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# Vermont Employment Updates

**May 2, 2018**  
**2:00-3:00 p.m.**

Hosted by:



Presented by:

**Alexandra H. Clauss**

30 Main Street, Suite 500 | PO Box 1489

Burlington, VT 05401

Tel: 802 864 0880 Fax: 802 864 0328

[aclauss@primmer.com](mailto:aclauss@primmer.com) | [www.primmer.com](http://www.primmer.com)

# Today's Speaker



Alexandra "Alexa" Clauss is an attorney and shareholder with Primmer Piper Eggleston & Cramer PC in Burlington, Vermont. Her practice is devoted to advising employers on laws affecting the workplace and a wide range of human resources issues.

She is a frequent speaker on HR topics, and she conducts workplace trainings, employee handbook reviews, and internal investigations. Alexa received her Bachelor of Commerce from McGill University and her J.D. and Sports Law Certificate from Tulane University Law School. She is admitted to practice in Vermont, New Hampshire and California. She has been selected as a Super Lawyers® Rising Star® in Employment & Labor each year since 2014.

# Please Note

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# Current Legislative Session (2017/2018)



# Vermont Legislative Developments

- H. 294 – An act relating to inquiries about an applicant's salary history
- The act will forbid prospective employers from:
  - screening candidates based on wages, benefits, compensation, or salary history;
  - requesting from job applicants or their current and former employers any such information;
  - requiring that prior compensation of job candidates satisfy a minimum or maximum criteria.
- The act does not make it unlawful to ask a prospective employee about his/her salary expectations or requirements.



# Vermont Legislative Developments

- H. 333 – An Act Relating to Identification of Gender-Free Restrooms in Public Buildings and Public Accommodation
- As of 4/29/18, this bill has passed both houses
  - Will require any “single-user toilet facility” in a place of public accommodation be made available for use by persons of any gender.
  - A single user toilet facility may be identified by a sign, provided that the sign marks the facility as a restroom and does not indicate any specific gender.



# Marijuana Legalization

- Vermont's marijuana legalization law, among other things, eliminates penalties for possession of one ounce or less of marijuana and two mature and four immature marijuana plants for a person who is 21 years of age or older.
- **H. 511** will take effect on **July 1, 2018**



# Marijuana Legalization

- 18 V.S.A. §4230a(e) provides:

Nothing in this section shall be construed to do any of the following:

- (1) require an employer to permit or accommodate the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana in the workplace;
- (2) prevent an employer from adopting a policy that prohibits the use of marijuana in the workplace;
- (3) create a cause of action against an employer that discharges an employee for violating a policy that restricts or prohibits the use of marijuana by employees; or
- (4) prevent an employer from prohibiting or otherwise regulating the use, consumption, possession, transfer, display, transportation, sale, or growing of marijuana on the employer's premises.



# Existing Vermont Law on Therapeutic Use of Marijuana

- Vermont's medical marijuana law (Title 18, Chapter 86: Therapeutic Use of Cannabis) is silent on whether employers are required to accommodate an employee's marijuana use for medical purposes.
- Vermont's law specifically states that it does not exempt any person from arrest or prosecution for using or being under the influence of marijuana in a workplace or place of employment.
- If an employee notifies an employer s/he uses marijuana for a medical purpose, consult with legal counsel prior to taking adverse action against the employee.

# Practical Steps

- Confirm policies prohibiting intoxication in the workplace are applicable to marijuana.
  - Employer prohibits the following activities at any time that employees are either (1) on duty or conducting Employer business (either on or away from Employer grounds), or (2) on Employer grounds (whether or not the employee is working):
    - The use, abuse, or being under the influence of alcohol, illegal drugs, or other impairing substances, including marijuana.
    - The possession, sale, purchase, transfer, or transit of any illegal or unauthorized drug, including prescription medication that is not prescribed to the employee, marijuana, or drug-related paraphernalia.
    - The illegal use or abuse of prescription drugs.
  - Nothing in this policy is meant to prohibit the appropriate use of over-the-counter medication or other medication that can legally be prescribed under both federal and state law, to the extent that it does not impair an employee's job performance or safety or the safety of others. An employee who is using any medication or substance that may impair their job performance, safety, or the safety of others must notify their supervisor or the Human Resources Department before reporting to work while under the influence of that medication or substance. Any employee who believes they need a reasonable accommodation in connection with a medication or substance taken to treat a disability should inform the Human Resources Department.
- Supervisors should be trained to identify intoxication.

