

Nebraska

Employment Law Workbook Addendum

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

Topics

I. Discrimination

A. Discrimination & Reasonable Accommodation due to Pregnancy, Childbirth, or Related Medical Conditions

Fair employment law provisions have been amended to address discrimination and reasonable accommodations due to pregnancy, childbirth, or related medical conditions.

Discrimination

The amendments provide that an employer commits an unlawful employment practice if it discriminates against an individual who is pregnant, has given birth, or has a related medical condition regarding application procedures, hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. Additionally, when referring to an individual who is pregnant, has given birth, or has a related medical condition, discrimination includes:

- Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of her pregnancy, childbirth, or related medical conditions;
- Participating in a contractual or other arrangement or relationship that has the effect of subjecting an individual who is pregnant, has given birth, or has a related medical condition to discrimination in the application or employment process, including a relationship with an employment agency, a labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs;
- Using standards, criteria, or methods of administration that have the effect of discrimination on the basis of pregnancy, childbirth, or related medical conditions, or perpetuate discrimination against others who are subject to common administrative control;
- Not making reasonable accommodations to an applicant or employee's known physical limitations related to giving birth, pregnancy, or a related medical condition unless the employer can demonstrate the accommodation would impose an undue hardship on the operation of its business;
- Denying employment opportunities to an applicant or employee who is pregnant, has given birth, or has a related medical condition if the denial is based on the employer's need to make a reasonable accommodation;
- Using qualification standards, employment tests, or other selection criteria that actually or tends to screen out an individual or a class of individuals who are pregnant, have given birth, or have a related medical condition

unless the selection criteria are shown to be job-related for the position in question and consistent with business necessity;

- Conducting a medical examination or asking an applicant whether she is pregnant, has given birth, or has a related medical condition, except that:
 - Pre-employment inquiries into the applicant's ability to perform job-related functions are permitted;
 - A test to determine the illegal use of drugs is not a medical examination; and
 - An employer can require a medical examination after an employment offer has been made and before work begins, and can condition the offer on the results of the examination if:
 - All entering employees are subjected to an examination;
 - Information obtained regarding the applicant's medical condition or history is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:
 - Supervisors and managers can be informed regarding necessary restrictions on the employee's work or duties and necessary accommodations;
 - First-aid and safety personnel can be informed, when appropriate, if the pregnancy, childbirth, or related medical conditions might require emergency treatment;
 - Government officials investigating compliance with the law must be provided relevant information on request, and
 - Information must be made available in accordance with state workers' compensation laws.
 - The results of the examination are used only in a manner not inconsistent with state fair employment laws;
- Requiring a medical examination or asking an employee whether she is pregnant, has given birth, or has a related medical condition unless the examination or inquiry is shown to be job-related and consistent with business necessity. A test to determine the illegal use of drugs is not a medical examination. An employer can conduct voluntary medical examinations, including voluntary medical histories, that are part of an employee health program available to employees at the worksite and can make inquiries into the ability of an employee to perform job-related functions if the information obtained regarding the medical condition or history of the employee is kept separate (see above);
- Requiring an employee to take leave under any leave law or employer policy if another reasonable accommodation can be provided to the

known limitations related to the employee's pregnancy, childbirth, or related medical conditions; and

- Taking adverse action against an employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation to the known limitations related to the employee's pregnancy, childbirth, or related medical conditions.

Reasonable Accommodation

Under the amendments, a reasonable accommodation includes:

- Acquiring equipment for sitting;
- More frequent or longer breaks;
- Periodic rest;
- Assistance with manual labor;
- Job restructuring;
- Light-duty assignments;
- Modified work schedules;
- Temporary transfers to less strenuous or hazardous work;
- Time off to recover from childbirth;
- Break time and appropriate facilities for breastfeeding or expressing breast milk.

As with accommodations relating to disability, a reasonable accommodation does not include accommodations an employer can demonstrate require significant difficulty or expense so as to create an undue hardship. Factors to consider when determining whether an accommodation creates an undue hardship include:

- The nature and the cost of the accommodation needed;
- The overall financial resources of the facility or facilities involved in providing the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources, or other impact the accommodation has on the facility's operation;
- The employer's overall financial resources, overall business size with respect to the number of employees, and the number, type, and location of its facilities; and
- The type of operation(s) of the employer, including the composition, structure, and functions of the workforce, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the employer.

R.R.S. Neb. § 48-1102 and R.R.S. Neb. § 48-1107.01 (Effective Date 07/13/2015).

B. National Guard Protections

Nebraska law incorporates parts of the federal Uniformed Services Employment and Reemployment Rights Act (USERRA), making those provisions applicable to all military members in Nebraska performing duty in active service. USERRA prohibits discrimination against, and provides reemployment rights and other benefits for, persons who must leave employment to perform service in the United States military.

The amendment specifies that these protections are provided to any person employed in Nebraska who is a member of the National Guard of another state and who is called into active service by the governor of that state. Thus, a Nebraska employee who is a member of the National Guard of another state is entitled to the employment protections and other benefits afforded under the adopted sections of USERRA.

