

Utah

Employment Law Workbook Addendum

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

Topics

I. Discrimination

A. Discrimination Protection for Breastfeeding Employees

Utah has amended the state Antidiscrimination Act to require employers to provide reasonable accommodations for an employee related to pregnancy, childbirth, breastfeeding, or related conditions. Accordingly, the amendments provide that an employer may not:

- Refuse to provide employee-requested accommodations related to pregnancy, childbirth, breastfeeding, or related conditions unless the employer demonstrates that the accommodation would require an undue hardship;
- Terminate the employee if another reasonable accommodation can be provided; or
- Deny employment opportunities, if the denial is based on the employer's need to make reasonable accommodations.

The amendments define "undue hardship" as an action that requires significant difficulty or expense when considered in relation to factors such as the size of the entity, the entity's financial resources, and the nature and structure of the entity's operation.

The amendments allow the employer to require an employee to provide certification from the employee's health care provider concerning the medical advisability of a reasonable accommodation. The certification shall include:

1. The date the reasonable accommodation becomes medically advisable;
2. The probable duration of the reasonable accommodation; and
3. An explanatory statement as to the medical advisability of the accommodation.

However, the employer may not require certification to allow the employee to obtain more frequent restroom, food, or water breaks. An employer is also not required to permit the employee's child to be at the workplace for the purposes of accommodating the pregnancy, childbirth, breastfeeding, or related conditions.

Lastly, the amendments require the employer to include written notice of an employee's rights to reasonable accommodations for the above-mentioned conditions in an employee handbook or to post this notice in a conspicuous place in the employer's place of business.

Utah Code Ann. § 34A-5-102 and Utah Code Ann. § 34A-5-106 (Effective Date 05/10/2016).

B. Discrimination Protections for Breastfeeding Employees

The Utah Antidiscrimination Act prohibits an employer from refusing to hire or promote, discharging, demoting, terminating, retaliating against, harassing, or discriminating against in matters of compensation or in terms, privileges, and conditions of employment, any person who is otherwise qualified, because that person falls under a protected classification. Pregnancy, childbirth, and pregnancy-related conditions are included among the list of protected classifications under the Act.

This amendment adds breastfeeding or medical conditions related to breastfeeding to the definition of pregnancy, childbirth, and pregnancy-related conditions. Thus, an employer is prohibited from discriminating against an employee because she is breastfeeding or has a medical condition related to breastfeeding.

Utah Code Ann. § 34A-5-102(o) (Effective Date 05/12/2015).

C. Compensation Discrimination Remedy

The Utah Antidiscrimination Act prohibits employers from discriminating against employees in matters of compensation. The Utah Division of Antidiscrimination and Labor has jurisdiction over administrative complaints for violations of the Antidiscrimination Act and may award back pay and benefits as a remedy for claims for compensation discrimination. This amendment increases the amount of available damages by providing for an award of an additional amount equal to the amount of back pay available to the complainant. The respondent can avoid the additional damages award by showing that the act or omission that gave rise to the violation was made in good faith and that the respondent had reasonable grounds to believe the act or omission was not discriminatory.

Utah Code Ann. § 34A-5-104 and Utah Code Ann. § 34A-5-107 (Effective Date 05/10/2016).

D. Discrimination Based on Sexual Orientation or Gender Identity

Utah's Antidiscrimination Act prohibits discrimination on the basis of race, color, sex, pregnancy, age, religion, national origin, and disability. The amendment adds sexual orientation and gender identity as protected classes under the Act and strengthens the Act's prohibition against discrimination based on religion. The amendment also acts to preempt any local law prohibiting employment discrimination.

Definitions

The Act applies to employers of 15 or more employees within the state for each working day in each of 20 calendar weeks or more in the current or preceding calendar year. The definition of "employer" does not include religious organizations. The amendment clarifies that religious organizations include a religious corporation, association, society, educational institution, or leader when that individual is acting in the capacity of a religious leader. The definition of "employer" now also specifically excludes the Boy Scouts of America.

