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Employment Law Bulletin

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No Fault Attendance Policy Violates ADA, Claims EEOC

The Equal Employment Opportunity Commission continues to focus on the implications of the Americans with Disabilities Act on employer "no fault" attendance policies. The EEOC filed a lawsuit against Mueller Industries, Inc. (no relationship to Special Counsel Robert Mueller) claiming that Mueller violated the ADA in two respects. First, there was automatic termination of an employee who was unable to return to work after 180 days on leave. Second, the employer's no fault attendance policy did not provide for an individualized assessment of the reasons for the absences, some of which may be covered under the ADA.

The company entered into a consent decree with the EEOC which will last for two and a half years. The consent decree provides for over $1 million in monetary relief, requires the company to reinstate employees terminated under the no fault attendance policy or automatic termination policy, and requires posting a notice to all employees regarding its ADA violations.

Employers are not required to accommodate a request for indefinite leave or for leave where the employee or the employee's healthcare provider does not provide an estimated date when the employee may return to work. However, an employer may not on a per se basis state that any leave that exceeds a certain amount of time means the employee is terminated. The ADA requires an individualized assessment of whether such leave may be accommodated. That said, if leave is requested for an extended period of time with an anticipated return date, the employer does not violate the ADA if, after making an individualized assessment, the employer concludes that it needs to fill the employee's position on a permanent basis, but communicates to the employee that if and when the employee is able to return to work, the employer will consider the employee for whatever jobs may be available.

Poorly administered no fault attendance policies can also run afoul of the Family Medical Leave Act, where FMLA-protected absences may not count as occurrences. An employer does not have to tell the employee that an occurrence will not count against the policy, but as the employer reviews disciplinary actions to take based upon points accumulated, the employer should err on the side of caution regarding absences which may be protected under the FMLA or ADA.

Parental Leave Discrimination Against Fathers

Employers recognize that offering employees the opportunity for leave to bond with a newborn or adopted child has become a fundamental benefit to attract and retain employees. Usually, the focus is on pregnancy and time for the mother to bond with the newborn. However, in that focus, some employers overlook the potential sex discrimination implications of not extending bonding leave to fathers.

On July 17, 2018, the EEOC announced a settlement where 210 men will share $1.1 million based upon their paternal leave sex discrimination claim. The case involved Estée Lauder and alleged that male employees were discriminated against by receiving only two weeks of bonding leave compared to six weeks for female employees. A similar case is pending against J.P. Morgan, where the allegation is that the company offered sixteen weeks of bonding leave for new mothers, but only two weeks of similar leave for fathers.

The EEOC alleged that the Estée Lauder policy was discriminatory based upon sex because the leave was unrelated to leave that was necessary for a mother to recover from her pregnancy. While employers may extend pregnancy-related leave for recovery, where the leave is to care for or bond with the newborn, there is no basis to distinguish men from women, and therefore, to do so is sex discrimination.

UPS and Teamsters Violate ADA and Bargaining Agreement

UPS and the Teamsters agreed to collective bargaining language which is relevant to those employers whose workforces are union-free. The agreement provided that employees who were temporarily disqualified from driving for medical reasons would be compensated at up to 90% of their regular rate while recovering. However, those who were disqualified for non-medical reasons, such as traffic violations or even driving under the influence of alcohol, were compensated at 100%. In the case of *EEOC v. UPS Ground Freight, Inc.* (D. Kan. July 27, 2018), the Court agreed with the EEOC that treating medical conditions less favorably than other disqualifying conditions violated that Americans with Disabilities Act.

At issue in the case were the circumstances when a driver's commercial driver's license was suspended. Even if the suspension was due to illegal behavior (driving while intoxicated), the driver was assigned to a non-driving job at 100% of his or her driver's pay. Yet, if the driver could not drive due to medical reasons, that driver was assigned to a non-driving job at only 90% of the driver's pay. The Court ruled that "paying employees less because of their disability is discriminatory under any circumstance." The overriding issue in this case is how an employer treats employees who are assigned alternative job responsibilities whether due to medical or other reasons. Under the ADA, an employer has a duty to analyze on a case-by-case basis the scope to which it may reasonably accommodate an employee's disability. In some situations, that may mean the employee is assigned to another job where the pay remains the same. In other cases, assignment to another job may not be possible or the pay may be less. The key is not to approach those with medical limitations or restrictions as a class by assignments to lower-paying jobs compared to employees who may be reassigned for non-medical reasons.

