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Boy, was the Nevada legislature busy this last session! When legislators wrapped up their legislative session in June, they had passed over twelve significant employment-related bills. Although the Governor vetoed a few, the majority were signed into law. Some are already in effect. Here's what you need to know to keep your HR practices current and compliant with Nevada law.

1. Nevada Pregnant Workers' Fairness Act (SB 253) – effective October 1, 2017

Nevada employers with 15 or more employees (for at least 20 weeks in the current or preceding year) must provide reasonable accommodations to and refrain from discrimination against employees and applicants based on pregnancy or childbirth-related conditions. The Nevada Pregnant Workers' Fairness Act amends Chapter 613 of the Nevada Revised Statutes (NRS) to make it unlawful for an employer to do any of the following (except for where the action is taken based upon a bona fide occupational qualification):

1. Refuse to provide a reasonable accommodation to a female employee or applicant, if requested, for a condition of the employee or applicant relating to pregnancy, childbirth or a related medical condition, unless the accommodation would impose an undue hardship on the business (as discussed below);
2. Take an adverse employment action against a female employee because the employee requests or uses a reasonable accommodation for a condition of the employee related to pregnancy, childbirth or a related medical condition, such as failing to promote the employee, requiring the employee to transfer to another position, declining to reinstate the employee to the same or equivalent position after the employee comes back to work, or taking "any other action which affects the terms or conditions of employment in a manner which is not desired by the employee";
3. Deny an employment opportunity to a qualified female applicant or employee based on their need for a reasonable accommodation for a condition related to pregnancy, childbirth, or a related medical condition;
4. Require a female applicant or employee who is affected by a condition related to pregnancy, childbirth, or a related medical condition to accept an accommodation that the employee or

applicant did not request or chooses not to accept; or

5. Require a female employee who is affected by a condition related to pregnancy, childbirth, or a related medical condition to take leave from employment if a reasonable accommodation for any such condition of the employee is available that would allow the employee to continue to work.

Key Definitions. The new law defines a condition related to pregnancy, childbirth, or a related medical condition as “a physical or mental condition intrinsic to pregnancy or childbirth that includes, without limitation, lactation or the need to express breast milk for a nursing child.” A "related medical condition" is defined as any medically recognized physical or mental condition related to pregnancy, childbirth, or recovery from pregnancy or childbirth, such as mastitis or other lactation-related medical conditions, gestational diabetes, pregnancy-induced hypertension, preeclampsia, post-partum depression, loss or end of pregnancy and recovery from loss or end of pregnancy.

Reasonable Accommodations. When an employee or applicant requests a reasonable accommodation, the new law requires that the employer and employee/applicant engage in a timely, good-faith interactive process to arrive at an effective, reasonable accommodation. Examples of reasonable accommodations include: (1) modifying equipment or providing different seating; (2) revising break schedules (as to frequency or duration); (3) providing a space in an area other than a bathroom that might be used for expressing breast milk; (4) providing assistance with manual labor if the manual labor is incidental to the primary work duties of the employee; (5) authorizing light duty; (6) temporarily transferring the employee to a less strenuous or hazardous position; or (7) restructuring a position or providing a modified work schedule.

An employer is not, however, required to create a new position, fire another employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job as an accommodation, unless the employer has made those accommodations for other classes of employees.

An employer seeking to show that a requested accommodation is an undue burden has to demonstrate that the accommodation is significantly difficult to provide or expensive, considering, without limitation: (1) the nature and cost of the accommodation; (2) the overall financial resources of the employer; (3) the overall size of the employer's business with respect to the number of its employees, and the number, type, and location of available facilities; and (4) the effect the accommodation would have on the employer's expenses and resources or on the employer's operations. Evidence that the employer provides or would be required to provide a similar accommodation to a similarly situated applicant or employee creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.

Notice Requirements. The new law requires covered employers to provide a written or electronic notice of the rights conferred by the Nevada Pregnant Workers' Fairness Act to employees, including the right that a

female employee is entitled to a reasonable accommodation for a condition related to pregnancy, childbirth, or a related medical condition. Covered employers must provide this notice immediately to existing employees to inform them of the rights that will become effective on October 1, 2017. (Note: the requirement to provide written notice to existing employees became effective upon passage and approval of the bill on June 2, 2017 so is already in effect.) Employers also must provide the required notice to new employees at the start of employment and to a pregnant employee within 10 days after she notifies her supervisor that she is pregnant. Further, employers must post the notice in a conspicuous place at the employer's business location, in an area accessible to employees.

Anti-retaliation. Employers may not retaliate against employees or applicants who oppose any practice made unlawful by the Nevada Pregnant Workers' Fairness Act, or who have made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing related to the Act.

2. Nursing Mother's Accommodation Act (AB 113) – effective July 1, 2017

Public and private employers in Nevada now must provide an employee who is a mother of a child under 1 year of age with (1) reasonable break time, with or without pay, to express breast milk as needed; and (2) a place (other than a bathroom), which is reasonably free from dirt and pollution, protected from the view of others and free from intrusion by others, where the employee may express breast milk.

