

## HRAGC LEGAL UPDATE

JUNE 15, 2023

### FEDERAL

#### National Labor Relations Board

The NLRB General Counsel said on May 30 that non-compete agreements for employees covered by the NLRA are unlawful unless they are narrowly tailored to special circumstances justifying the infringement on employee rights.

The Board issued a decision on June 13 making it harder to satisfy the independent contractor test.

#### EEOC

On May 18 the EEOC issued a guidance clarifying that employers using AI may not simply rely on a vendor's assurance of compliance with Title VII. The employer could still be liable if the AI discriminates in violation of Title VII.

### NEW HAMPSHIRE

#### New Hampshire Supreme Court

On June 7 the New Hampshire Supreme Court interpreted the after-acquired-evidence doctrine. The Court explained that "after-acquired evidence is evidence of an employee's misconduct – discovered by the employer after it has terminated the employee for an unlawful reason – which is so severe that the employer would have terminated the employee on those grounds alone if it had known of the misconduct at the time of the discharge." This evidence can be used by the employer in a wrongful or unlawful termination action to bar or limit the employee's recovery. The Court held the doctrine is applied differently based on the nature of the claim: for contract-based claims the evidence could be a complete bar to recovery while in tort-based claims the evidence could limit the employee's damages. The case is *City of Portsmouth v. Portsmouth Ranking Officers Ass'n*.

#### Legislature

Consideration of bills is nearly complete. A terrific resource to check on the status of a bill is [www.legiscan.com/nh](http://www.legiscan.com/nh).

HB74 This bill requires employers of 15 or more employees who offer paid earned time to provide a written policy to employees regarding accrual and use of unused earned time and pay unused earned time under certain circumstances.

The bill was passed by the House and is now pending in the Senate Commerce Committee. The bill was deemed Inexpedient to Legislate and was killed.

HB82 This bill prohibits an employer from refusing to hire, or terminating the employment of a person solely because the person is a qualified patient of the New Hampshire therapeutic cannabis program and the person has a positive drug test indicating cannabis. It does not apply if drug screening is required for safety reasons. The bill does not require an employer to permit an impaired employee at work.

There is a hearing June 23 in the House Labor, Industrial and Rehabilitative Services Committee.

HB107	<p>This bill prohibits a person convicted of certain sexual assault offenses from hiring or engaging in any employment or volunteer service providing direct services to a minor or supervising a minor.</p> <p>The bill was passed by the House, as amended, and is pending in the Senate Judiciary Committee. There was a hearing on April 11. It was rereferred to committee on May 11 and remains pending.</p>
HB118	<p>This bill prohibits an employer from requiring an employee to attend or participate in anti-union training of any kind including requiring or coercing an employee to view a video that casts unions in a negative light. The penalty for violating the law is a fine of \$10,000 per employee.</p> <p>The bill was deemed Inexpedient to Legislate by the House on March 16.</p>
HB125	<p>This bill clarifies the weekly work hour limitations and limits on night work for youths ages 16 &amp; 17 during the school year and vacations.</p> <p>The bill was deemed Inexpedient to Legislate by the House on March 16.</p>
HB150	<p>This bill reduces the number of employees required to certify a collective bargaining unit from 10 to 5.</p> <p>The bill was passed by the House and is pending in the Senate Commerce Committee. There is a pending motion made May 18 in the Senate to deem the bill Inexpedient to Legislate.</p>
HB182	<p>This bill provides no employer shall discharge or take any other disciplinary action against any employee by reason of failure of such employee to report for work at the commencement of such employee's regular working hours where the failure is due to the employee's responding to an emergency in his or her capacity as a volunteer member of a fire department or ambulance department.</p> <p>There is a hearing June 23 in the House Labor, Industrial and Rehabilitative Services Committee.</p>
HB190	<p>This bill ties the duration of unemployment benefits to the state's average unemployment rate and provides for benefits between 14 weeks and 24 weeks depending on the unemployment rate.</p> <p>There is a hearing June 23 in the House Labor, Industrial and Rehabilitative Services Committee.</p>
HB362	<p>This bill provides that only the complainant may remove a case from the Commission for Human Rights to a court. It eliminates the ability of the employer to remove the case to court.</p> <p>The bill has been retained in the House Judiciary Committee.</p>
SB42	<p>This bill provides that the Dept. of Employment Security shall not charge interest on overpayments of unemployment benefits unless the person willfully made a false statement or representation or knowingly failed to disclose a material fact to obtain or increase any benefit or other payment, either for oneself or any other person.</p> <p>The bill was passed by the Senate on February 9 and passed by the House on June 8.</p>

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