OSHA to Rescind Key Provisions of Electronic Reporting Rule

The Electronic Reporting Rule (ERR) became effective on January 1, 2017, and had a scheduled phase-in process to occur in 2017 and 2018. The ERR applies to employers with 250 or more employees and requires the annual electronic submission of OSHA Form 300 (work-related injuries/illnesses), OSHA Form 300A, and injury and illness reports (OSHA Form 301). Employers with 20 or more and less than 250 employees were required to submit only the OSHA Form 300A. OSHA has continually delayed the effective implementation of the ERR and thus employers are not obligated to submit the OSHA 300 or 301 Forms electronically at this time. It is anticipated that OSHA's revisions to ERR will eliminate the requirement

for electronic submissions. Why OSHA's change of direction regarding ERR?

1. Concern about the protection of employee privacy as OSHA Form 301 includes information about the employee's injury or illness, medical information and how the injury or illness occurred. This information could be accessible to the public.

2. OSHA would need to analyze thousands of submissions and it questions the real value of that information to the agency.

3. OSHA's action is pursuant to the Trump administration's continuing effort to reduce the cost to employers of regulatory compliance. OSHA estimates that compliance with electronic record reporting would cost the business community approximately $8.2 million annually.

Unemployment Drug Testing Could Increase

In 2017, Congress passed a resolution to undo an Obama-era Department of Labor rule regulating drug testing for unemployment benefit recipients. After President Donald Trump approved the resolution, the DOL officially rescinded the rule, which limited drug testing to applicants in particular industries and positions, and those previously terminated for drug use.

This week, the DOL released its draft rule to expand states' ability to condition unemployment benefits on drug testing. The draft rule allows states to drug test unemployment applicants whose only "suitable work" is in an "occupation that regularly conducts drug testing." The rule further allows states to deny benefits if the applicants test positive for controlled substances. The rule does not define "suitable work" and allows for states to do that, but the DOL does provide a list of jobs that should regularly be tested.

While there are equal amounts of support and criticism regarding this proposed rule, there is no doubt it will be challenged. Many opponents argue that such drug testing might violate applicants' privacy rights under the Fourth Amendment and would drain state resources. It will likely take some time before the proposed law could be implemented in light of potential challenges. However, at this time, it might not have a high impact across the country as currently, only approximately three states have passed laws allowing for such drug testing. That being said, numerous states have expressed interest in implementing such requirements. It is likely that after the 2018 elections, there will be more movement among the states on this issue.

Notably, if something like this was implemented, it could impact employers' policies and procedures and their potential workforce. On the positive, it would allow employers to save on potential unemployment costs for former employees who fail their benefit drug test. There are certainly particular industries with high rates of turnover and employee drug use wherein a rule like that would help curb their costs and the number of claims employers face. However, to the extent an employer could access or discover the results of a job applicant's previous unemployment compensation drug test, through voluntary disclosure or otherwise, it would result in multiple issues. It could result in employers denying employment to applicants who are reformed and would be good for a particular position. It could also result in ADA violations as recovering drug addicts are qualified individuals with disabilities. Further, it could open the employer up to privacy violations. Ultimately, it is a developing issue that employers should watch over the next year or two to determine if and how states' laws change and how it could impact employers.

NLRB Update

This article was prepared by Frank F. Rox, Jr., NLRB Attorney for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Rox served as a Senior Trial Attorney for the National Labor Relations Board for more than 30 years. Mr. Rox can be reached at 404.312.4755.

Advice Memoranda Find Work Rules Fine

Under the NLRB new rule for analyzing work rules, the General Counsel's Division of Advice has found that rules restricting use of intellectual property and app users were

legal. In a memorandum dated June 14, 2018, Advice found that Lyft's rules restricting the use of the Company logo without written permission and the confidentiality rule that barred employees from using or disclosing so-called "user information" were legal under the National Labor Relations Act. The Advice Division agreed with the Regional Director that the rules in question constituted category 1 rules – a rule generally lawful to have in place and "unlikely to interfere" with employee rights guaranteed under the NLRA.