R.R.S. Neb. § 55-161 (Effective Date July 21, 2016).

II. Pre-Employment Inquiry Guidelines

A new law allows private employers to adopt a policy that gives certain veterans and their spouses hiring and promotion preferences over other equally qualified applicants or employees, which will not be considered a violation of state fair employment laws. If adopted, the policy must be written and applied uniformly to hiring and promotion decisions, and a copy must be provided to the state labor department, which will keep a registry of employers with policies.

Under the law, a veteran is either: 1) A person who passed a physical fitness determination, completed training, performed full-time duty in the U.S. armed forces, and was honorably or generally (under honorable conditions) discharged or otherwise separated from service; or 2) A spouse of a veteran who has a 100% permanent disability (per the U.S. Department of Veterans Affairs) or was killed in hostile action.

If a policy is adopted, a veteran desiring to take advantage of it must provide the employer with a copy of his or her Department of Defense Form 214 (DD Form 214) or its successor form. A veteran's spouse must provide the employer with a copy of the veteran's DD 214 or its successor form, proof of marriage, and either a copy of the veteran's disability verification from the V.A. demonstrating a 100% disability rating or a copy of the veteran's DD Form 1300 or its successor form documenting the veteran was killed in hostile action.

R.R.S. Neb. § 48-238 (Effective Date 08/30/2015).

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

Nebraska law prohibits employers from discriminating against employees in matters of compensation based on gender. Prior to the amendment, the state's equal pay provisions had applied to employers with fifteen or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year. The amendment expands this definition to include all employers with two or more employees for each working day in each of 20 or more weeks in the current or preceding calendar year.

Employers must keep an abstract or copy of the equal compensation statutes posted in a conspicuous place.

R.R.S. Neb. § 48-1220 (Effective Date July 21, 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

Nebraska has joined the list of states that restrict employer access to employees' or applicants' personal social media accounts. The new Workplace Privacy Act ("Act") prohibits an employer from:

- Requesting or requiring an employee or applicant to disclose a username, password, or any other related account information that allows access to his or her personal account;
- Requesting or requiring an employee or applicant to access his or her personal account in the employer's presence ("shoulder surfing");
- Requiring an employee or applicant to add anyone, including the employer, to his or her list of personal account contacts;
- Requiring or coercing an employee or applicant to change the settings on his or her personal account to allow others to view the contents of the account;
- Requiring an employee or applicant to waive any protections granted under the Act; and
- Retaliating or discriminating against an employee or applicant because he or she files a complaint under the Act or assists in an investigation, proceeding, or action concerning a violation of the Act.

The Act prohibits an employee from downloading or transferring any of the employer's non-public, proprietary information or private financial data to an employee's personal account without authorization. The new law does not restrict an employer's right to:

- Request or require an employee or applicant to disclose account access information to the employer for electronic communication equipment supplied by or paid for (in whole or in part) by the employer, or other accounts or services provided by the employer;

- Restrict an employee's access to certain websites while using electronic communication equipment supplied by or paid for (in whole or in part) by the employer;
- Monitor, review, access, or block electronic data stored on an employer's network or on electronic communication equipment supplied by or paid for (in whole or in part) by the employer;
- Access an employee's or applicant's information that is already in the public domain;
- Conduct employer and law enforcement investigations; and
- Comply with state and federal employee and applicant screening laws.

If an employer unintentionally receives the username, password or other authentication information to gain access to an employee's personal account, the employer must delete the information as soon as practicable.

The law provides a private right of action for an employee who alleges a violation of the Act.

R.R.S. Neb. § 48-3501 (Effective Date July 21, 2016).

B. Data Security Breach Notification

Nebraska's data breach statute requires an individual or entity with personal information to provide notice to affected resident individuals as soon as possible if an unauthorized use of the personal information has or is reasonably likely to occur. This amendment modifies certain statutory definitions and augments reporting procedures to include state law enforcement.

The statute defines personal information as a resident's first name or first initial and last name in combination with:

- Social security number;
- Drivers' license number or state ID number;
- Account number with access code or password;
- Unique electronic ID number or routing code with access code or password; or
- Unique biometric data.

The amendment adds that personal information also includes:

- A user name or email address in combination with a password or security question and answer that would permit access to an online account.

The statute defines "security breach" as the unauthorized acquisition of unencrypted computerized data that compromises the security, confidentiality, or integrity of personal information maintained by a covered entity. This amendment clarifies that data is not

considered encrypted if the confidential encryption process or key was or is reasonably believed to have been acquired as a result of the breach of the security of the system.

The statute requires a covered entity to notify affected Nebraska residents in the event of a data security breach. The amendment adds a requirement that the breach must also be reported to the state attorney general no later than the time the notice is reported to the affected residents.

R.R.S. Neb. § 87-802 and R.R.S. Neb. § 87-803 (Effective Date July 21, 2016).