

# LABOR AND EMPLOYMENT LAW:

ISSUES AND STRATEGIES FOR EMPLOYERS

>> Since the beginning of the year, employers across the nation have been addressing a host of new or amended federal, state and/or local laws, and more changes are coming in 2020.



## MARGO WOLF O'DONNELL

Partner and Co-Chair -  
Labor & Employment Group  
Benesch  
>>modonnell@beneschlaw.com  
>>312-212-4982

**MARGO WOLF O'DONNELL** is a partner at **Benesch**, and co-chairs its Labor and Employment Group. She has more than 25 years of experience litigating and counseling clients on complex employment-related issues, including individual and group discharges, releases, confidentiality agreements, noncompete agreements and internal investigations. She has been recognized as one of the Best Lawyers in America, a "role model" by Chambers, and one of the top ten women employment management attorneys in Illinois by Leading Lawyer. She also leads B-Sharp, a group at her firm that provides power coaching and leadership training to women in-house counsel.

### What's the most common labor or employment law concern you're hearing from clients?

#### Margo Wolf O'Donnell:

Employers want to know how to draft compliant drug policies. While state laws are rapidly changing in this area, cannabis remains illegal under federal law, creating a strange dichotomy. The Illinois Cannabis Regulation and Tax Act, which goes into effect January 1, will also amend the Illinois Right to Privacy in the Workplace Act to include marijuana among the legal substances that an employee may permissibly use under state law during non-working and non-call hours, and employers may not "discriminate" against employees for such use. As a result, Illinois has made it more difficult for employers to take lawful adverse employment actions due to cannabis usage based on "a good faith belief that the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance."

### In light of the new laws legalizing cannabis, how can employers maintain a drug-free workplace?

**Wolf O'Donnell:** Federal law and most state laws allow employers to impose certain legal restrictions on cannabis use for safety-sensitive positions or based on regulations promulgated by the United States Department of Transportation. Even the new Illinois law allows employers to enforce "reasonable zero tolerance or drug-free workplace policies, or employment policies concerning drug testing, smoking, consumption, storage or use of cannabis in the workplace or on call." This

means that employers with employees in Illinois can prohibit the possession and actual use of cannabis in the workplace in their handbooks, employment agreements and workplace policies.

### How has the #MeToo movement changed what employers need to do to keep their workplace free of litigation?

**Wolf O'Donnell:** Live training is preferable, and should be conducted by a well-respected employment attorney or other third party. The training should cover issues relating to civility, anti-harassment and anti-discrimination policies, and complaint-reporting procedures. Employers protect themselves best by ensuring that all complaints of discrimination, whether written or oral, and even those that are anonymous—via blogs or tweets or through a hotline—are investigated. If possible, an investigation should start with the complainant, then proceed next with interviews of any other individuals who might have knowledge. Investigations should usually end with an interview of the accused. Along the way, it's critical not to promise confidentiality. You can simply state that you will keep the investigation as confidential as possible, but business needs may require that it be reported to certain individuals.

### How should employers handle requests for short-term or long-term leave for employees who don't qualify for leave under the Family Medical Leave Act?

**Wolf O'Donnell:** An employer has the duty to engage in the interactive process once they have reason to know of a

disability, and a leave request can trigger that duty. The timing and length of the leave plays a large role in whether an employer needs to accommodate it, as well as the potential for other accommodations being equally effective. Employers often run into issues when their policies dictate restrictions on leave that don't comply with current and applicable laws. For example, requiring employees to show that they are 100 percent healed or that they must provide a release without restrictions before returning to work can violate the ADA if the employee could perform the essential functions of the job with reasonable accommodations. Additionally, in some states, including Illinois, employers are not required to accommodate long-term leaves, and employers are not required to allow an employee to be on leave indefinitely.

### How can an employer reduce implicit bias in the workplace?

#### Wolf O'Donnell:

Employers first need to recognize that implicit bias can permeate every encounter in the workplace. It can be an issue at every stage of the employment life cycle, but hiring and performance reviews are the most likely points where it can be problematic. Many employers use implicit bias training and policies and procedures to reduce bias in the workplace. Employers should pay careful attention to assignments and carefully monitor the progress of diverse employees. Performance reviews should be updated and tied closely to job duties and actual performance, rather than opinions

regarding a particular individual's personality or characteristics. Interview questions should be reviewed for bias and those reviewing resumes should be trained on how to screen individuals properly.

### How can an employer ensure enforceability of a noncompete or nonsolicit?

**Wolf O'Donnell:** An employer must identify the legitimate business interest that prompts the need for such an agreement, and the restrictions that should be in place to prevent the misappropriation and competition that could undermine their business. With precise drafting, employees will be more compliant with these types of agreements, and more specific restrictions are more likely to be enforced by courts. Because continued employment of less than two years might not be enough consideration to support a noncompete or nonsolicit agreement in Illinois, employers here need to think about what consideration they can provide at the commencement of employment.

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- > Co-Chair, Labor & Employment Practice Group, Chicago
- > Nationally recognized litigator and business advisor, with a focus on employment disputes and agreements, restrictive covenants, internal investigations, corporate governance, and intellectual property.
- > 312.212.4982 | [mmodonnell@beneschlaw.com](mailto:mmodonnell@beneschlaw.com)

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[www.beneschlaw.com](http://www.beneschlaw.com)