> In light of the [Board's] recent decision in *Boeing Company,* the region reviewed the employer's rules that it had previously concluded were unlawfully overbroad [under President Obama] to determine their legality under the new *Boeing* standard.

The Division of Advice, agreeing with the Regional Director, ultimately recommended that the charge be dismissed. Teamsters Joint Council had filed an unfair labor practice charge alleging that the rules were overly broad even under *Boeing*.

Eighth Circuit Finds Burger King Franchisee Wrong

The Eighth Circuit has found that EYM King of Missouri, LLC, violated the NLRA when it issued disciplinary action against employees who engaged in a one-day strike. The Board had rejected EYM's argument that the strike constituted an "intermittent work stoppage" held in support for the fifteen dollars an hour fight. The Circuit Court granted the Board's petition for enforcement. The Court, in finding that the strike constituted protected, concerted activity, inferred knowledge of the strike even if EYM did not receive some of the employees' strike notices:

> The end of the rally . . . did not signify the end of the strike. The one-day strike was scheduled for April 15, 2015. [The disciplined employee] did not report to her April 15 shift. [Thus,] EYM King's argument to the contrary is unpersuasive.

The problem EYM had in this case is that they issued the discipline before the strike could ripen into an intermittent strike. It is difficult to establish intermittent strikes, so be sure to consult with labor counsel if you have any questions on this topic.

The D.C. Circuit Finds That NLRB Properly Limited Resignation Rule

The Board found that a union's rule restricting employees' right to quit a union during a strike was illegal under the National Labor Relations Act. While acknowledging the right of unions to impose ministerial requirements on the resignation process, the Court said that the Board "reasonably concluded that the [Union's] policy restricts members' right to revoke their dues-deduction authorizations." The Union's rule required members wishing to resign their membership to appear at the union hall with a picture ID and a written request. Expect the Republican-dominated NLRB and the Courts to continue to limit resignation restrictions. The workers were represented by the National Right to Work Legal Defense Foundation, which said that

> Instead of cooking up schemes to trap workers . . . into paying union dues, union officials should ask themselves why they are so afraid of giving workers a choice when it comes to union membership and dues payment.

The answer to that question appears self-evident.

Use of Company Email to Organize on the Way Out

Employees may lose the use of their company email systems for union business if the NLRB has its way under President Trump. *Purple Communications* is at risk as the Board has called for comment on rescinding the case in *Caesar's Entertainment Corp.*

In *Purple Communications,* the Obama era Board majority said that employees who use their employers' email system should generally be allowed to use the system for union business, overturning a precedent that allowed employers to limit the use of company email. Democrats Mark G. Pearce and Lauren McFerran wrote dissents on the solicitation for comment. Pearce stated that *Purple Communications* was an acknowledgement that email's role is "a natural gathering place in the

workplace and nothing has changed since the issuance of *Purple* to warrant a re-examination of this precedent."

Purple Communications has appealed the NLRB's decision in its case to the Ninth Circuit and a hearing on that case will be heard in October of this year. To put it mildly, management side practitioners are happy and union side supporters are not happy. Until this matter is finally decided, either by the courts or the NLRB, *Purple Communications* is still the law, so the following thoughts on an email policy are offered:

- Employers are not required to make computers or email available to those whose jobs don't require such access. If access is given, then the policy should specify that such access to the employer's email system for personal use is only available during non-work time and that employees who are off work have no right to access employer email for any personal reasons.

- If employees take breaks away from work stations, there is no need to make computers or email available for those taking breaks on their own time. In other words, employers may limit access to employer email systems away from working time, requiring employees to use only personal email capabilities in those circumstances.

- Employers have the right to prohibit the sending or receiving of emails from outsiders unless they are business related – either on work or non-work time.

- Employers have the right to monitor use of email under a valid, legal email use policy and then act upon violations of that policy.

An articulated email policy must not be applied in a discriminatory fashion, one designed to chill employees' rights under Section 7 of the Act. Thus, a specific disclaimer and assurance should be considered to be made a part of any policy implemented.

