



Lum, Drasco & Positan, LLC

ATTORNEYS AT LAW SINCE 1870

Lum Law Notes

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Lum, Drasco & Positan LLC

Attorneys At Law Since 1870

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FIRM NEWS

Dennis J Drasco participated in a two-day TRIAL ADVOCACY INSTITUTE sponsored by the NJ Institute for Continuing Education on July 16 and 17, 2020. All panelists for the program were Fellows of the American College of Trial Lawyers (ACTL). Dennis is a Fellow and member of the New Jersey state committee of ACTL. His panel dealt with the preparation and examination of expert witnesses at trial.

Wayne J. Positan addressed the Boston University Class of 1970 on the occasion of their 50th Reunion as part of BU Virtual Alumni Weekend on October 4, 2020 with BU President Robert Brown and BU Alumni President J.R. Hipple. Positan is a Past President of the BU Alumni Council and BU Alumni Association.

Christina Silva co-organized and co-presented a continuing legal education program on behalf of the Academy of New Jersey Management Attorneys (ANJMA) entitled, *Employment Law, Trends, Strategies and Ethics 2020*, which was conducted via Zoom webinar to close to 120 participants and included topics on virtual litigation, COVID-19 management issues, New Jersey employment law update, and ethics lessons for 2020.

Cynthia A. Matheke was a recipient of the Gerald B. O'Connor award for excellence in medical malpractice litigation granted by the New Jersey Association for Justice. This award recognized her role as a trailblazer among female trial lawyers in our State and her dedication to mentoring younger members of the bar.

The Lum Firm is pleased to announce that Sixteen of our attorneys have been named to *The Best Lawyers in America*® 2021:

Dennis J. Drasco (2001) - Appellate Practice, Commercial Litigation, Construction Law, Litigation - Construction, Litigation - Insurance, Litigation - Land Use and Zoning, Litigation - Real Estate, Litigation - Trusts and Estates

**Also recognized as Attorney of the Year in Litigation – Insurance

Wayne J. Positan (1993) - Appellate Practice, Commercial Litigation, Employment Law - Management, Labor Law -Management, Litigation - Labor and Employment

Paul A. Sandars III (2005) - Commercial Litigation, Construction Law, Litigation – Construction

Donald J. Volkert, Jr. (2018) - Arbitration

Kevin J. O'Connor (2015) - Commercial Litigation

Scott E. Reiser (2015) - Commercial Litigation

Edward M. Callahan, Jr. (2015) - Construction Law, Litigation – Construction

Bernadette Hamilton Condon (2015) - Construction Law, Litigation – Construction

Jack P. Baron (2021) - Corporate Law

Elizabeth Moon (2016) - Employment Law – Management

Daniel M. Santarsiero (2016) - Employment Law - Management, Labor Law – Management

Christina Silva (2011) - Employment Law - Management, Labor Law - Management, Litigation - Labor and Employment

**Also recognized as Attorney of The Year in Labor Law - Management

Gina M. Sorge (2019) - Family Law

Richard C. Camp (2019) - Family Law Arbitration, Family Law Mediation, Mediation

Arthur M. Owens (2020) - Legal Malpractice Law – Defendants

Cynthia A. Matheke (2003) - Personal Injury Litigation - Defendants, Personal Injury Litigation – Plaintiffs

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INTERNET FRAUD IN THE TIME OF COVID-19

By: Kevin J. O'Connor

Albert Einstein is attributed as saying there are only two things that are infinite: the universe and human stupidity. I would add to that the infinite human capacity to perpetrate fraud. Even in the time of current COVID-19 pandemic, cybercriminals remain active in trying to separate people from their money or personal information. These fraudsters prey upon the fear and uncertainty caused by the pandemic to perpetrate their scams. Any unsolicited telephone calls, texts or emails must be treated cautiously and skeptically to protect one's assets and personal data.



Types of Scams to Watch Out

Unsolicited calls, texts and emails are the stock and trade of cybercriminals. Here is a (non-exhaustive) list of some of the common types of schemes that attempt to take advantage of the COVID-19 pandemic to prey on people:

- Communications claiming to be from the CDC or other public health agency.
- Offers for vaccinations or home testing kits.

- Proposals for contract tracing or advising that you have been exposed to COVID-19 based on a contract trace.
- Communications purported to be from government agencies soliciting applications for economic relief under a government program.
- Emails or texts advising that a check is available under a government relief program.
- Solicitation of donations in the form of cash, gift cards, or by wiring funds.
- Offers of employment or job assistance.

As Cybercriminals are getting more brazen their tradecraft has become more sophisticated. Often, the electronic communications mock the logos and style of real companies or entities in order to trigger the false sense the communication emanates from a legitimate source. However, the victim is really responding to a contact point set up and controlled by the fraudster and is tricked to send the cybercriminal money and/or personal information that can be used to hack the victim's account. Also, the victim may be opening the door to a cyberattack via ransomware and other malicious programs.