# Existing Vermont Law on Workplace Drug Testing

- Under Vermont law, prior to drug testing any employee or applicant, an employer must have a written policy that incorporates Vermont's drug testing laws and at a minimum identifies:
  1. the circumstances under which persons may be required to submit to drug tests;
  2. the particular test procedures;
  3. the drugs that will be screened;
  4. a statement that over-the-counter medications and other substances may result in a positive test; and
  5. the consequences of a positive test result.

# Existing Vermont Law on Drug Testing Applicants

Under Vermont law, an applicant may only be drug tested if all of the following conditions are met:

1. **Conditional Offer Of Employment** -- The applicant has been given an offer of employment conditioned on the applicant receiving a negative test result.
2. **Notice** -- The applicant received written notice of the drug testing procedure and a list of the drugs to be tested. The notice must also state that therapeutic levels of medically-prescribed drugs tested will not be reported. (This notice requirement cannot be waived.)
3. **Administration** -- The drug test must be administered in accordance with 21 VSA § 514.

# Existing Vermont Law on Drug Testing Employees

In Vermont, an employee may only be drug tested if all of the following conditions are met:

1. **Probable cause** -- The employer or an agent of the employer has probable cause to believe the employee is using or is under the influence of a drug on the job.
2. **Employee assistance program** -- The employer has available for the employee tested a bona fide rehabilitation program for alcohol or drug abuse and such program is provided by the employer or is available to the extent provided by a policy of health insurance or under contract by a nonprofit hospital service corporation.
3. **Employee may not be terminated** -- The employee may not be terminated if the test result is positive and the employee agrees to participate in and then successfully completes the employee assistance program; however, the employee may be suspended only for the period of time necessary to complete the program, but in no event longer than three months. The employee may be terminated if, after completion of an employee assistance program, the employer subsequently administers a drug test in compliance with conditions (1) and (4) and the test result is positive (i.e. there needs to be new probable cause).
4. **Administration** -- The drug test must be administered in accordance with 21 VSA § 514.

# Vermont Legislative Developments

- S. 40: Minimum wage increase to \$15 an hour by 2024.
- If the bill becomes law, the minimum wage increase would phase in as follows:
  - January 1, 2019: \$11.10/Hour
  - January 1, 2020: \$11.75/Hour
  - January 1, 2021: \$12.50/Hour
  - January 1, 2022: \$13.25/Hour
  - January 1, 2023: \$14.10/Hour
  - January 1, 2024: \$15.00/Hour

# Vermont Legislative Developments

- H. 196, Family Leave. The proposed bill would amend the existing parental and family leave law to provide that:
  - For parental leave, each parent can take up to 6 weeks of paid leave or one parent can take 12 weeks.
  - For family leave, eligible employees may take up to 6 weeks of paid leave.
- Benefits would be paid from a newly established "Parental and Family Leave Insurance Special Fund," funded by a deduction from employee wages;
- The weekly benefit would be the *lesser* of 70% of the employee's average weekly wage or double the weekly livable wage established by the Joint Fiscal Office;
- The law would extend family leave protection to employers with 10 or more employees

# Vermont Legislative Developments

- H. 711, An act relating to employment protections for crime victims. If the bill becomes law, it would:
  - Add “crime victim status” to Vermont’s Fair Employment Practices Act (21 V.S.A. 495) as a protected characteristic
  - Prohibit employers from discriminating against an individual because of their crime victim status.
  - Create additional unpaid leave to be available for crime victims for the purposes of attending a deposition or court proceeding for a related criminal proceeding.