NLRB Offers Early Outs

Anticipating a budget crunch, the NLRB on August 7, 2018, offered early outs pursuant to its authority under the Voluntary Early Retirement Authority (VERA) and Voluntary Separation Incentive Payments (VSIP). The window period for application closed on August 21, 2018, and thirty-eight eligible employees took advantage of the offer. The NLRB claims in its press release, that the offer was "part of an initiative to address staffing imbalances and to reposition the Agency to better carry out its mission."

Three of the thirty-eight applicants come from Region 10, approximately 8% of the Region's staff. Region 10 services the northern half of Alabama, most of Tennessee and Georgia, all of the Carolinas, the western half of Kentucky, and parts of Virginia and West Virginia. The number of cases handled by each agent in Region 10 are already markedly higher than usual in Atlanta.

EEO Tips: Mandatory Flu Shot Policies

This article was prepared by JW Furman, EEO Consultant Investigator, Mediator and Arbitrator for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Ms. Furman was a Mediator and Investigator for 17 years with the Birmingham District Office of the U.S. Equal Employment Opportunity Commission (EEOC). Ms. Furman has also served as an Arbitrator and Hearing Officer in labor and employment matters. Ms. Furman can be reached at 205.323.9275.

Believe it or not, summer is almost over and it is again time to think about flu vaccines! How effective will they be this year, will you and your family get shots, *and* will the flu shot be required for your employees? Many employers believe that in order to keep the workforce healthy and fully staffed during flu season, employees should be inoculated. Before issuing such a mandate, a simple question needs to be asked: Can employers lawfully require all employees to be vaccinated against the flu?

Although the question is simple, the answer most certainly is not. Even in the health care industry, where some states have passed laws requiring workers to be

vaccinated and the Center for Disease Control recommends vaccines for all who have patient contact, the answer is not always simple. One might think that health care facilities, above most employers, have a legitimate basis for blanket mandatory flu shot policies and therefore have no problem with enforcement. However, they have been slammed with litigation over vaccinations in the last few years. The Equal Employment Opportunity Commission has either filed or joined several lawsuits over mandatory vaccination policies in medical facilities just in the last year. Although the EEOC says that the law does not prohibit employers in any industry from having mandatory vaccination policies, it cautions that employees may be entitled to exemptions from such mandates under Title VII of the Civil Rights Act or the Americans with Disabilities Act. Once an employee objects to the policy citing a protected basis (usually for medical or religious reasons), the employer's obligation is the same as with any other request for accommodations under those statutes. The employer must evaluate each exemption request individually and engage in an interactive process with the employee to determine what, if any, reasonable accommodations are available.

The questions that arise while evaluating an employee's request for accommodation regarding a flu shot requirement do not always have simple answers either. For example, if the request has a religious basis, it must involve a sincerely held religious belief or practice. Courts have expanded the meaning of "religion" for Title VII purposes, so the employee's religious belief concerning vaccinations may not be within a traditional religious tenet. It is important to have discussions with the employee to understand the request and the reason(s) behind it. Some objections to the policy may involve the method of delivery of the vaccine, other objections may be ingesting it in the first place. If the request for exemption to the policy has to do with a medical condition, a medical professional may need to be consulted after a thorough discussion with the employee regarding his/her concerns. This consultant should be able to address possible effects of the flu vaccine on the employee in relation to his/her existing medical condition and accommodations that may satisfy the needs of both parties.

The required interactive process does not end once the request and its background are understood by the employer. The employee needs to continue to be included while exploring possible reasonable accommodations. Even though one party believes he/she has found the perfect solution, another perspective may prove it unworkable. Neither may see his/her "ideal" accommodation applied in the end, but the interactive process does remind both parties that the others' interests must be considered.

An effective policy should clearly state a legitimate need or basis for requiring employee vaccinations. Employees who prefer not to be inoculated are less likely to request exemption from a policy that they understand has a beneficial purpose. The policy should explain the process for requesting exemptions and what type of information will be needed to process requests. Distribute the policy and discuss it with employees. In my experience, people are more likely to accept rules made by others (like employers) that are discussed and implemented openly. Employees responsible for enforcing this policy need to receive training regarding what the policy does and does not say, and how to process a request for exemption. They should never threaten or take disciplinary action without exploring the reason an employee refuses to comply with the policy. And they should always, always document every step of the interactive process (because despite best efforts, litigation does happen).