Undue Burden. This new law does not apply to private employers who employ fewer than 50 employees *if* the requirements it imposes would constitute an undue hardship on the employer, considering the size, financial resources, nature, and structure of the employer's business. In addition, contractors licensed under NRS Chapter 624 are not required to comply with these requirements with regard to employees who perform work at a construction jobsite located at least 3 miles from the employer's regular place of business.

If any employer determines that providing reasonable break time and suitable breast milk expression facilities will cause an undue burden, the employee and the employer may meet to agree on a reasonable alternative. If the parties cannot reach an agreement, the employer can require the employee to accept the reasonable alternative selected by the employer, subject to the employee's right to appeal the decision to the appropriate authorities (which are listed in the bill and vary depending on the person's employer).

Complaint Procedure. For public employers, this new law requires the Local Government Employee-Management Relations Board to create an expedited procedure for resolving complaints brought before it and to create a complaint form to be used by employees. For complaints against private employers, the Nevada Labor Commissioner (or his/her representative) is tasked with enforcing these new requirements.

Anti-retaliation. Employers are prohibited from retaliating or encouraging another person to retaliate against an employee for (i) taking the time to express breast milk or using the facilities designated for such expression; or (ii) taking any action to require the employer to comply with the AB 113 requirements, including filing a complaint, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing to enforce the provisions of this new law.

Notice of Rights. The Nevada Labor Commissioner has provided a sample notice on its website of employee rights under this Act.

3. Non-Compete Agreements – Changes To Enforceability (AB 276) – effective June 3, 2017

In February 2017, a bill was introduced in the Assembly proposing to limit any post-employment non-compete period to just three months. That bill did not pass, but another non-compete bill - AB 276 - was recently signed by Governor Sandoval. It enacts some important changes to existing Nevada non-compete law, requiring careful review.

To begin, AB 276 amends NRS Chapter 613 to require that a non-compete covenant: (a) be supported by valuable consideration; (b) not impose any restraint that is greater than necessary for the protection of the employer for whose benefit the restraint is imposed; (c) not impose any undue hardship on the employee; *and* (d) impose restrictions that are appropriate in relation to the valuable consideration supporting the non-compete covenant.

Many questions are raised by the new requirement that the restrictions be in relation to the consideration offered to the employee to support the non-compete agreement. One key question is whether continued employment of an at-will employee will be sufficient consideration to support a non-compete. We will have to see how that language plays out in future enforcement actions.

Restructuring or Reductions In Force. The new amendments state that, if an employee's termination is the result of a reduction in force, reorganization, or "similar restructuring," a non-compete covenant is only enforceable during the period in which the employer is paying the employee's "salary, benefits or equivalent compensation," such as severance pay. This restriction may vastly reduce the ability of Nevada employers to use non-compete agreements when executives, managers, or other employees are let go due to downsizing or other restructuring.

Restrictions Related to Customers. These new amendments further provide that a non-compete covenant may not restrict a former employee from providing service to a former client or customer of the employer if: (a) the former employee did not solicit the former client or customer; (b) the client or customer voluntarily chose to leave and seek services from the former employee; and (c) the former employee is otherwise complying with the limitations in the covenant as to time, geographical area, and scope of activity to be restricted, other than any limitation on providing services to a former customer or client who seeks the services of the former employee

without any contact instigated by the former employee.

Confidentiality and Non-Disclosure Agreements. AB 276 additionally states that it does not prohibit agreements to protect an employer's confidential and trade secret information if the agreement is supported by valuable consideration and is otherwise reasonable in scope and duration.

Judicial Revision Required. Notably, the new provisions state that if, during a non-compete enforcement action, a court determines that the non-compete covenant is supported by valuable consideration, but otherwise contains limitations that are unreasonable, or impose greater restraint than necessary and create undue hardship on the employee, the court "shall revise the covenant to the extent necessary and enforce the covenant as revised." Any judicial revisions must be made to cause the limitations contained in the non-compete agreement as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

4. Wage Transparency (AB 276) – effective June 3, 2017

Although unrelated to non-competes, AB 276 (discussed above) included language that amends certain provisions of NRS Chapter 613 to protect employees from being subjected to discrimination for inquiring about, discussing, or voluntarily disclosing their wages or the wages of another employee. This wage transparency provision generally protects all employees except those whose essential job functions involve access to the wage information of other employees.

5. Domestic Violence Leave (SB 361) – effective January 1, 2018

Beginning in 2018, Nevada employers must provide an employee who has been employed for least 90 days and who is a victim of domestic violence, or whose family or household member is a victim of domestic violence, up to 160 hours of leave in one 12-month period, assuming the employee is not the alleged perpetrator. A “family or household member” means a spouse, domestic partner, minor child, or parent or another adult who is related within the first degree of consanguinity or affinity to the employee, or other adult person who is or was actually residing with the employee at the time the act of domestic violence was committed.

