

# **Ten Tips for Nonprofit Employers to Reduce Risk in 2024**

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- Multi-state guidance on personnel matters
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- Employee Benefits
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Developments in Labor and Employment Law Blog



11.07.2023

### IRS Delays Roth Catch-Up Requirement for Certain Higher-Paid Employees



By George J. Kasper



Our August 24, 2023 blog post “[Retirement Plans: Will January 1, 2024 Effective Date for Age 50 Catch-Up Contribution Changes Be Delayed?](#),” discussed the new catch-up contribution rule and options for keeping retirement plans tax-compliant. Since then, the IRS has delayed enforcement of the Roth Catch-Up Requirement for certain higher-paid employees.

The IRS recently issued Notice 2023-62, which provides Plan Sponsors with a transition period until 2026 to implement the Roth catch-up contribution



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Alerts, commentary, and insights from the attorneys of Pullman & Comley’s Labor, Employment Law and Employee Benefits

# Tip #1: Ensure Your Agreements Remain Effective under Changing Law

The Speak Out Act

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act

The NLRB's Decision in *McLaren*

Proposed FTC Non-Compete Rule

Connecticut Law on Non-Competes

# The Speak Out Act

## (Federal) Public Law No. 117-224, 42 U.S.C. Sec. 19401-19404

- Became effective on December 7, 2022.
- **Nondisclosure or non-disparagement agreements entered into before the claims arose will be deemed unenforceable as applied to sexual assault and sexual harassment disputes.**
- Note: the Act does not clearly define "dispute"
  - which could mean lawsuit, be interpreted to include a claim to the CCHRO or EEOC, or even a report to the HR department.
- Does not apply to settlement agreements entered into after dispute.
- Does not apply to protection of trade secrets and confidential proprietary information.
- Takeaways:
  - Review and update the language of any nondisclosure and non-disparagement provisions entered into with employees as a condition of employment.
  - How is our organization equipped to handle reports of sexual harassment or assault in the workplace?*
  - What is the desired purpose of including nondisclosure and non-disparagement provisions?*

## **PUBLIC LAW NO: 117-90**

- Amended the Federal Arbitration Act.
- Gives individuals asserting sexual assault and sexual harassment claims the option to bring those claims in court even if they had agreed to arbitrate such disputes **before the claims arose.**
- Also applies to class or collective action waivers.
- Such agreements are not *per se* invalid, but a party bringing a sexual assault or harassment claim can elect to avoid them.
- Remains to be determined whether the option to avoid arbitration applies only to sexual assault or harassment claims, or includes any other claims brought with sexual assault or harassment.
  - Takeaway: Review and update the language of any mandatory arbitration or class-action waivers entered into with employees as a condition of employment.
  - Think ahead: *What would it mean if an employee voluntarily agreed to arbitrate their dispute?*

- On February 21, 2023, the NLRB issued a decision holding that employers may not offer non-supervisory employees severance agreements that require employees to broadly waive their rights under the National Labor Relations Act, including agreements containing broad confidentiality and/or non-disparagement prohibitions.
  - The decision involved severance agreements prohibiting separating employees from making statements that could disparage the employer and from disclosing the terms of the agreement itself.
  - The NLRB found that the provisions in question had the potential to restrict employees from engaging in “concerted activity” protected by the NLRA.
    - Because the provisions in the severance agreements could operate to restrain such conduct, even if the separating employees agreed to them willingly, the NLRB held the provisions were unlawful.

- On January 5, 2023, the Federal Trade Commission proposed a new federal regulation that would ban non-competes in agreements between employers and employees and require employers to rescind existing non-competes.
- The proposed rule defines noncompete clauses as unfair methods of competition, thus bringing them within the agency's regulatory authority.
- The FTC claims that non-competes significantly reduce wages, stifle new business and new ideas, and "hinder economic liberty."
  - According to the FTC, adoption of the proposed rule could increase workers' earnings across industries and job levels by nearly \$300 billion per year.
- The FTC received tens of thousands of comments. Reportedly it will not finalize the rule until April 2024. A court challenge is likely.



- Connecticut has long restricted non-competes for physicians. The agreement must be limited to one year, and may not extend over a 15-mile radius.
- Recent amendments to the statute make it clear that the 15 miles must be measured from a single location where the physician practices.
- The restrictions on non-competes also apply to APRNs and PAs.
- Specific requirements for employers with more than 35 physicians.