"Gender identity" has the meaning ascribed to it in the Diagnostic and Statistical Manual (DSM-5). Gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose.

"Sexual orientation" means an individual's actual or perceived orientation as heterosexual, homosexual, or bisexual.

Effect on Workplace Policies

The amendment provides that an employer may continue to enforce certain workplace policies and procedures so long as those policies and procedures do not discriminate based on an employee's gender identity. The Act does not prohibit an employer from adopting reasonable dress and grooming standards not prohibited by other provisions of state or federal law, provided that these standards afford reasonable accommodations based on gender identity to all employees. In addition, an employer may adopt and enforce reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, again provided that such rules and policies afford reasonable accommodations based on gender identity.

Religious Liberty Protections

The amendment provides that the Antidiscrimination Act may not be interpreted to infringe on an individual's rights of expressive association or the free exercise of religion protected by the state and federal Constitutions. In addition, the amendment adds provisions strengthening the Act's prohibition against discrimination based on religion. The Act now protects an employee's ability to express his or her religious or moral beliefs and commitments in the workplace in a reasonable, non-disruptive, and non-harassing way on equal terms with similar types of expression of beliefs or commitments allowed by the employer in the workplace, unless the expression is in direct conflict with the essential business-related interests of the employer. Further, an employer may not discriminate against an employee due to his or her lawful expression or expressive activity outside of the workplace regarding the employee's religious, political, or personal convictions, including convictions about marriage, family, or sexuality, unless the expression or expressive activity is in direct conflict with the essential business-related interests of the employer.

Preemption of Local Laws

The amendment adds a provision to the Antidiscrimination Act expressly stating that the Act supersedes and preempts any ordinance, regulation, standard, or other legal action by a local government entity, a state entity, or the governing body of a political subdivision that relates to the prohibition of discrimination in employment. This is a significant provision in that several localities in Utah have enacted laws prohibiting discrimination based on sexual orientation and gender identity, including Salt Lake County, Summit County, Grand County, Salt Lake City, Park City, Moab, Ogden, and Logan, among others. These local laws may no longer be enforced.

Utah Code Ann. § 34A-5-102, Utah Code Ann. § 34A-5-102.5, Utah Code Ann. § 34A-5-102.7, Utah Code Ann. § 34A-5-104, Utah Code Ann. § 34A-5-106, Utah Code Ann. § 34A-5-107, and Utah Code Ann. § 34A-5-109 through Utah Code Ann. § 34A-5-112 (Effective Date 05/12/2015).

E. OSHA Anti-Retaliation

Utah's Occupational Safety and Health Act protects employees who file complaints, institute or testify in proceedings, or exercise rights related to the Act. The amendments add that a person may not retaliate against an employee for taking any of those actions, and provide a method for an employee who believes he or she has experienced retaliation to report the violation to the Division of Occupational Safety and Health (DOSH).

The amendments allow a party to seek review of an order issued by DOSH after its investigation of an alleged violation. The party seeking review has 30 days in which to request review from the Division of Adjudication. The Division of Adjudication then conducts a de novo review of the underlying order and may either order that the violation cease and

reinstate the employee with back pay, or issue an order stating its determination that there was no violation. The amendments also allow a party to appeal the Division of Adjudication's order to an administrative law judge assigned by the Division of Adjudication.

Utah Code Ann. § 34A-6-203 of the Utah Code (Effective Date 05/10/2016).

II. Pre-Employment Inquiry Guidelines

Under a new law, private employers can adopt a veterans' preference employment policy. Moreover, the law provides that granting preference to a veteran is not a violation of Utah's Antidiscrimination Act or any other state or local equal employment opportunity law.

If adopted, a policy must be in writing and uniformly applied to employment decisions regarding hiring, promotion, or retention during a reduction-in-force. Also, the policy must be publicly posted at the place of employment and online if the employer has a website or posts employment opportunities online.