Steps to Combat Fraud

- Never respond directly to an unsolicited communication.
- Do not use the email/phone contact information in an unsolicited email or text.
- If you want to respond, look up the official website for the entity or organization and use that contact information.
- Do not open any attachments to unsolicited electronic communications.
- Hang up on robocalls.
- Never make a donation by cash, gift card or by wiring money.
- Trust no one/verify everything.

Obviously, these are not exhaustive. As noted above, cybercriminals have a great capacity to try to capitalize on human tragedy and the COVID-19 crisis is no exception. These unprecedented times require everyone to be especially vigilant when dealing with unsolicited communications and requests, even those purporting to be emanating from a well know and recognizable entity.

Kevin J. O'Connor, Esq. is a Member of the Firm of Lum, Drasco & Positan LLC and practices in the Firm's Litigation Group.

EMPLOYER INVESTIGATIONS RELATED TO REMOTE WORK ENVIRONMENT AND COVID-19 TOPICS

By: Christina Silva, Esq.

Among the various challenges employers have faced as a result of the COVID-19 pandemic is the adjustment of the "work environment" to include remote work contacts, communication and interaction. Employees now commonly conduct business related video calls and meetings from home with work colleagues, clients and customers, through Zoom, Google Meet, Microsoft Teams, and other virtual meeting platforms. This manner of interaction has expanded the concept of the "work environment" beyond the physical worksite, extending application of anti-harassment, anti-discrimination and anti-retaliation policies to remote work environments. As such, the COVID-19 pandemic has increased potential areas of "workplace" misconduct that may require employer investigations.



Some of the new areas of workplace misconduct that have arisen in the age of virtual work related meetings and remote work environments include:

- Conduct that occurs when a person believes their audio or video is muted when it is not, and the person makes inappropriate statements, "jokes", or offensive references about the meeting

participants or other individuals, or engages in other commentary that is offensive, insulting, harassing, discriminatory or bullying;

- Conduct that occurs when a person believes their audio or video is muted when it is not, and the person engages in inappropriate physical conduct that is visible on the screen;
- Conduct that occurs when a meeting participant sends a chat message to another participant on the video call/meeting, that contains inappropriate, offensive, or suggestive content.

The fact that this conduct occurs between individuals in a remote work setting does not remove the conduct from employer required policy enforcement. As such, employers should ensure that their employee handbook policies against workplace misconduct fully address remote work settings, and should take effective responsive measures to address such misconduct, including conducting a prompt and thorough investigation into such conduct and taking remedial corrective measures as necessary.

In addition to revisiting existing workplace policies to ensure application and enforcement of such policies to remote work settings, and conducting investigations in the event of misconduct in such settings, employers should also conduct investigations into other claims made by employees regarding employment actions taken by an employer related to COVID-19, including topics such as:

- Employees who claim the workplace is unsafe due to an employer's alleged failure to meet required health and safety standards;
- Employees who claim they have been subjected to retaliation for raising concerns about an employer's alleged failure to follow federal and state guidelines for providing a safe work environment ("whistleblower" claims);
- Employee claims of discrimination or retaliation in an employer's layoff and furlough selection process;
- Employee claims that the employer has failed to provide reasonable accommodation related to return to work or COVID-19 illness or exposure;
- Employee claims that the employer has failed to provide required sick or leave of absence time, or that the employer has otherwise retaliated against an employee for taking such time off due to COVID-19 related concerns;
- Employee wage and hour claims that the employer has failed to properly account for remote work time.

Investigations into these and other related areas continue to be conducted remotely despite the COVID-19 pandemic. Pre-pandemic, investigation interviews were usually conducted in person. Currently, the "in person" interview can proceed through virtual investigation interviews conducted over one of the video call platforms. The investigation witnesses are informed that the interview will be conducted by video call, and asked whether they prefer to meet on one of the commonly used video call platforms (Zoom, Google, Teams) or by FaceTime. The witnesses are asked to meet for the video interview in a private and quiet location, or alternatively, if the employer has maintained a worksite with essential employees on site, the employer can ensure a space is available for a private video call to take place. Document sharing can be done either during the video call through the platform utilized, or after the interview through email and a follow up video call. This approach permits the investigator to evaluate not just the verbal information obtained, but also visual cues and response which may be pertinent to investigation findings. As with any workplace investigation, at the conclusion of all investigation interviews and review of relevant documentation, the investigator will compile the investigation findings and prepare a written report for the employer, and can provide a verbal report to the employer's lead executive team or Board of Directors as applicable, also through a virtual video meeting.

While the work environment looks different today due to the COVID-19 pandemic, employees continue to interact with each other and third parties either in person or through virtual communication methods.

Employers maintain an obligation to promptly investigate employee work related complaints. Employer investigations are a key component to any defense subsequently raised in employee related litigation, so it is in the employer's best interest to ensure that investigations proceed in a timely and thorough manner since there is no reason for any delay related to the ongoing pandemic. The Firm's attorneys stand ready to assist any employer seeking to create or update workplace policies to include remote work settings, or any employer needing to conduct an investigation into an employee complaint relating to any work related topic, including those related to employment actions associated with the COVID-19 pandemic.