# Vermont Legislative Developments

- H. 707 - A bill relating to sexual harassment claims
- The proposed bill would, among other things:
  - Extend sexual harassment prohibitions beyond the employment relationship to independent contractors and personal service arrangements;
  - Require that any changes to a sexual harassment policy be provided to all employees in writing;
  - Encourage (but not require) employers to conduct sexual harassment education and training programs for all employees within one year of hire and at least annually thereafter;

# Vermont Legislative Developments

- H. 707 - A bill relating to sexual harassment claims (Cont.)
  - Prohibit employment agreements from:
    - Restricting employees from opposing, disclosing reporting, or participating in a sexual harassment investigation; or
    - Waiving rights or remedies with respect to a sexual harassment claim
  - Establish requirements for settlement agreements relating to sexual harassment claims, including a prohibition on prohibiting the employee from working for the employer or an affiliate;
  - Create a right for the Vermont Attorney General or the Human Rights Commission to “enter and inspect any place of business” and question the employer representative responsible for investigating and receiving sexual harassment to ensure compliance



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# **Last Legislative Session (2016/2017)**

# Accommodations for Pregnancy-Related Conditions

- Employers are required to provide reasonable accommodations for pregnancy-related conditions.
- Took effect January 1, 2018 and applies to all employers in Vermont, regardless of size.
- 21 VSA 495k



# Definitions

- Pregnancy-related condition: a limitation of an employee's ability to perform the functions of a job caused by pregnancy, childbirth, or a related medical condition
- Reasonable Accommodation: changes and modifications made in the workplace, structure of job or manner of job is performed that helps make it possible for the employee to work, unless it would impose an undue hardship on the employer
- Undue Hardship: Significant difficulty or expense. Factors to be considered in determining whether there is an undue hardship include:
  - (i) the overall size of the employer's operation with respect to the number of employees, number and type of facilities, and size of budget; and
  - (ii) the cost for the accommodation needed.

# Interactive Process

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- Informal process where employee and employer determine limitations created by condition and how best to respond to need for accommodation.
- Needs to occur promptly once employer is aware of need for accommodation.

# Interactive Process

- Inquiry is individualized.
- Discuss in good faith:
  - What is needed?
    - Can explore alternatives.
  - Why is it needed?
  - How long will it be needed?
  - How will it be effective? (i.e., how will it help person get the work done.)
- **DOCUMENT!**
- Duty to accommodate is ongoing—means employer can be required to provide more than one and need for accommodation can change.

# Examples of Accommodations for Pregnancy-Related Conditions

- E.g., nausea, fatigue, attendance, parking, walking, ergonomics, lifting, bending, twisting, pulling, standing, depression
  - Longer or more frequent restroom breaks
  - Workstation closer to restroom
  - Allowing access to store food/drinks
  - Modify eating/drinking policy
  - Flexible schedules, work from home
  - Limit overtime
  - Reduce physical exertion
  - Alternative assignments
  - Unpaid leave
  - Closer parking space



# What is **NOT** a reasonable accommodation?

- Eliminating or reallocating an essential job function - unless the employer makes such accommodations for other employees
- Lowering production standards - qualitative or quantitative - unless the employer makes such accommodations for other employees
- Providing personal use items - hearing aids, wheelchair, prosthetic limb
- A promotion

***If an employee requests anything else, it requires consideration and an interactive process.***

# What if...

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- ...the employer believes it's in the employee (or fetus)'s best interest to take time off or be reassigned?
- **NO!**

# Practical Steps for Compliance

- Make supervisors aware of obligations to reasonably accommodate employees and train staff to recognize and respond to requests
- Consider adopting or revising policies to ensure a procedure exists for handling pregnancy-related accommodation requests
- Ensure decision-making is non-discriminatory and consistent with law
- Thoroughly document employee accommodation requests and good faith efforts to evaluate and respond to requests
- Review/update job descriptions to reflect essential functions of job
- Consider involving employment counsel before any accommodation request is denied
- Consider interaction with other leave laws
- **Employers must post notice form from VT DOL in workplace**

# Social Media Account Privacy



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# Social Media Account Privacy; Prohibitions

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- Took effect January 1, 2018 and applies to all employers in Vermont, regardless of size.
- 21 VSA 495I

# Social Media Accounts

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- “Social media account” means an account with an electronic medium or service through which users create, share, and interact with content, including videos, still photographs, blogs, video blogs, podcasts, instant or text messages, e-mail, online services or accounts, or Internet website profiles or locations.
- “Social media account” does not include an account provided by an employer or intended to be used primarily on behalf of an employer.