The leave allowed under this new law may be paid or unpaid, and may be used intermittently or in a single block of time. The leave must be used within 12 months after the date when the act of domestic violence occurred. If used for FMLA-qualifying purposes, the domestic violence leave will run concurrently with FMLA leave and both leave balances will be reduced accordingly.

Reasons For Leave. Eligible employees may take domestic violence leave for the following reasons:

1. For the diagnosis, care, or treatment of a health condition related to an act of domestic violence committed against the

employee or the employee's family or household member;

2. To obtain counseling or assistance related to an act of domestic violence committed against the employee or the employee's family or household member;
3. To participate in court proceedings related to an act of domestic violence committed against the employee or the employee's family or household member; or
4. To establish a safety plan, including any action to increase the safety of the employee or the employee's family or household member from a future act of domestic violence.

Notice Requirements. This new leave law requires an employee who has used any leave allowed under the bill to give his or her employer at least 48 hours notice if the employee needs to use additional leave for any of the purposes outlined above.

Reasonable Accommodations. Employers are obligated to make reasonable accommodations that will not create undue hardship for an employee who is a victim of domestic violence (or whose family or household member is such a victim). These accommodations may include: (a) a transfer or reassignment; (b) a modified schedule; (c) a new telephone number for work; or (d) any other reasonable accommodation which will not create an undue hardship deemed necessary to ensure the safety of the employee, the workplace, the employer, and other employees.

Documentation. Employers may require employees to present documentation substantiating the need for leave, such as a police report, a copy of an application for a protective order, an affidavit from an organization that provides assistance to victims of domestic violence, or documentation from a physician. Any substantiating documentation provided to the employer must be treated confidentially and must be retained in a manner consistent with the FMLA requirements. In addition, employers may require an employee to provide documentation that confirms or supports the need for a reasonable accommodation under this new law.

Recordkeeping. Employers are required to keep a record of the hours taken for domestic violence leave for a 2-year period following the entry of the information in the record and make these records available to inspection by the Nevada Labor Commissioner upon request. When producing records pursuant to an inspection request, employee names must be redacted, unless a request for a record is made for investigation purposes.

Notice. Pursuant to SB 361, the Nevada Labor Commissioner has provided a bulletin setting forth the rights conferred to employees under the domestic violence leave law, available on its website. Employers must post the bulletin in a conspicuous location in the employer's workplace. The bulletin may be included in the posting already required by NRS 608.013.

Additional Protections. The domestic violence leave law states that an

otherwise eligible employee may not be denied unemployment benefits if the employee left employment to protect himself or herself (or a family or household member) from an act of domestic violence, and the person actively engaged in an effort to preserve employment.

The new law also prohibits employers from denying an employee's right to use domestic violence leave, requiring an employee to find a replacement as a condition to using this leave, or retaliating against an employee for using such leave. It is also unlawful for employers to discharge, discipline, discriminate in any manner or deny employment or promotion to, or threaten to take any such action against an employee because:

1. The employee sought leave under SB 361;
2. The employee participated as a witness or interested party in court proceedings related to domestic violence, which triggered the use of leave under SB 361;
3. The employee requested an accommodation pursuant to SB 361; or
4. The employee was subjected to an act of domestic violence at the workplace.

6. National Guard Members of Any State (AB 337) – effective July 1, 2017

Nevada law currently prohibits the termination of an employee who is a member of the Nevada National Guard because the employee attends training or active duty, responds to a call for active duty, or otherwise is satisfying military requirements. This new amendment extends the same protections to an employee working in Nevada who is a member of the National Guard of another state.

Enforcement. A member of the National Guard (of either Nevada or another state) who believes he or she was terminated in violation of this law may, within 60 days of receiving notice of termination, seek a hearing before the Nevada Labor Commissioner to determine whether his or her employment was so terminated. If the Labor Commissioner concludes that the National Guard member (of Nevada or another state) was unlawfully terminated, the member is entitled to immediate reinstatement in the position which the member would have occupied but for the termination, immediate restoration of seniority and benefits, and receipt of all wages and benefits lost as a result of the termination. If the Labor Commissioner does not find a violation, the National Guard member may, within 120 days after receiving notice of termination, bring a civil action in any Nevada district court, seeking such a determination. Additionally, a member who prevails in court is entitled to the reasonable fees and costs incurred in bringing the action.

Update Your Policies and Practices Accordingly

Take time now to review and update your employee handbook, supervisor manuals, and other personnel policies to reflect these new Nevada laws. It's also important to train your managers, supervisors, team leads, and human resources personnel on the requirements and restrictions imposed

on employers by these laws to ensure compliance.

If you have any questions, please reach out to me at DLane@hollandhart.com or 775-327-3045, or contact the Holland & Hart attorney with whom you typically work.
