed fundamentally affect the employment relationship." *Casias*, 695 F.3d at 437.

Unlike New Mexico, many states have enacted legislation that specifically prohibits employment discrimination based on an individual's status as a holder of a medical marijuana card. *See e.g.* Ariz. Rev. Stat. Ann. § 36-2813. Employers can argue that if the New Mexico legislature had intended to provide protection to medical marijuana users in the employment context, it would have designed its law similar to those laws. Public employers, however, should be aware that the wording of New Mexico's statute leaves the door open for plaintiffs to argue that the Act regulates public employment. N.M.S.A. § 26-2B-4 ("A qualified patient shall not be subject to . . . penalty in any manner for the possession of or the medical use of cannabis . . . ").

For purposes of navigating the law, good practices to implement include:

1) Review drug-use and testing policies to ensure that they clearly explain expectations and comply with existing law. If necessary, make changes to clarify what you expect from your employees in terms of impairment, safety, marijuana use and termination.
2) Communicate expectations with employees. Speak directly to your employees about the company's standards and expectations on drug use and testing, and address any changes that were made to the written policy. Emphasize the importance of maintaining a drug-free workplace for everyone's safety, health and productivity.
3) Be cautious about asking a prospective employee if he or she is a medical marijuana user. The ADA requires that "medical examination or inquiry" of an employee must be "job-related and consistent with business necessity."
4) Human Resources personnel and managers should be trained and educated on any new policies, how to handle failed drug tests and what to do about any employees who use medically prescribed marijuana. Remind HR personnel and managers about confidentiality relating to sensitive employee information—including drug-test results and requests for accommodations for medical conditions.
5) Closely monitor legislative and legal developments as they relate to medical marijuana in the workplace. In particular, keep an eye out for the outcome of the *Smith v. Presbyterian*, D-202-CV-2101403906, and any amendments to the Lynn and Erin Compassionate Use Act.

Regardless of the preceding assurances, employees should be careful as they wade through the murky waters of medical marijuana use in the employment context. Employers have real concerns including workplace safety, government contracting requirements, productivity and third-party liability. Those concerns should be balanced against the potential for litigation. ■

Barbara Evans is a partner with Atwood, Malone, Turner & Sabin, in Roswell. She is a litigator with her primary focus on employment law and governmental liability. In addition to litigating employment law and governmental liability disputes, Evans drafts employment agreements and policies for her clients.

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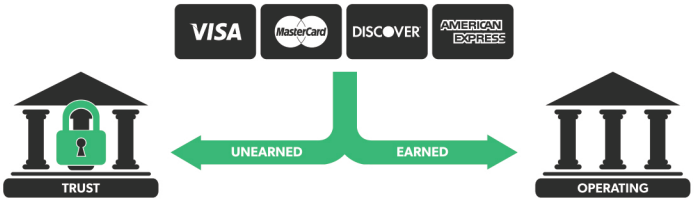

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