# Social Media Privacy: What is Prohibited

- The law prohibits employers from requiring or coercing an applicant or employee to:
  - Disclose a social media username, password or turn over unlocked device so employer may access social media account content
  - Access a social media account in the presence of employer
  - Divulge or present the employee or applicants social media account content
  - Change privacy settings to increase third-party access
  - Add anyone to their list of contacts

# Prohibitions Don't Apply When...

- A social media account that is provided by or intended to be used primarily on behalf of the employers
- There are exceptions for law enforcement agencies
- Employer needs username or password for employer-issued device
- Employer needs to comply with requirements of other State or Federal laws





# What Employers ARE Permitted to Request

Employers are permitted to request an employee share specifically identified social media to:

1. Comply with employer's legal and regulatory obligations;
2. Investigate alleged unauthorized disclosure of proprietary, confidential or financial information; or
3. Investigate allegation of unlawful harassment, threats of violence or discriminatory or disparaging content concerning another employee.

# Practical Steps for Compliance

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- Employers should ensure they do not maintain practices, policies, or agreements that are inconsistent with this law
- Employers should ensure supervisors are aware of requirements concerning applicant and employee social media account privacy
- Employers should confirm compliance by recruiters, staffing or other temp agencies
- Employers should adopt a clearly defined policy on ownership and access guidelines for any employer provided electronic devices and employer-sponsored/maintained social media accounts



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# **Other Recently Enacted Vermont Employment Laws**



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# Vermont's Earned Sick Time Law

21 V.S.A. §§ 481-486

# Overview

- Status quo was likely insufficient.
- Choices:
  1. Adopt a new compliant policy; or
  2. Confirm existing policy is compliant and make any necessary revisions.
    - To be compliant, an existing policy must meet ALL the **use** and **accrual** requirements of the law.
    - Policy amendments will most likely be necessary.
- All employers must also follow notice and posting requirements.

# Employer Coverage

- All employers doing business in or operating in the State of Vermont are covered.
- Employers with >5 employees who work on average 30+ hours per week must have started providing earned sick time on **January 1, 2017**.
- Employers with 5 or fewer employees, who are employed for an average of 30 or more hours per week, must start providing earned sick time on **January 1, 2018** (“small employer”).
- **After Jan. 1, 2018, all Vermont employers are covered.**
- **New Employers:** new employers are not subject to the Earned Sick Time Act for a period of one year after the employer hires its first employee.

# Employee Coverage

- A covered “employee” is a person who, in consideration of direct or indirect gain or profit, is employed for an average of no less than 18 hours per week during a year.
- The following are **not** covered employees for purposes of earned sick leave:
  - An individual who is employed by the federal government.
  - An individual who is employed by an employer:
    - for 20 weeks or fewer in a 12-month period; and
    - in a job scheduled to last 20 weeks or fewer.
  - An individual that is employed by the State that meets certain requirements.
  - An employee of a health care facility as defined in 18 V.S.A. § 9432(8) or a facility as defined in 33 V.S.A. § 7102(2) if the employee only works on a per diem or intermittent basis.
  - Certain employees of a school district, supervisory district, or supervisory union.
  - An individual who is under 18 years of age.

# Employee Coverage

- The following are **not** covered employees for purposes of earned sick leave:
  - An individual that is either:
    - a sole proprietor or partner owner of an unincorporated business who is excluded from the definition of “employee” for purposes of workers compensation coverage; or
    - an executive officer, manager, or member of a corporation or a limited liability company for whom the Commissioner has approved an exclusion from workers compensation coverage.
  - An individual that:
    - works on a per diem or intermittent basis;
    - works only when he or she indicates that he or she is available to work;
    - is under no obligation to work for the employer offering the work; and
    - has no expectation of continuing employment with the employer.



