

Tennessee

Employment Law Workbook Addendum

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

Topics

I. Discrimination

No new laws or regulations enacted in 2015 or 2016.

II. Pre-Employment Inquiry Guidelines

Tennessee state law prohibits local governments from enacting any ordinance, resolution, or other provision regulating civil rights, leaves of absence, or health insurance that deviates from, modifies, supplements, adds to, changes, or varies in any manner from state law. This amendment adds a provision that a local government cannot, as a condition of doing business within its jurisdictional boundaries or contracting with the local government, prohibit an employer from requesting any information on an application for employment or during the process of hiring a new employee. Thus, the amendment effectively prohibits a Tennessee municipality from enacting a local ban-the-box ordinance.

Tenn. Code Ann. § 7-51-1802 (Effective Date 03/17/2016).

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

Tennessee law provides requirements employers must follow upon the garnishment of a debtor's income. The amendment creates new definitions for "employer" and "employee," and expands the law to include garnishment of the earnings of independent contractors and similarly situated workers.

Under the amended law, an "employer" is any person or entity that employs, retains, or contracts with another person for services for compensation in any form, notwithstanding the status of the person employed, retained, or contracted with as an employee, agent, contractor, or subcontractor. Likewise, an "employee" is any person employed, retained, or contracted by an employer who receives compensation from the employer for services performed, notwithstanding the status of the person as an employee, agent, contractor, or subcontractor. As a result, the earnings of an independent contractor are subject to garnishment under the law.

The amended law replaces "salaries, wages, and other compensation due from an employer" with "exempt earnings due from the employer." Tennessee law defines "earnings" as compensation in any form, paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

Tenn. Code Ann. § 26-2-102 and Tenn. Code Ann. § 26-2-214 (Effective Today)

V. Drug Testing

Tennessee has changed its penal statutes concerning marijuana. However, the laws do not contain employment-related provisions.

Before the amendments, to not qualify as unlawful “marijuana,” cannabis oil with cannabidiol containing less than 0.9% of tetrahydrocannabinol (THC) had to be transferred, dispensed, possessed or administered as part of a clinical research study on treating intractable seizures supervised by a physician practicing at a hospital or associated clinic affiliated with a university having a college or school of medicine. This provision has been removed.

Additionally, a new statute provides that a Class C misdemeanor is committed if a person knowingly possesses cannabis oil containing cannabidiol that has less than 0.9% of THC unless:

- The bottle containing the oil is labeled by the manufacturer as containing cannabidiol with less than 0.9% of THC; and
- The oil was obtained legally in the United States and outside Tennessee and the person retains proof of the legal order or recommendation from the issuing state.

Tenn. Code Ann. § 39-17-402 and Tenn. Code Ann. § 39-17-401 (Effective Date 05/04/2015).

VI. Noncompete and Other Employment Agreements

No new laws or regulations enacted in 2015 or 2016.

VII. Workplace Safety

Tennessee law allows an individual with a valid handgun carry permit to transport and store a firearm or ammunition in his or her motor vehicle in a public or private parking area if he or she is permitted to park in the location, and (1) the firearm or ammunition is stored in the vehicle in a place hidden from ordinary observation when the person is in the vehicle, or (2) is locked in the vehicle’s trunk, glove box, or interior, or in a container securely affixed to the vehicle, if the individual is not in the vehicle.

The new law prohibits an employer from discharging or taking adverse employment action against an employee based solely on the employee’s transportation or storage of a firearm or ammunition in his or her vehicle in a workplace parking area. For purposes of the new law, “employee” means a person who performs services for an employer for valuable consideration and who possesses a valid handgun carry permit. Employees pursuing a claim for violation of the new law are entitled to seek damages, injunctive relief, and attorneys’ fees, and must file suit within one year of the termination or adverse employment action. The new law applies to employee terminations and adverse employment actions occurring on and after the law’s effective date.

Tennessee law also allows an employer to prohibit the possession of weapons by any person, including holders of valid handgun permits, on company premises. The new law states that it cannot be construed as prohibiting an employer from prohibiting firearms or firearm ammunition on the employer’s premises. The new law further provides that the presence of a firearm or ammunition within an employer’s parking area in accordance with state law does not by itself constitute a failure by the employer to provide a safe workplace.

Tenn. Code Ann. § 50-1-312 (Effective Date 07/01/2015).

VIII. Workers’ Compensation

Among various changes to workers’ compensation laws, two notable amendments concern settling claims for disability benefits.

The first amendment provides that in any case where an employer has paid permanent partial disability benefits to an employee in an attempt to settle a claim for workers' compensation benefits, but the employee and employer have not entered into a settlement agreement that has been approved by a workers' compensation judge, the statute of limitations for filing a claim to recover workers' compensation benefits is extended for two years from the date the last payment of permanent partial disability benefits was made to the employee.

The second amendment provides that an agreement settling a claim for permanent disability benefits must be approved by a workers' compensation judge, and an agreement not so approved is void.

Both amendments apply to injuries occurring on or after the law's effective date.

Tenn. Code Ann. § 50-6-203 and Tenn. Code Ann. § 50-6-240 (Effective Date 05/04/2015).

IX. Miscellaneous

A. Mandatory Use of E-Verify

The Tennessee Lawful Employment Act (TLEA) was enacted in 2011. Under the TLEA, all private employers with six or more employees are required to either:

- enroll in and use the federal E-Verify program; or
- request and maintain approved employee identification documents, such as a driver's license, state photo identification card, U.S. birth certificate, passport, or other documentation.

The amendments remove the second option for employers with 50 or more employees, and require that employers with 50 or more employees enroll in E-Verify by January 1, 2017. Employers with fewer than 50 employees may still use the approved employee identification documents rather than enroll in E-Verify.