## Tip #2: Make Sure You Investigate All Harassment/ Discrimination Allegations and Communicate the Results to the Complaining Employee



## **Trends**

- We are seeing an uptick in internal complaints which involve personality conflicts as people have returned to the office and interactions change.
- Employees are using buzz words.
- We are also seeing an uptick of complaints intertwined with performance issues.
- We are seeing an uptick in issues related to off duty social media use involving colleagues and text messages.

## **Action Steps**

- Make sure everyone in your organization (especially your managers) knows that they have an obligation to bring forward anything they witness or hear about that could be interpreted as inappropriate (including buzz words).
- Investigate any complaint made (scope of investigation is fact specific).
- Document the results of the investigation in a writing (and communicate them to the complaining employee) to avoid any claim that you did not investigate, take the claim seriously or fail to take appropriate action.
- Be careful of the rumor mill.
- Consider supplemental harassment / discrimination training.

## Tip #3: Update Your Employee Handbook to Include New Employee Protections.

Crown Act

Voting Leave

PUMP Act

Pregnant Workers Fairness Act

## **PUBLIC ACT 21-2 (“An Act Creating A Respectful and Open World For Natural Hair”).**

- Effective upon passage (signed on March 4, 2021)
- Amends the Connecticut Fair Employment Practices Act so that discrimination on the basis of “race” is “inclusive of ethnic traits historically associated with race, including, but not limited to, hair texture and protective hairstyles.”
- “Protective hairstyles” includes, but is not limited to, “wigs, headwraps and hairstyles such as individual braids, cornrows, locs, twists, Bantu knots, afros and afro puffs.”
- Action Steps:
  - Review dress codes and/or grooming policies which dictate how employees may wear their hair in the workplace and refer to protective hairstyles in EEO policy.
  - Any policy that prohibits employees from wearing their hair in a certain style must be applied to employees equally, and must not disproportionately impact employees of one race over another.
  - Re-evaluate whether a prohibition on a specific hairstyle is necessary for the workplace.

- **CT Senate Bill 1202**

- Effective currently through June 30, 2024.
- Employers must provide each employee two hours of unpaid time off to vote in any state election or special election for U.S. senator, representative in Congress, state senator, or state representative.
- To be eligible, the employee must request the time at least two working days in advance of the election.
- Takeaway:
  - Insert a policy in your handbook that states that employees may have two hours off to vote but must request it two days in advance of the election.

- The **Pump for Nursing Mothers Act** (“PUMP Act”) requires employers subject to the FLSA to provide nursing mothers with break time and a private place other than a bathroom to express breast milk. The employees must either be completely relieved from duty while pumping, or must be paid for the break time. Employers with fewer than 50 employees may not be subject to these requirements if compliance would impose an “undue hardship.”
- The **Pregnant Workers Fairness Act** requires employers of at least 15 employees to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.” Employers must engage in the interactive process regarding accommodations, may not deny a job or an opportunity to an employee or applicant based on the need for a reasonable accommodation, and may not retaliate against an employee for reporting or opposing discrimination under the statute.

Tip #4: Make Sure You Advise Your Employees about the Availability of Family Medical Leave and Process Leave As Such When Applicable.





## Trends

- Some smaller (< 50) employers still don't realize that they must now provide (unpaid) Family Medical Leave to their employees.
- Employers don't recognize that the CT Paid Leave Authority doesn't process everything, and employers have obligations, too.
- Many still have not revised their policies and procedures, nor notified employees of their leave entitlement.
- Intersection with worker's compensation issues.
- Confusion as to process, time frames and forms.

# FMLA Tips to Reduce Exposure

- Create or Update your FMLA policy and distribute it to your employees if you haven't already (template available).
- Create or Update Your Procedure for Processing FMLA requests.
  - Consider using a checklist for each employee who is taking FMLA leave (template available).
  - Use the CT DOL's Standard Forms including but not limited to:
    - [Notice-of-Eligibility-and-Rights-and-Responsibilities.pdf \(ct.gov\)](#)
    - [Designation-Notice.pdf \(ct.gov\)](#)
    - [Medical-Certification-for-Employees-Serious-Health-Condition.pdf \(ct.gov\)](#)

# FMLA Tips to Reduce Exposure

- Make sure your employees have notice that Family Medical Leave and income substitution benefits are available to eligible employees.

Sample notice available at: [NEW-53122-Prototype-of-Employers-Written-Notice-to-Employees-of-Rights-under-CTFMLA-and-CTPL.pdf](#)

- Train your managers on FMLA revisions and requirements.
- Make sure you apply FMLA leave if it should be applied.
- Get help when drafting requests for medical reports, analyzing the reports you receive back and requesting and reviewing FMLA paperwork.
- Analyze potential exposure under all statutes. (E.g., is the ADA implicated? Workers' Comp. issues?)