# FAQ: What if an employee's hours fluctuate near 18 hours/week

- Vermont's Earned Sick Time Rules provide:
- "To calculate if an employee has worked an average of 18 hours per week an employer shall, on a yearly basis, divide the number of hours worked by the employee in the last completed calendar year by 52. If an individual has been employed for an average of not less than 18 hours per week in the prior calendar year, the individual's accrual of sick time shall be deemed to have commenced on the first day of that year. The previous calendar year calculation shall not be applied to those individuals hired during that calendar year who are anticipated to work an average of more than 18 hours a week."

# Accrual or Front Loading

- Earned sick time can either be front loaded or accrue on a periodic basis.
  - Accrual: Covered employees must accrue at least one hour of earned sick time for every 52 hours worked.
    - For non-exempt employees, ALL hours actually worked will count towards the accrual of earned sick time (*subject to permitted caps*).
    - For exempt employees, an employer can limit to 40 the number of hours in a workweek that will count towards the accrual of earned sick time (*subject to permitted caps*).
  - Front loading: The full amount of annual accrual is available for the employee's use at the beginning of the annual period.

# FAQ: Does earned sick time accrue on overtime hours?

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- **Yes**—if the employee is non-exempt (hourly), subject to permissible caps on accrual.
- If the employee is exempt (salaried), accrual is based on 40 hours per week, unless the normal workweek is less.

# Caps & Carry-Over

- In **2017** and **2018**:
  - Regardless of the number of hours worked by an exempt or non-exempt employee, employers can limit the amount of earned sick time an employee can accrue and/or use to **24 hours** in a 12-month period.
- In **2019 and thereafter**:
  - Employers can limit the amount of earned sick time an employee can accrue and/or use to **40 hours** in a 12-month period.
- Earned sick time that remains unused at the end of every annual period is carried over to the next annual period (*unless time is paid out or front loaded—more on next slide*).

# Alternatives to Carry-Over

- Front loading: If an employer offers a paid time off policy and provides an employee with at least the full accrual of earned sick time at the beginning of each annual period, carry-over does not apply.
- Time is Paid Out: Also, at an employer's discretion, it can pay out accrued but unused earned sick time at the end of an annual period, and then the amount for which the employee was compensated does not carry over.

# Waiting Period on Usage

- An employer may require a **waiting period** for newly hired employees of **up to one year**.
  - During this waiting period, an employee shall accrue earned sick time pursuant to the earned sick time law, but shall not be permitted to use the earned sick time until after he or she has completed the waiting period.
- What if employee is **rehired**?
  - If an employee is discharged (involuntary termination) and rehired within 12 months, they must be permitted to use earned sick time without a waiting period.
    - Example from Final Rules: If a person worked for eight months and was laid off and rehired two months later he or she will only have four months left until he or she has completed the waiting period.
  - If an employee voluntarily resigned and is rehired within 12 months, it depends on the parties' agreement.

# Length of Absence

- If an employee's absence is shorter than a normal workday, the employee must be permitted to use earned sick time in the smallest time increments that the employer's payroll system uses to account for other absences or that the employer's paid time off policy permits.
  - Employers are not required to permit an employee to use earned sick time in increments that are shorter than one hour.



# Qualifying Reasons for Use of Earned Sick Leave

An employee can use earned sick time for any of the following reasons:

- (i) the employee is ill or injured;
- (ii) the employee obtains professional diagnostic, preventive, routine, or therapeutic health care;
- (iii) the employee cares for a sick or injured parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, including helping that individual obtain diagnostic, preventive, routine, or therapeutic health treatment, or accompanying the employee's parent, grandparent, spouse, or parent-in-law to an appointment related to his or her long-term care;
- (iv) the employee is arranging for social or legal services or obtaining medical care or counseling for the employee or for the employee's parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, who is a victim of domestic violence, sexual assault, or stalking or who is relocating as the result of domestic violence, sexual assault, or stalking;
- (v) the employee cares for a parent, grandparent, spouse, child, brother, sister, parent-in-law, grandchild, or foster child, because the school or business where that individual is normally located during the employee's workday is closed for public health or safety reasons.