If the not-so-simple answer to the simple question has made you rethink requiring flu shots for all employees, there are steps you can take that may help maintain a healthier workforce during flu season. The EEOC recommends encouraging employees to be vaccinated. Some health plans and employers offer vaccines at no cost to employees. Employers can offer flu shots at the workplace or provide information about local availability. Some provide hand sanitizer to employees and hire more frequent/thorough facility cleaning. And, lastly, search the internet and you can find one or two studies that indicate mandatory flu shot policies do not produce significant benefits.

Wage and Hour Tips: When is Travel Time Considered Work Time

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Prior to working with the firm, Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act. Mr. Erwin can be reached at 205.323.9272.

One of the most confusing areas of the FLSA is determining whether travel time is considered work time. The following provides an outline of the enforcement principles used by Wage Hour to administer the Act. These principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home to Work Travel

An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home-to-work travel, which is not work time.

Home to Work on a Special One-Day Assignment in Another City

An employee who regularly works at a fixed location in one city is given a special one-day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct (not count) time the employee would normally spend commuting to the regular work site. For example, a Huntsville employee who normally spends ½ hour traveling from his home to his work site that begins at 8:00 am is required to attend a meeting in Montgomery that begins at 8:00 am. He spends three hours traveling from his home to Montgomery. Thus, employee is entitled to 2 ½ hours (3 hours less the ½ hour normal home to work time) pay for the trip to Montgomery. The return trip should be treated in the same manner.

Travel That is All in the Day's Work

Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community

Travel that keeps an employee away from home overnight is considered as travel away from home. It is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on non-working days. As an enforcement policy, Wage Hour does not consider as hours worked that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

For example, an employee who is regularly scheduled to work from 9:00 am to 6:00 pm is required to leave on a Sunday at 3:00 pm to travel to an assignment in another state. The employee, who travels via airplane, arrives at the assigned location at 8:00 pm. In this situation the employee is entitled to pay for 3 hours (3:00 pm to 6:00 pm) since it cuts across his normal workday, but no compensation is required for traveling between 6:00 pm and 8:00 pm. If the employee completes his assignment at 6:00 pm on Friday and travels home that evening, none of the travel time would be considered as hours worked. Conversely, if the employee traveled home on Saturday between 9:00 am and 6:00 pm, the entire travel time would be hours worked.

Driving Time

Time spent driving a vehicle (either owned by the employee, the driver, or a third party) at the direction of the employer while transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their “exempt” foremen to perform the driving in order not have to pay for this time. If employers are using nonexempt employees to perform the driving, they may establish a different rate for driving from the employee’s normal rate of pay. For example, if you have an

equipment operator who normally is paid $20.00 per hour, you could establish a driving rate of $10.00 per hour and thus reduce the cost for the driving time. The driving rate must be at least the minimum wage. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time

Time spent by an employee in travel, as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5:00 pm and is sent to another job, which he finishes at 8:00 pm, and is required to return to his employer's premises arriving at 9:00 pm, all the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8:00 pm is home-to-work travel and is not hours worked.

The operative issue regarding riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. receiving work instructions, loading or fueling vehicles, etc.) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site, then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place then the riding time becomes hours worked. In my experience, when employees report to a company facility, there is the temptation for managers to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity, which begins the employee's workday and thus makes the riding time compensable. Therefore, employers should be very careful that the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (such as unloading vehicles) when he returns to the facility at the end of his workday for the return riding time to not be compensable. Recently, an employer told me that to prevent the employees performing work before riding to a job site, he would not allow the employees to enter their storage yard but had the supervisor pick the employees up as he began the trip to the job site. In the afternoons, the employees were dropped off outside of the yard, so they would not be performing any work that could make the travel time compensable.

If you have questions or need further information, do not hesitate to contact me.

2018 Upcoming Events

2018 Employee Relations Summit

Record turnout expected at Summit; make your reservations today!

