

Delaware

Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

Topics

I. Discrimination

The Delaware fair employment practices law requires a person to file a charge of discrimination within 120 days of an alleged unlawful employment practice or its discovery. This amendment increases the limitations period from 120 days to 300 days, aligning it with the statute of limitations under federal employment discrimination law.

19 Del. C. § 712 (Effective Date 07/19/2016).

II. Pre-Employment Inquiry Guidelines

No new laws or regulations enacted in 2015 or 2016.

III. Family and Medical Leave

A. Family Responsibility Discrimination

Delaware law prohibits employment discrimination on the basis of race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, national origin, status as a victim of domestic violence, a sexual offense, or stalking, membership in a volunteer emergency responder organization, or disability. The amendments add “family responsibilities” to this list of protected classes.

Family responsibilities refer to an employee’s obligations to care for a family member that would qualify as “covered” under the federal Family and Medical Leave Act. The amendments clarify that employers may still enforce their own leave, scheduling, absenteeism, work performance, and benefits policies, but must do so in a non-discriminatory manner regarding employees with family responsibilities.

Delaware’s employment nondiscrimination law applies to employers with four or more employees within the state.

19 Del. C. § 710 and 19 Del. C. § 711 (Effective Date 12/30/2016).

B. Reproductive Health Discrimination

Delaware law prohibits employment discrimination on the basis of race, marital status, genetic information, color, age, religion, sex (including pregnancy), sexual orientation, gender identity, national origin, status as a victim of domestic violence, a sexual offense, or stalking, membership in a volunteer emergency responder organization, or disability. The amendments add “reproductive health decisions” to this list of protected classes.

Reproductive health decisions are those related to the use of a particular drug, device, or medical service, including contraception, fertility control, or the planned initiation or termination of a pregnancy.

Delaware’s employment nondiscrimination law applies to employers with four or more employees within the state.

19 Del. C. § 710 and 19 Del. C. § 711 (Effective Date 12/30/2016).

C. Domestic Violence Leave

Delaware has amended its fair employment practices statute to increase assistance to, and prevent discrimination against, victims of domestic violence, sexual assault, and stalking.

The amendments require an employer to make reasonable accommodations for an employee due to limitations known to the employer that are related to domestic violence, a sexual offense, or stalking, unless the employer can demonstrate that the accommodation would impose an undue hardship on the employer's business operations. Use of accrued leave is a potential reasonable accommodation. The statute also lists the following as a reasonable accommodation: making reasonable changes in the schedules or duties of the job in question that would accommodate the victim of domestic violence, a sexual offense, or stalking, enabling the person to satisfactorily perform the essential duties of the job in question.

The statutory provision's specification that reasonable accommodations must be provided for "limitations known to the employer" implies that an employee who is a victim of domestic violence, a sexual offense, or stalking must make his or her status as such known to the employer and request an accommodation, or follow the employer's policy for requesting use of accrued leave. The statute does not include provisions covering the timing of a request for leave or the duration of leave. However, the employer can require that the sexual offense, domestic violence, or stalking must be verified by an official document, such as a court order, or by a reliable third-party professional, including a law-enforcement agency or officer, a domestic violence or domestic abuse service provider, or health care provider.

In addition, the amendments make it an unlawful employment practice for an employer to:

- Fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because the individual was the victim of domestic violence, a sexual offense, or stalking; or
- Fail or refuse to make reasonable accommodations to the limitations known to the employer and related to domestic violence, a sexual offense, or stalking, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such employer.

19 Del. C. § 710 and 19 Del. C. § 711 (Effective Date 12/30/2015).

IV. Wage and Hour Law

Delaware has amended its fair employment practices statute to prohibit an employer from taking the following unlawful employment actions:

- requiring as a condition of employment that an employee refrain from inquiring about, discussing, or disclosing his or her wages or the wages of another employee;
- requiring an employee to sign a waiver or other document that denies an employee the right to disclose or discuss his or her wages; or
- taking adverse action against an employee who inquires about, discusses, or discloses his or her own wages or the wages of another employee.

The new law does not create an obligation for an employer or employee to disclose wages.

19 Del. C. § 711 (Effective Date 6/30/2016).

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

No new laws or regulations enacted in 2015 or 2016.

IX. Miscellaneous

A. Employer Access to Social Media

Delaware has joined the list of states that have enacted laws protecting an employee's or applicant's right to privacy with respect to social networking site passwords and account information. The new law makes it unlawful for an employer to require or request that an employee or applicant:

- Disclose a username or password to personal social media accounts;
- Access personal social media accounts in front of an employer (often referred to as "shoulder surfing");
- Be required to use personal social media accounts; or
- Disclose any personal social media accounts.

The new law also prohibits an employer from retaliating against an employee or applicant for not complying with a request or demand concerning a personal social media account.

The law contains exceptions relating to investigations, employer devices and accounts, the public domain, and compliance with screening and monitoring requirements:

- **Screening and Monitoring:** An employer may screen applicants before hiring, or monitor or retain employee communications pursuant to federal or state law or a self-regulatory organization.
- **Investigations:** An employer may require or request an employee to disclose a username, password, or social media account reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations pursuant to an employer's personnel policy, federal or state law, case law, or other rules and regulations. However, the social media-related information must be used solely for the purposes of the investigation.

- **Public Domain:** The law does not apply to information in the public domain.
- **Employer Devices and Accounts:** The law does not apply to electronic communication devices supplied by the employer or an account or service provided by the employer or used for business purposes.

19 Del. C. § 709A (Effective Date 08/07/2015).

B. Electronic Smoking Devices

Under Delaware law, smoking is prohibited in indoor workplaces. The new law amends the workplace smoking prohibition to include the use of an electronic smoking device. Under the amendment, “smoking” includes the use of an electronic smoking device that creates an aerosol or vapor, in any manner or in any form. An electronic smoking device is any product containing or delivering nicotine or any other similar substance intended for human consumption that can be used by a person to simulate smoking through inhalation of vapor or aerosol from the product. The term includes any such device, whether manufactured, distributed, marketed, or sold as an e-cigarette, e-cigar, e-pipe, e-hookah, or vape pen, or under any other product name or descriptor.

Vapor establishments are excepted from the new prohibition. A vapor establishment is a business that (1) generates at least 80% of its revenue from the sale of electronic smoking devices and substances for use within electronic smoking devices and (2) does not share indoor common space with other businesses unless there are doors from the vapor establishment to the indoor common space that remain closed other than for ingress and egress.

16 Del. C. § 2901 through 16 Del. C. § 2908 (Effective Date 10/5/2015).

C. Partial Unemployment Reporting & Recordkeeping

A new Delaware unemployment regulation governs benefits for those who are partially unemployed, i.e., an employee who, during any given week, is employed by his or her employer but works less than his or her regular full-time hours because of a lack of full-time work.

The new regulation requires that, after the end of any week in which an employer furnishes any employee with less than regular full-time work (or the earnings equivalent thereto), the employer or employee must deliver, on the customary payday for the pay period during which full-time work was unavailable, a completed Low Earnings Report (Form UC-114) signed by both the employer and the employee to the nearest Division of Unemployment Insurance local office.

Additionally, each employer must keep for four years payroll records containing the following information on each employee determined to be eligible for partial unemployment insurance: 1) Amount of wages earned by week; 2) Specific dates of weeks in which the employee worked less than full-time; and 3) Number of hours of work lost by each employee, if any, due to the employee’s unavailability for work.

19 DE Admin. Code 1202 (Effective Date 07/01/2015).