# Payment of Earned Sick Time

- Earned sick time shall be paid on the same schedule and in the same paycheck as regular wages are paid and must be paid at the following rates:
  - Hourly employee: the rate the employee is regularly paid for each hour of work.
  - Hourly employee with different rates: the rate the employee would have been paid during his/her absence or a blended/weighted average rate (the "regular rate"). The method used must be consistent for all employees during the annual period.
  - Salaried employee: the rate based on earnings in the previous pay period divided by total hours worked (presumed to be 40 per workweek unless employee works fewer hours). Cannot be below effective minimum wage.
  - Commissioned employee: either the base hourly wage or the effective minimum wage, whichever is greater.
  - Tipped employees who receive tipped wage rate: the non-tipped minimum wage.
- Payment of earned sick time does not need to factor in sums paid as commissions, bonuses, or other sales or production incentive pay, or overtime.

# No Payout Required at Termination

- The Earned Sick Time law provides:
  - *“Upon separation from employment, an employee shall not be entitled to payment for unused earned sick time accrued pursuant to [this subchapter] unless agreed upon by the employer.”*



# Employee Obligations

- An employer may require an employee planning to take earned sick time to:
  - make reasonable efforts to avoid scheduling routine or preventive health care during regular work hours; or
  - notify the employer as soon as practicable of the intent to take earned sick time and the expected duration of the employee's absence.

# Employer Posting and Notice Requirements

- All covered employers must post the VT DOL's Vermont's Earned Sick Time Act Notice of Employee Rights in the workplace.
  - <http://labor.vermont.gov/wordpress/wp-content/uploads/EarnedSickTimePoster.pdf>
- Employers are also required to notify employees concerning earned sick leave at the time of the employee's hiring (e.g., distribute policy & get signed acknowledgment of receipt).

# Recordkeeping

- An employer must keep true and accurate records of the accrual and use of earned sick time.
- Such records must be maintained for a period of at least three years.
- An employee who requests his or her earned sick time records shall be provided with a copy within 5 days and shall be allowed to inspect the original paper or electronic records at a reasonable time and place.

# Employee Protections

- The law protects employees from discharge and retaliation for:
  - lodging a complaint of a violation of the earned sick time provisions;
  - cooperating with the Vermont Commissioner of Labor in an investigation of a violation; or
  - if the employer believes the employee may lodge a complaint or cooperate in an investigation of a violation.
- Employees cannot be required to find a replacement for absences as a condition of using earned sick leave, including absences for professional diagnostic, preventive, routine, or therapeutic health care.
- Group insurance benefits must continue during an employee's use of earned sick time at the same level and conditions that coverage would be provided as for normal work hours.
  - The employer may require that the employee contribute to the cost of the benefits during the use of earned sick time at the existing rate of employee contribution.

# Enforcement

- Complaints are investigated by Vermont Commissioner of Labor following process for complaints of unpaid wages (there is no right of appeal a decision to Employment Security Board).
- Employers who violate provisions on earned sick time will be subject to the same penalties as for nonpayment of wages and benefits under Vermont law.
  - \$5,000 fine per violation can be imposed
    - Where the employer is a corporation, the president or other officers who have control of the payment operations of the corporation shall be considered employers and liable to the employee for actual wages due when the officer has willfully and without good cause participated in knowing violations.
  - Employers who fail to provide earned sick time as required by law and/or in an employment agreement are liable to the employee for actual damages caused by the failure to pay for the benefits.

# FAQ: Can an employer requests for documentation of reason for leave?

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- The law is silent, meaning there is no express prohibition on requesting documentation.
  - Use caution before taking adverse action against an employee who fails to submit documentation.
  - Determine whether there is support for requesting documentation under another law (e.g., FMLA, VPFLA, ADA)



# FAQ: Can an employee demand an unpaid absence?

- What if an employee is absent for qualifying reasons and says they don't want to use their earned sick time?
  - Ok with mutual agreement.
- Employers can require that employees utilize earned sick leave in connection with any qualifying absence.
  - However—if leave qualifies under Vermont Parental and Family Leave law, it is the employee's choice whether to use paid leave.