Birmingham - November 15, 2018
McWane Center
200 19th St N, Birmingham, AL 35203
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Registration Fee – Complimentary

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Birmingham – December 6, 2018
8:30AM -4:30PM
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For more information about Lehr Middlebrooks Vreeland & Thompson, P.C. upcoming events, please visit our website at www.lehrmiddlebrooks.com or contact Alana Ford at 205.323.9271 or aford@lehrmiddlebrooks.com.

In the News

Missouri Rejects Right-to-Work

67% of Missouri's voters rejected the opportunity for Missouri to become the 28th right-to-work state. The vote occurred on August 7, 2018. In a right-to-work state, union security language is illegal. That is, the union and an employer may not require an employee to join or pay union dues or fees or else face termination. In the past six years, Indiana, Michigan, Wisconsin, West Virginia, and Kentucky have become right-to-work states and the United States Supreme Court ruled in favor of right-to-work for public sector employees. The Missouri legislature passed a right-to-work law in 2017. However, those opposed to right-to-work collected 300,000 signatures to force a state referendum on the right-to-work issue.

$2.5 million Racial Harassment Settlement

The long overdue focus on sexual harassment in the workplace should also broaden an employer's concerns about potential racial or national origin harassment. The EEOC recently obtained a $2.5 million settlement in a racial and national origin harassment case involving dishwashers at a Miami, Florida, hotel. The dishwashers complained to HR that their supervisors – the chefs – disciplined them for speaking Creole to each other and referred to them as "the slaves." After the dishwashers reported this to HR, the entire dishwashing staff was terminated.

The EEOC also recently reported a national origin settlement for $39,000 where an Asian employee was subjected to harassment by his white supervisor by referring to the employee as "my little Asian" and "chow." In another case, the EEOC alleged that an employee who complained to HR about racial harassment was told that he would never be promoted. Employers need to emphasize and define what is considered inappropriate behavior or harassment in general, but specifically, issues related to sexual harassment, racial harassment and national origin harassment. Circumstances occur where harassing behavior may be an outcome of public discourse regarding policy issues, such as immigration. Be sure that your employees understand boundaries of acceptable discourse and what may be considered harassment or inappropriate behavior, even if it is not illegal.

Background Check Basics

Employers are increasingly using background checks in the application or promotion process. Under the Fair Credit Reporting Act, there are strict procedures which are required when the background check is conducted through a third-party provider. If the employer conducts its own background check, these disclosures are not necessary. Remember that if using a third-party provider, the applicant or employee's authorization for the background check must be on a stand-alone page. It may not be included as part of an overall agreement section to an employment application, nor may it simply be added to the bottom of an application after several other questions are asked of the applicant. You also may not include with the authorization to conduct a background check an agreement of the applicant or employee to waive any employer liability arising from the background check. Should you receive information from the third-party provider which is adverse to the employee, before you take any action toward the employee, you must provide the employee with a copy of the report with the adverse information and a statement of rights under the Fair Credit Reporting Act. Note that in addition to the Fair Credit Reporting Act, some states have more restrictive requirements regarding employer use of employee background information, including financial and criminal history. The above is just a summary of some of the FCRA requirements where we continue to see compliance issues. Indeed, some of the non-compliant authorizations we see come from consumer reporting agencies themselves!

Implications of Employee Failure to Report Sexual Harassment

In conducting sexual harassment investigations and assessing the evidence, one of the factors employers often consider is whether the employee availed herself or himself of the employer's reporting process and, if not, why not. To some employers, an employee's failure to report is treated as an adverse inference on the credibility of the employee's allegations. Be careful about reaching such a conclusion. According to one survey, 70% of women who are recipients of sexual harassment do not report it. The reasons vary – some do not think they will be believed, others do not know how to report it, others do not have confidence or trust in the employer's decision-making and investigatory processes. Judges and juries will become more tolerant of individuals who failed to report harassment in a timely manner. As is evidenced by disclosures and research surrounding #MeToo, individuals are often reluctant to report the behavior even when the employer's best efforts encourage employees to do so. It is important for an employer to determine why behavior was not reported in a timely manner, but do not discredit the report on the sole basis that it was not timely. Continue to encourage employees to report the behavior immediately; do not include any statement in your policy that puts a deadline on reporting the information or else it will not be processed.

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