# Tip #5: Update Your Drug-Free Workplace Policy.



- Connecticut was the 19<sup>th</sup> state to legalize recreational cannabis for adults 21 years or older.
- **Employers may continue to maintain drug free workplaces and may continue to prohibit employees from being under the influence of cannabis at work.**
- The law creates employment protections for certain recreational cannabis users in certain industries who use cannabis during non-work time and/or pre-employment.

# Actions to Minimize Issues and Exposure

- Determine your stance on off-duty cannabis use.
- Consider your drug testing policies and procedures and determine whether any changes should be made.
  - If you do not have a written policy, implement a clear Drug Free Workplace Policy.
  - If you do have a written Drug Free Workplace Policy, revise it now to include references to recreational cannabis use and ensure compliance with statutory requirements / notice requirements.
  - Consider circulating a memo re: recreational cannabis use and how it continues to be prohibited at work and having a specific cannabis policy in your handbook.
- Review your pre-employment procedures and adjust if necessary.
- Train your managers in recognizing signs of impairment at work and what your policies require.

## Tip #6: Make Sure to Request Medical Documentation to Assist with FMLA and ADA Issues.



## Trends

- Employers often do not request medical documentation to support FMLA requests, or employees' claims that they need certain accommodations / can't do certain things.
- Employers are accepting vague notes from medical providers that don't provide the information they need.
- Employers are not engaging in the interactive process when they should do so under the Americans with Disabilities Act.
- Employers are struggling with employees with mental health issues and substance abuse issues often intertwined with performance and attendance issues.



- ❑ Require that your employers have their providers fill out the state forms when commencing leave.
  - [Medical-Certification-for-Employees-Serious-Health-Condition.pdf \(ct.gov\)](#)
  - [Medical-Certification-for-Care-of-a-Family-Member's-Serious-Health-Condition.pdf \(ct.gov\)](#)
- ❑ For extended leaves, require the provider re-certify.
- ❑ Require a fitness for duty certification prior to return if the employee took leave for their own serious medical condition. Request information on any restrictions/ accommodations needed upon return.



# Tips for Disability/ Accommodation Issues

- If you have an employee who appears unable to perform the functions of their position because of a medical condition and/or who requests an accommodation, you need to engage in the interactive process under the ADA or state law.
- Get help writing a letter to the employee requesting that they obtain a detailed medical report from their provider. (You can follow up requesting more info if the employee offers only a vague note that does not provide you with the info you need.)
- Attach a job description to the letter if it would be helpful for the doctor to use.
- Get help evaluating the provider's response and next steps in light of same.

## Tip #7: Refine or Implement a Clearly Defined Remote Work Policy.

- Many organizations have accepted a hybrid (in person and virtual) model that combines remote work with time in the workplace.
  - Benefits:
    - Autonomy, flexibility for employees
      - better work-life balance
      - Less commute time
      - Reduce carbon footprint
      - Lower transport costs
    - Tool for recruitment and retention of employees
    - Increased morale
    - Increased productivity (?)
- Hybrid work brings its own challenges.
  - Differences in expectations
  - Communication preferences
  - Proximity bias
  - Unclear boundaries between work/home



# Actions to Take Now

- Communication:
  - Clear Expectations for the Role
    - Define job duties and responsibilities
    - Designated backup team members
    - Basing performance metrics on results achieved
  - Establishing which communications channels should be used for what purposes, during which hours
  - Define schedules and manage time – core days, core hours
  - Clear guidance for management and employees
- Technology
  - Differing facility with remote technologies
  - Ensuring access to mentorship and training for technology
  - Manage accessibility of technologies for individuals with disabilities
- Consistency
  - Ensure that remote employees are invited to/engaged in all meetings pertinent to their positions, receive the same development opportunities • have regular facetime with their managers and direct reports • are given access to the same resources • are evaluated the same way

## Tip #8: Be Sure to Document Performance Deficiencies

# Failure to Document Performance Deficiencies

## Issues We See Regularly

- Terminating employees or wanting to terminate them with no written record of issues.
- Not documenting all issues (what if I need to go back?).
- Avoiding issues that need to be addressed.
- Being accused of discrimination or unfair treatment, not having a clear record of performance issues.
- Employees claiming that they did not know there was an issue.
- Not communicating expectations clearly enough.
- Not providing employees with reviews or regular feedback.