# FAQ: What if an employee works in multiple states?

- Covered employees whose primary place of work is Vermont must be provided earned sick time. The location where an employee does most of their work for their employer is their primary place of work.
- If an employee is eligible to accrue and use earned sick time, then all hours the employee works shall be applied toward accrual of earned sick time regardless of the location of the work.
  - Example from Final Rule: In a single year, an employee of a Vermont catering company works 550 hours in Vermont, 350 hours in New Hampshire and 200 hours in Maine. The caterer will accrue earned sick time on all 1,100 hours worked for the catering company.

# Practical Steps

- If you have not already done so, review and revise existing paid time off or paid sick leave policies and procedures for compliance with the law **or** develop a new Vermont earned sick leave policy that complies with the law.
- Train managers and HR personnel on the law.
- Review VT DOL information (poster, Final Rules, FAQs): <http://labor.vermont.gov/learn-more-about-vermonts-new-earned-sick-time-law/>
- Consult with counsel for a legal review of policy.



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# **CRIMINAL HISTORY RECORDS; EMPLOYMENT**

21 V.S.A. § 495j

# Vermont's Ban the Box Law Became Effective July 1, 2017

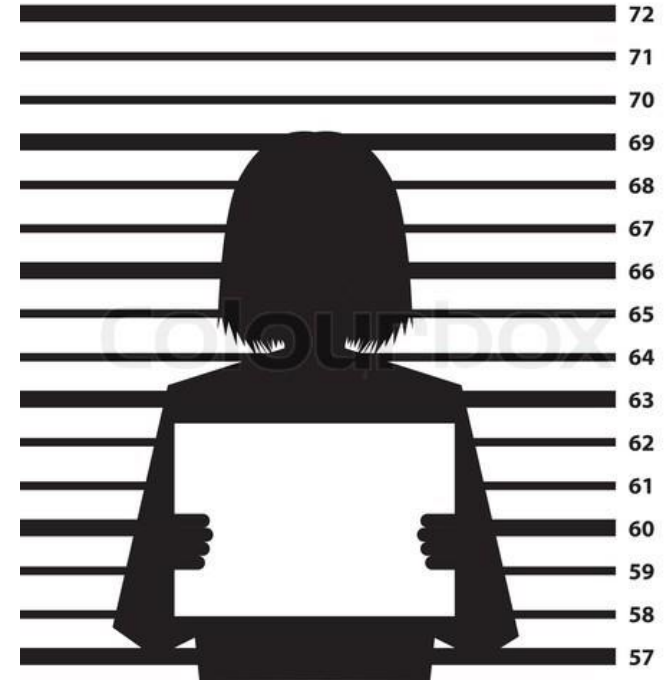
- Employers are prohibited from asking about an individual's criminal history record on initial employment applications
- Employer can inquire about a prospective employee's criminal record:
  - During an interview
  - OR once the prospective employee has been deemed otherwise qualified for the position



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# When applicant divulges criminal history

- If applicant divulges criminal history in response to employer inquiry, employer is required to offer applicant the opportunity to explain the circumstances if criminal history record does not disqualify applicant under federal or state law
  - The statute does not require the employer to hire the person



# Exceptions

- There are a few instances where the law allows an employer to inquire about criminal convictions on an initial employee application:
  - If the employee is applying for a position that **state or federal law disqualifies** candidates with a conviction
    - This exception is narrowly tailored to types of criminal offenses that create legal disqualification for particular position

# Enforcement

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- \$100 penalty for each violation (21 V.S.A. § 495j(d)) and potential exposure to lawsuit and/or enforcement by Vermont Attorney General's Office (21 V.S.A. § 495b).



# Practical Steps for Compliance

- Review applications for impermissible inquiries regarding criminal records.
- If necessary, collect and replace old versions of application (e.g., from recruiters).
- Confirm compliance of applications and practices by recruiters, staffing or other temp agencies.
- Do not seek background checks on an applicant until after an interview occurs or the employee is deemed qualified for the position.
- Train employees who conduct interviews on handling criminal history questions and disclosures.
- Establish consistent practices for handling criminal history information.