The bill also strengthens the penalty provisions for violations of the TLEA, which imposes a \$500 fine for each violation. Per the amendment, if an employer knowingly violates the TLEA, it will be subject to a \$500 penalty and an additional penalty of \$500 per day for each day the employer is in violation, beginning 45 days after the employer receives notice of the violation from the Commissioner of the Department of Labor and Workforce Development.

The amendments also revise the administrative investigation procedures when a violation of the TLEA is reported.

Tenn. Code Ann. § 50-1-703 (Effective Date 07/01/2016).

B. Seasonal Employer Status

Under Tennessee law, a seasonal employer is one that customarily carries on production operations only within a regularly recurring active period or periods of less than an aggregate of 36 weeks in a calendar year. Effective July 1, 2020, the amendment redefines a "seasonal employer" as one that:

1. customarily employs workers only during a regularly recurring period of 26 consecutive weeks or less within a calendar year, and
2. has been determined to be a seasonal employer by the Department of Labor and Workforce Development.

With respect to the second requirement, the amendment provides that no employer will be considered a seasonal employer until the Department issues a written determination that an applicant is a seasonal employer. Employers seeking this designation must submit applications to the Department between September 1st and October 31st of each year. The designations will remain in effect for the following year without retroactivity. In addition, applicants must have an experience rating, no unpaid liability, and not be delinquent in submitting any premium and wage reports or required payments in the four quarters preceding the application. The amendment also provides that if a seasonal worker performs tasks outside of the 26 consecutive week period, the seasonal employer will be disqualified from this designation and all wages paid to those employees will be considered nonseasonal wages.

The Department's seasonal employer determination is final and conclusive unless the employer has timely filed with the Division of Employment Security a written application for review and redetermination within 30 calendar days after the notice is given. The Department may, on its own motion, reconsider the active seasonal period and seasonal employer status. The Department may also terminate the employer's seasonal status upon receipt of a written request from the seasonal employer.

The amendment includes a posting requirement. A seasonal employer must conspicuously display the Department's seasonal determination on the employer's premises. Seasonal employers must provide, prior to the beginning of each active seasonal period and prior to the performance of any service, provide each seasonal worker or prospective seasonal worker with written notice that seasonal wages are potentially excludable from the base period. The notice must also advise as to the beginning and ending dates of the active seasonal period.

Under the amendment, wages from seasonal employment will not be included in the base period for any week of unemployment commencing during the inactive seasonal period between two successive active seasonal periods if:

- the worker performs the services in an active seasonal period, and
- reasonable assurance is provided that the claimant will perform the service for the seasonal employer during the following active seasonal period.

If a worker is not offered an opportunity to perform in the next active seasonal period and there was reasonable assurance of employment, the seasonal worker will be entitled to retroactive payment of benefits for each week that the seasonal worker previously filed a timely claim for benefits.

Tenn. Code Ann. § 50-7-213, Tenn. Code Ann. § 50-7-306, Tenn. Code Ann. § 50-7-404, and Tenn. Code Ann. § 50-7-715 (Effective Date 07/01/2016).

C. Data Security Breach Notification

Tennessee has made various amendments to its data security breach notification law. The amendment adds to the definition of "unauthorized person" an employee of the information holder who obtains personal information and intentionally uses it for an unlawful purpose. The amendment also deletes the word "unencrypted" from the statute's definition of "breach of the security of the system." Therefore, a breach is simply "the unauthorized acquisition of data," instead of the "unauthorized acquisition of unencrypted data."

The crux of the amendment adds a timeframe for providing notice to affected individuals. The data security breach law previously stated that the breach notification had to be made in

the most expedient time possible and without unreasonable delay. The amendment clarifies that notice of the disclosure shall be made immediately, but no later than 14 days from the discovery or notification of the breach. A longer time period for notification is permissible where needed for the legitimate needs of law enforcement.

Tenn. Code Ann. § 14-18-2107 (Effective Date 07/01/2016).

D. Use of Autonomous Communication Device

Tennessee law prohibits a person from operating a motor vehicle with a television receiver, video monitor, or a television or video screen capable of receiving a broadcast signal.

This amendment creates an exception for a vehicle's autonomous technology. The statute defines "autonomous technology" as technology installed in a motor vehicle that has the capability to drive the motor vehicle without the active physical control or monitoring by a human operator. The amendment allows an operator to use an integrated electronic display when the vehicle's autonomous technology is engaged.

Tenn. Code Ann. § 55-9-105 (Effective Date 03/22/2016).

E. Electronic Unemployment Communications & Reports

A new statute provides that unemployment-related notifications, notices, decisions, or correspondences can be electronically sent to or received by the state labor department if an individual or entity agrees to this communication method.

Additionally, a reporting provision has been amended to provide that, beginning January 1, 2016 and in each subsequent quarter, unless federal law establishes a lower threshold, employers with 10 or more employees must electronically file wage and premium reports containing the name, Social Security number, and gross wages of each employee. For reports due for the quarter beginning July 1, 2016, employers that fail to electronically file will be assessed a \$50 penalty for each month or portion thereof if the report is past due, up to a total per-report penalty of \$500.

Tenn. Code Ann. § 50-7-404 and Tenn. Code Ann. § 50-7-101 et. seq. (Effective Date 07/01/2015).

F. Franchisees

Tennessee has amended its right-to-work law. Under the amendment, for purposes of the right-to-work law, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose, unless pursuant to a voluntary agreement entered into between the United States Department of Labor and a franchisee. The terms "franchisor" and "franchisee" have the same meaning as under title 16, section 436.1 of the Code of Federal Regulations.

Tenn. Code Ann. § 50-1-208 (Effective Date 04/10/2015).