\*\*\*Generational issues and differences on viewpoints.

## *Document, Document, Document!!*

### **The Importance of Documentation**

Documentation serves to:

- Put employee on notice of problem.
- Explain to employee how to correct conduct.
- Avoids legal exposure.
- Assists in any future dispute – including litigation.





Documentation provides objective evidence that an employee:

- Had or should have had knowledge of the **employer's expectations**;
- Was advised that his/her/their conduct or performance was **unacceptable**;  
and
- Was provided the **opportunity to correct** deficiencies, and was advised that failure to do so would result in additional discipline up to and including termination.



## ▪ Guidelines for Appropriate Documentation

1. The danger of forms.
2. Include date and, if appropriate, time.
3. List all persons involved.
4. Describe conduct involved.
5. Describe method of curing issue.
6. Usually avoid time limitations for improvement in performance.
7. Be as thorough as necessary.
8. Avoid promises and words that create false expectations / maintain discretion.

- Conn. Gen. Stat. Sec. 31-128e (b):
  - Each employer shall include a statement in clear and conspicuous language in any documented disciplinary action, notice of termination of such employee's employment or performance evaluation that the employee may, should the employee disagree with any of the information contained in such documented disciplinary action, notice of termination or performance evaluation, submit a written statement explaining his or her position. Such employee statement shall be maintained as part of such employee's personnel file and shall accompany any transmittal or disclosure from such file or records made to a third party.

Tip #9: Be Aware of How Your Team Communicates,  
and Encourage Inclusivity.

# Be Aware of Microaggressions

*A verbal or nonverbal slight, snub, or insult that communicates hostile, derogatory or negative messages targeted towards an individual who might identify as being from a marginalized group.*

- Microaggressions are constant and continual.
- Microaggressions are cumulative, and any one offense or put-down may represent the straw that breaks the camel's back.
- Microaggressions are constant reminders to people that they are second-class citizens.
- Microaggressions are energy-depleting.

# Examples of Microaggressions

Often every-day slights, indignities, put-downs and insults that minorities experience in their day-to-day interactions with well intentioned individuals who are unaware that they have engaged in an offensive act or made an offensive statement.

Some Initial Examples:

- You speak excellent English.
- Where are you really from?
- I think I will sit over here.
- I don't know how you do it with all those kids.
- Is that your natural hair?



Royal Pharmaceutical Society

# Encourage Your Employees to Be Authentic Allies

## Allyship is:

- A continuous process of building relationships based on trust, consistency and accountability with marginalized individuals and/or groups of people.
- Not self defined – work and efforts must be recognized by those you are seeking to ally with.
- An opportunity to grow and learn about ourselves, while building confidence in others.

## Tips for Being an Authentic Ally:

- Listen to your colleagues and appreciate them for their unique attributes.
- See something, say something.
- Remember you are at work and act professionally.
- Remind others they are at work and to act professionally.
- Intervene if you see something or hear about something that is inappropriate or seems to make someone feel uncomfortable.
- Tell someone if they say/do something that makes you uncomfortable.
- Don't get defensive if someone critiques what you said or did and suggests it could have been handled differently – learn from it.
- Report issues so they may be addressed.

# Initial Tips for Responding to an Issue

- **Take the report seriously.**
- Give the person your full attention.
- Listen and acknowledge the concern.
- Don't feel the need to debate the issue or give an instant solution – just listen and appreciate how you can be helpful.
- Encourage the person to come forward with the issue and assist them in doing so.
- Involve management and/or HR.



# Tip #10: Invest in Training Your Managers.

# Invest in Your Managers

## Trends:

- Assuming managers know how to lead without providing them with education/ training on what it takes to be an effective leader.
- Managers not recognizing or reporting legal issues which require the organization to take action (FMLA, ADA, mental health, discrimination, substance abuse, etc.).
- Managers not communicating effectively with their employees.
- Managers being too friendly/ too loose with their employees.
- Managers sending the wrong message to their employees.
- Managers not documenting things that should be documented.

## Action Steps:

- Have regular training sessions devoted to leadership development.
- Educate your managers on your organization's employment policies and applicable employment laws.
- Stress the importance of documentation and assist your managers with documentation and difficult situations.
- Check in with your managers regularly regarding what type of support they need / any issues on their teams.
- Stress the obligation to report any issues to leadership.
- Encourage collaboration between managers.
- Consider Having Us Help with Your Training!

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