Colorado Prohibits Employer Access to Social Media Accounts; Expands FMLA Coverage to Civil Union and Domestic Partners

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Colorado employers take note -- Governor John Hickenlooper recently signed into law two bills that create additional rights for employees in the state. Employers now are prohibited from requiring access to an applicant's or employee's personal social media account. Violations may result in penalties and fines. Employers also must extend leave under the federal Family and Medical Leave Act (FMLA) to permit eligible employees to care for their civil union partner or domestic partner who has a serious health condition. Here are the details of both new laws and how they may affect your operation.

Employers Denied Access to Private Social Media Accounts

Colorado joins the growing trend of states restricting employer access to private social media and other online accounts of job applicants and employees. Colorado's new law, House Bill 13-1046, applies to any employer engaged in a business, industry, trade or profession in the state, except government law enforcement agencies. It prohibits employers from suggesting, requesting or requiring that an applicant or employee disclose their user name, password or other means of accessing their personal account or online services. Employers also may not compel an applicant or employee to add anyone to their list of contacts (e.g., to "friend" on Facebook, etc.) or to change their privacy settings on their social media accounts. Employers violate this law if they discipline, discharge or otherwise penalize an employee, or fail to hire an applicant who refuses to disclose any of the prohibited information or refuses to add the employer to their contacts or to change their privacy settings.

A person harmed by an employer's violation of the law may file a complaint with the Colorado Department of Labor and Employment (CDLE). The CDLE is required to investigate the complaint and issue findings within 30 days after a hearing. The law provides that the CDLE may create rules regarding the penalties for violations, including imposing fines of up to $1,000 for a first violation and up to $5,000 for each subsequent violation.

Access Permitted for Company Systems and Certain Investigations

Two exceptions to the prohibition on requiring access to online accounts

are spelled out in the law. First, employers are permitted to require employees to disclose any user name, password or other access to non-personal accounts or services that provide access to the employer's internal computer or information systems. Second, employers are allowed to conduct investigations in two areas: (1) to ensure compliance with applicable securities or financial law or regulatory requirements based on the receipt of information about the use of a personal online account by an employee for business purposes; and (2) to investigate whether an employee has made an unauthorized posting of the employer's proprietary information or financial data to a personal online account. No "fishing expeditions" are allowed under the investigative exceptions; employers may only access personal online information for these investigative purposes following the receipt of information that the employee is using his or her personal online accounts in these specific, inappropriate ways.

Employers Permitted to Enforce Non-Conflicting Policies

Existing employment policies that do not conflict with the provisions of this new law are permissible and may be enforced. Employers should examine their policies and practices that may conflict with this law and revise them to remove any requirements or actions prohibited by this law. Specifically, employers should revisit their background check practices related to social media, workplace investigation procedures, policies governing use of company computers, electronic accounts and personal online accounts as well as any other policy addressing technology and employer access to accounts.

FMLA Leave Available to Care for Civil Union Partner or Domestic Partner

Effective August 7, 2013, Colorado's Family Care Act extends federal FMLA leave to employees to care for the employee's civil union partner or domestic partner who has a serious health condition. As passed, the Family Care Act (House Bill 13-1222) is greatly downsized from the original bill introduced into the Colorado House in February. The initial bill would have expanded the group of family members for whom Colorado employees are entitled to take leave under the federal FMLA to include care for any person related to the employee by blood, adoption, legal custody, marriage or civil union partners and domestic partners. This would have permitted leave to care for siblings, grandparents, grandchildren and in-laws, regardless of age or dependency. Due to significant opposition by business groups, the bill was amended to remove all additional family members except civil union and domestic partners for the expanded FMLA coverage.

Apply Federal FMLA to Employees with Partners

Colorado employees currently must look to the federal FMLA for job-protected leave benefits. Under the federal FMLA, an eligible employee of a covered employer may take up to 12 weeks of leave during a 12-month period to care for a spouse, child or parent who has a serious health condition. The federal FMLA, however, does not permit leave for an employee to care for his or her civil union partner or domestic partner. The

Family Care Act allows an eligible employee to take leave to care for the employee's partner in a civil union or the employee's domestic partner (if the employer recognizes the person as the employee's domestic partner or the domestic partnership is registered with the municipality or the state, as applicable). The employer is permitted to require the employee to provide reasonable documentation or a written statement of the family relationship, in accordance with the FMLA. The employer also is allowed to require the same medical certification as may be required under the FMLA.

"Double Dipping" of FMLA Leave

The Family Care Act states that FMLA leave taken by an employee under this new law would run concurrently with leave taken under the FMLA and that the new law would not increase the total amount of leave to which an employee is entitled during a 12-month period. This seems to suggest that "double dipping" would not be permitted. However, federal regulations provide that the FMLA does not supersede any state law that provides greater leave rights than those provided by the FMLA. Further, the regulations state that if state law provides for a certain amount of leave, which may include leave to care for a seriously-ill "spouse equivalent," and leave was used for that purpose, the employee is still entitled to his or her full FMLA leave entitlement, as the leave used under state law was provided for a purpose not covered by the FMLA. 29 C.F.R. § 825.701(a)(3). On the other hand, if FMLA leave is used first for a purpose that is permitted under both state and federal law and state leave has thereby been exhausted, the employer would not be required to provide any additional leave to care for the "spouse equivalent" during that 12-month period.

What does this mean? It means that to determine leave entitlement, it matters whether the employee requests the new state-provided leave for care of a civil union or domestic partner before or after the employee has used up leave provided under the federal law. If leave to care for a seriously-ill civil union partner under state law is requested first, the employee potentially may "double dip" if he or she subsequently requests leave provided under the federal law. This could lead to a total of 24 weeks of leave in a single 12-month period. However, if leave that qualifies under the federal FMLA occurs first and the employee takes the full 12 weeks of leave at that time, no leave is available should the employee need to care for his or her civil union partner or domestic partner under state law.

Revise FMLA Policies and Forms Now

To prepare for the August 7th effective date of the new leave entitlement, covered Colorado employers should revise their FMLA policies and forms now to include provision of leave to care for a civil union partner or domestic partner with a serious health condition. As always, it is wise to consult with your legal counsel to ensure your policies and practices comply with all applicable laws.