Christina Silva, Esq. is a Member of the Firm of Lum Drasco & Positan LLC and Co-Chair of the Firm's Labor and Employment Department.

THE LEGALIZATION OF RECREATIONAL CANNABIS: WHAT DOES THIS REALLY MEAN (AND HOW DOES IT AFFECT ME AS AN EMPLOYER)?

By: Jordan Doppelt, Esq.

On November 3, 2020, New Jersey residents voted to amend the State Constitution to legalize the use of regulated recreational cannabis. The amendment is set to take effect on January 1, 2021. Before it can be signed into law, the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (the "Act") must be passed. The Act sets forth the legal framework for the personal use of cannabis for certain adults and also removes marijuana as a Schedule I drug. A separate Bill which provides, in part, certain criminal and civil justice reforms has been passed by the Senate and received by the Assembly (the "Decriminalization Bill"). Both the Act and the Decriminalization Bill, if enacted in their current forms, will provide protections for employers.



What Does the New Law Cover?

There is a misconception that once the clock strikes midnight on January 1, 2021, all marijuana will become legal. This simply is not the case. The Act provides a limited definition of "cannabis" and carves out certain exclusions including, for example, medicinal cannabis and "marijuana" as it pertains to offenses under various sections of Title 2C of the New Jersey Statutes. The Act also applies only to "consumers" (i.e. someone 21 years of age or older "who purchases, directly or through a cannabis delivery service, acquires, owns, holds, or uses cannabis items for personal use by a person 21 years of age or older, but not for resale to others.")

What Does This Mean for Employers?

Under both the Senate and Assembly Bills of the Act (S21/A21),

- Employers will be prohibited from: (1) refusing to hire or employ any person; (2) discharging any employee; or (3) taking any adverse action against any employee with respect to their compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items;
- Notwithstanding this language in the Act, employers remain protected and are not going to be required to amend, repeal, affect, restrict or preempt their rights and obligations to maintain a drug-free and alcohol-free workplace. Employers are also *not* going to be required to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale or growth of cannabis or cannabis items in the workplace nor are they required to permit their employees to be under the influence. In fact, the Act specifically provides that it does not affect the ability of employers to have policies that prohibit the use of cannabis items or employee intoxication during working hours.
- Employers will be permitted to require their employees to undergo a drug test in three situations: (1) upon suspicion of an employee's usage of a cannabis item while engaged in the performance of their work responsibilities; (2) upon finding any observable signs of intoxication relating to the

use of a cannabis item; or (3) following a work-related accident which is subject to investigation by the employer. The standard for “suspicion” varies between the Senate Bill (which allows for “any suspicion” of an employee’s usage) and the Assembly Bill (which requires the employer to have a “reasonable suspicion.”)

- Employers will also be permitted to use the results of the drug test when determining employment actions such as dismissal, suspension, demotion or other disciplinary actions.
- For employers with a federal contract or federal funding, unless failing to do so would put them in violation of that contract or cause them to lose that funding, the employer is prohibited from refusing to employ and from otherwise penalizing a person who has engaged in what is now permitted conduct and who is found to have cannabinoid metabolites in their bodily fluids.
- Lastly, unless it conflicts with above, the Act will prohibit an individual from being subject to “...penalty in any manner, or denied any right or privilege, including but not limited to civil liability or disciplinary action by a business, occupational, or professional licensing board or bureau, solely for conduct permitted under the bill.”

In addition to the standard of “suspicion” needed for an employer to be able to require a drug test, one other barrier to the passage of the Act is the ability of an employer to perform a random drug test. The Senate Bill allows for random drug testing so long as the test is “scientifically reliable” or conducted by a certified Workplace Impairment Recognition Expert whereas random drug testing is not provided for under the Assembly Bill.

Employers must also be aware of the Decriminalization Bill (S2535/A1897 and 4269). Under this Bill,

- When making an employment decision, an employer will be prohibited from relying exclusively on, requiring an applicant to disclose/reveal, or from taking any adverse action against any application for employment due solely to any arrest, charge, conviction, or adjudication of delinquency for violations of certain statutory provisions. Doing so will subject the employer to penalties between \$1,000 and \$10,000 depending upon the number of violations.
- However, the Decriminalization Bill specifically does not create or establish “a standard of care or duty for employers with respect to any other law” nor does it create, establish or authorize a cause of action against an employer for any actual or alleged violation of the Bill.

This legislation has evolved since Election Day and will likely continue to do so in the coming weeks. As was the case before voters approved this Amendment, employers may not restrict an employees’ actions outside of the workplace but may require that their employees not be under the influence at work. It would be prudent for employers to review and update their policies as needed in order to account for these legislative changes.

Jordan Doppelt, Esq. is an Associate in the Labor & Employment Department of the Firm of Lum Drasco & Positan LLC.

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Lum Law Notes is a publication intended for the clients of Lum, Drasco & Positan LLC and other interested persons. It is designed to keep its readers generally informed about developments in the firm and its areas of practice and should not be construed as legal advice concerning any specific factual situation

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