Under the law, employers can require veterans to submit a Department of Defense form DD 2014 to be eligible for the preference. A "veteran" is either: A) one who served on active duty in the armed forces for more than 180 consecutive days, or was a member of a reserve component who served in a campaign or expedition for which a campaign medal has been authorized and who has been separated or retired under honorable conditions; or B) incurred an actual service-related injury or disability in the line of duty whether or not that person completed 180 consecutive days of active duty. Moreover, to be "preference eligible," an individual must be either: 1) one who served on active duty in the armed forces for more than 180 consecutive days, or was a member of a reserve component who served in a campaign or expedition for which a campaign medal has been authorized and who has been separated under honorable conditions; 2) a veteran with a disability, regardless of the percentage of disability; 3) a spouse or unmarried widow(er) of a veteran; 4) a purple heart recipient; or 5) a retired member of the armed forces.

Utah Code Ann. § 34-50-101 through Utah Code Ann. § 34-50-105 (Effective Date 05/12/2015).

III. Family and Medical Leave

No new laws or regulations enacted in 2015 or 2016.

IV. Wage and Hour Laws

Utah law requires that final wages be paid within 24 hours of separation when an employer ends employment (e.g., firing, layoff), and penalties apply for untimely payment. The law has been amended to clarify the 24-hour requirement. Specifically, the amendments provide that an employer meets the 24-hour requirement if it either:

- Mails wages in an envelope postmarked with a date that is no more than one day after separation; or
- Within 24 hours of separation, direct deposits wages into the employee's account or hand-delivers wages to the employee.

Utah Code Ann. § 34-28-5 (Effective Date 05/12/2015).

V. Drug Testing

No new laws or regulations enacted in 2015 or 2016.

VI. Noncompete and Other Employment Agreements

Utah has enacted the Post-Employment Restrictions Act to prohibit an employer and an employee from entering into a post-employment restrictive covenant on or after May 10, 2016, for a period of more than one year from the termination of employment. The Act defines a post-employment restrictive covenant as an agreement, written or oral, between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes, or services that are similar to the employer's products, processes, or services.

The Act provides that post-employment restrictive covenants do not include nonsolicitation agreements or nondisclosure or confidentiality agreements. In addition, the Act does not prohibit reasonable severance agreements that include a post-employment restrictive covenant if the agreement is mutually and freely agreed upon in good faith at or after the time of termination. In addition, the Act does not prohibit a post-employment restrictive covenant related to or arising out of the sale of a business, if the individual subject to the restrictive covenant receives value related to the sale of the business. The Act defines the sale of business as a transfer of the ownership by sale, acquisition, merger, or other method, of the tangible or intangible assets of a business entity or a division or segment of the business entity.

The Post Employment Restrictions Act will be codified at Utah Code Ann. § 34-51-101, Utah Code Ann. § 34-51-102, Utah Code Ann. § 34-51-201, Utah Code Ann. § 34-51-202, Utah Code Ann. § 34-51-301 (Effective Date 05/10/2016).

VII. Workplace Safety

No new laws or regulations enacted in 2015 or 2016.

VIII. Workers' Compensation

A. Volunteers are not Employees for Workers' Compensation

The new statute clarifies that volunteers and interns for nongovernment entities are not considered employees for purposes of Utah's workers' compensation coverage. However, a nongovernment entity may elect to provide coverage for volunteers or interns under the same policy it uses to cover employees, and the statute provides guidelines for doing so.

If a nongovernment entity chooses to provide coverage to volunteers or interns:

- the volunteer or intern is considered an employee of the nongovernment entity;
- workers' compensation statutes provide the exclusive remedy for the volunteer or intern in case of a covered industrial injury or disease;
- the nongovernment entity must keep sufficient records for its volunteers or interns;
- disability compensation benefits are calculated using the state's minimum wage during the industrial accident or occupational disease that is the subject of the claim;
- the insurer must calculate the premium rate for the volunteer or intern on the basis of the state minimum wage on the actual hours the volunteer or

intern provided service, and may assume 30 hours per week if the nongovernment entity provides no record of the actual hours worked; and

- the nongovernment entity must notify volunteers or interns that the entity has elected to provide workers' compensation coverage by posting a printed notice and notices on the entity's website.