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# Flexible Working Arrangements

21 V.S.A. § 309

# Flexible Working Arrangements

- Took effect on January 1, 2014
- All Vermont employers covered.
- Flexible working arrangements are: intermediate or long-term changes in the employee's regular working arrangements, including changes in the number of days or hours worked, changes in the time the employee arrives at or departs from work, work from home, or job-sharing
  - Vacations, routine scheduling of shifts, and other forms of leave are excluded from the definition of "flexible working arrangement."
- Employers must engage in good faith discussions concerning employee requests for flexible working arrangements.
- Employers are obligated to respond to employee requests at least twice per calendar year.

# Flexible Working Arrangement Requests

- An employer has discretion to deny a request when it is inconsistent with business operations.
- The statute lists eight possible reasons denial may be appropriate. Inconsistent with business operations includes:
  1. the burden on an employer of additional costs;
  2. a detrimental effect on aggregate employee morale unrelated to discrimination or other unlawful employment practices;
  3. a detrimental effect on the ability of an employer to meet consumer demand;
  4. an inability to reorganize work among existing staff;
  5. an inability to recruit additional staff;
  6. a detrimental impact on business quality or business performance;
  7. an insufficiency of work during the periods the employee proposes to work; and
  8. planned structural changes to the business.

# Flexible Working Arrangement Requests

- If an employee requests a flexible work arrangement in writing and the employer denies any part of the request, the employer must provide a written denial.
- Retaliation against employees who exercise their rights under this law is prohibited.
- Employees do not have the right to bring a private action, but the Attorney General or a state's attorney may enforce the law through investigation or by bringing an action against a private employer.

# Practical Steps

- It is important supervisors are aware of these obligations in order to recognize and respond to requests.
- Employers should implement internal procedures to document employee requests and efforts taken to evaluate and respond to requests.
- When written responses are provided to employees, if applicable, it is advisable to include a disclaimer that granting a flexible working arrangement does not alter the at-will nature of an individual's employment and that it may be subject to review if it later becomes inconsistent with business operations.
- Where a position requires a specific schedule, a best practice would be to add scheduling requirements to the job description.
- Lastly, employers must ensure that its decision-making is fair, non-discriminatory, and consistent with the law.



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# Employee Wage Discussions

21 V.S.A. § 495

# Employee Wage Discussions

- Effective July 1, 2013, the equal pay act added a new section to 21 V.S.A. § 495, Unlawful Employment Practice
- It applies to all employers in Vermont.
- Employers must not :
  - require an employee to refrain from disclosing the amount of his or her wages or from inquiring about or discussing the wages of other employees; or
  - retaliate against any employee who has or is believed to have disclosed his or her wages, inquired about, or discussed the wages of other employees.
- Section 7 of the National Labor Relations Act (NLRA) already protects non-supervisory employees' rights to talk about their wages with their coworkers, with or without a union.



# Employee Wage Discussions

- Retaliation is also prohibited against employees who oppose practices prohibited by the law or against an employee who lodges or is about to lodge a complaint or participate in a complaint in any manner.
- Employers are not required to disclose the wages of an employee in response to an inquiry by another employee, unless the failure to do so would otherwise constitute unlawful employment discrimination.
- Employers may also prohibit human resources managers from disclosing employee wages, unless otherwise required by law.

# Practical Steps

- Employers should review and revise any policies or agreements that restrict or could reasonably be interpreted to restrict employee discussion or disclosure of wages.
- Employers must use caution not to retaliate in any way against employees who discuss or inquire about their wages or other employees' wages.



# THANK YOU!

## Questions? My Contact Info

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**Alexandra H. Clauss, Esq.**

30 Main Street, Suite 500

PO Box 1489

Burlington, VT 05401

Tel: 802 864 0880

Fax: 802 864 0328

[aclauss@primmer.com](mailto:aclauss@primmer.com)

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