If a nongovernment entity does not provide coverage to volunteers, a volunteer or intern may seek remedies available through his or her own personal insurance policy.

Utah Code Ann. § 34A-2-104.5 (Effective Date 05/10/2016).

B. Employer Workers' Compensation Liability

Utah allows workers' compensation benefits for a wholly dependent person to extend indefinitely if:

- the person is still in a dependent condition when the benefits are set to terminate; and
- "under all reasonable circumstances" the person should be entitled to additional benefits.

The liability of the employer or insurance carrier involved terminates when the benefits are scheduled to terminate and the additional benefits are paid out of the state's Employers' Reinsurance Fund. However, the amendments remove this liability limitation and reference to the Employers' Reinsurance Fund.

The Employers' Reinsurance Fund remains liable for certain benefits for which employers may request reimbursement. The amendments also impose timeframes within which requests for reimbursement must be made and state that untimely requests may not be reimbursed. An employer or its insurance carrier must submit requests for reimbursement within these time frames:

- for medical benefits or compensation paid on or before July 1, 2016, by June 30, 2018; and
- for medical benefits or compensation paid after July 1, 2016, within 24 months of the date the benefits or compensation is paid or the date the Employers' Reinsurance Fund is determined to be liable, whichever is later.

Utah Code Ann. § 34A-2-416 and Utah Code Ann. § 34A-2-703 (Effective Date 05/10/2016).

IX. Miscellaneous

A. Franchisor Not an Employer of Franchisee's Employees

The new law amends the Utah Insurance and Labor Code to adopt definitions of a franchise, franchisee, and franchisor as defined per federal regulations (16 C.F.R. § 436.1).

A franchise means any continuing commercial relationship or arrangement, whatever it may be called, in which the terms of the offer or contract specify, or the franchise seller promises or represents, orally or in writing, that:

- The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark;
- The franchisor will exert or has authority to exert a significant degree of control over the franchisee's method of operation, or provide significant assistance in the franchisee's method of operation; and
- As a condition of obtaining or commencing operation of the franchise, the franchisee makes a required payment or commits to make a required payment to the franchisor or its affiliate.

Franchisee means any person who is granted a franchise.

Franchisor means any person who grants a franchise and participates in the franchise relationship. Unless otherwise stated, it includes subfranchisors. For purposes of this definition, a "subfranchisor" means a person who functions as a franchisor by engaging in both pre-sale activities and post-sale performance.

The new law provides that for purposes of the Utah labor relations, wage and hour, and antidiscrimination laws, a franchisor is not considered to be an employer of a franchisee or a franchisee's employee unless the franchisor exercises a type of degree of control over the franchisee or the franchisee's employee not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

Utah Code Ann. § 31A-40-102, Utah Code Ann. § 31A-40-212, Utah Code Ann. § 34-20-2, Utah Code Ann. § 34-20-14, Utah Code Ann. § 34-28-2, Utah Code Ann. § 34-40-102, Utah Code Ann. § 34A-2-103, and Utah Code Ann. § 34A-5-102 (Effective Date 05/10/2016).

B. Medical Marijuana

Utah's Hemp Extract Registration Act allows the possession or use of hemp extract to treat intractable epilepsy. The Act requires the Department of Health to issue a hemp extract registration card to an individual who provides the Department with a statement signed by a neurologist that indicates the individual suffers from intractable epilepsy and may benefit from treatment with hemp extract. The amendment extends the Act's repeal date, which was originally set for July 1, 2016, to July 1, 2021.

Utah Code Ann. § 26-56-103, Utah Code Ann. § 58-37-4.3, Utah Code Ann. § 63I-1-226, and Utah Code Ann. § 63I-1-258 (Effective Date 05/10/2016).