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Employment Law Letter
Focusing on Colorado, Idaho, Montana, New Mexico, Utah, and Wyoming

Vol. 4, No. 11 | November 2023

SEPARATION AGREEMENTS

A reminder for employers: Review your separation agreements

CO | ID | MT | NM | UT | WY

by Mark Wiletsky, Holland & Hart, LLP

Companies routinely use separation agreements with departing employees. Through those agreements, the employee receives some type of separation benefit (typically a payment or severance) in exchange for waiving and releasing any potential claims against the company.

The goal is to avoid an existing or potential dispute, claim, or lawsuit. But if companies don't routinely review and update those agreements, they risk the agreement being challenged or invalidated. Even worse, companies are sometimes investigated and forced to pay fines or penalties for provisions in the agreements. A recent settlement announced by the Securities and Exchange Commission (SEC) provides a strong reminder to employers to regularly review and update agreements used with employees.

Facts

On September 19, 2023, the SEC announced a settlement with a real estate services firm. According to the announcement, the company violated the SEC's whistleblower protection rule with separation agreements it used between 2011 and 2022. The agreements contained a common provision: Employees had to affirm they hadn't filed a complaint about the company with any state or federal court or local, state, or federal agency. These types of representations are typically included in separation or settlement agreements to ensure that any pending complaint or charge is resolved in conjunction with the separation or settlement agreement.

The SEC, however, concluded the agreements discouraged employees from filing complaints with federal agencies, including the SEC. Specifically, the announcement noted that by conditioning separation pay on employees' signing the release with this language, the company impeded potential whistleblowers from reporting complaints to the SEC. In its order reflecting the settlement, the SEC referenced laws encouraging whistleblowers to report potential securities law violations, which provide (among other things) confidentiality protections.

The company at issue didn't admit any fault and, according to the SEC announcement, cooperated with the agency. Still, the company paid $375,000 to resolve the investigation, and the settlement is public.

Other crack downs on separation agreements

It may be tempting to conclude the SEC's settlement in this matter won't affect your separation or settlement agreements. Taking that position, however, is risky, to say

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the least. Other agencies have similarly cracked down on agreements that may interfere with their jurisdiction, and state legislatures are limiting confidentiality provisions in agreements with employees.

For example, courts and the Equal Employment Opportunity Commission (EEOC)—which administers, investigates, and enforces federal antidiscrimination laws such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA)—have held that any attempt to limit an employee's ability to file a charge or participate in an investigation with the EEOC is void.

Like the SEC's recent announcement, the EEOC announced a settlement in 2018 with a company that had tied receipt of severance pay to limited employees' rights to file charges or communicate with the EEOC or accept relief obtained by the EEOC. As part of the settlement, the company hired an outside EEO consultant to review its agreements, and it agreed to revise past agreements and notify employees who signed them about their rights.

Earlier this year, the National Labor Relations Board (NLRB) issued its decision and order in *McLaren Macomb*, in which it concluded certain confidentiality and nondisparagement provisions in employee severance agreements violated the employees' rights under the National Labor Relations Act (NLRA)—and the mere offer of such provisions in severance agreements is unlawful.

Finally, in 2023 Colorado enacted the Protecting Opportunities and Workers' Rights (POWR) Act. Among other things, the law restricts employers' ability to prohibit employees or prospective employees from disclosing or discussing unlawful employment practices. Several other states—such as California, Illinois, Maine, New York, Oregon, and Washington—have similarly enacted laws restricting the use of nondisclosure and nondisparagement clauses in agreements with employees.

Practical pointers

The SEC's recent settlement is another reminder to look critically at your company's separation and settlement agreements. Beyond those agreements, it's important to review any agreement with employees or prospective employees that could potentially limit their right to disclose unlawful working conditions or participate in a complaint or investigation with a federal, state, or local agency.

With so many companies operating across multiple states, it's important to ensure any agreement complies with the laws of each jurisdiction in which it might be used. An agreement that is compliant in Utah might not work in Colorado or California.

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HARASSMENT

Proposed harassment guidance broadens employers' obligations under EEO law

CO	ID	MT	NM	UT	WY

by Allison Hawkins and Amy Wilkes, Burr & Forman LLP

On October 2, 2023, the U.S. Equal Employment Opportunity Commission (EEOC) published in the Federal Register its notice of proposed guidance on "Enforcement Guidance of Harassment in the Workplace." The guidance incorporates updates reflecting current case law governing workplace harassment and addresses the proliferation of digital technology and how social media postings and other off-work conduct could contribute to a hostile work environment. It further illustrates a wide range of scenarios showcasing actionable harassment.

Covered basis

The guidance makes clear that federal equal employment opportunity (EEO) statutes only protect against harassment if it's based on an employee's legally protected characteristics, such as race, color, national origin, religion, sex, age, physical and mental disability, and genetic information.

Building in part on case law over the past 25 years and in part on positions taken by the commission, it goes on to provide that "sex-based" discrimination includes harassment based on pregnancy, childbirth, and other related medical conditions such as a worker's "reproductive decisions" including "contraception or abortion" and that "sex-based" discrimination incorporates protections for LGBTQ+ workers against harassment based on sexual orientation and gender identity. It also provides protections for "sex-based" stereotyping.

Notably, under the proposed guidance, the EEOC would recognize claims for perceptional-based harassment where harassment is based on the perception that an individual has a particular protected characteristic, even if that perception turns out to be incorrect. Moreover, the EEOC would recognize claims under federal EEO law for "association harassment," where a complainant associates with someone in a different protected class or suffers harassment because they associate with someone in the same protected class.

Causation

The guidance reaffirms that a causation determination of whether hostile workplace harassment is based on a protected characteristic will depend on the totality of the circumstances. It provides numerous examples that reflect a wide range of scenarios wherein causation may or may not be established.

The scenarios reflect findings where the conduct involved alleges facially discriminatory conduct, stereotyping, situational context evaluations, close timing, and comparator evidence.

Narrowing the objective standard

To establish a hostile work environment, an employee must show there's conduct that is both subjectively and objectively hostile. Notably, the guidance states that whether conduct is objectively hostile "should be made from the perspective of a reasonable person of the complainant's protected class."

The traditional "reasonable person" standard wasn't so limited. In the EEOC's view, "personal or situational characteristics," such as age differential or undocumented worker status, also affect both the objective and subjective reasonableness assessment—a position not shared by all the courts.

Conduct not directed at the employee

The guidance provides that an individual who hasn't personally been subjected to unlawful harassment based on their protected status may be able to file an EEOC charge and a lawsuit alleging they have been harmed by unlawful harassment of a third party.

For example, an employee who is forced to engage in unlawful harassment of another employee may have their own claim under the law, even though they weren't personally subjected to unlawful harassment.

Conduct outside the workplace

The guidance broadly considers conduct occurring in a non-work-related context as part of a hostile work environment. The EEOC provides several examples where an employer may have an obligation to take action against conduct that occurs in a non-work-related context.

In the commission's view, an employer may be liable for harassment if the conduct simply "impacts the workplace." Here are two examples that illustrate this:

- If "a Black employee is subjected to racist slurs and physically assaulted by white coworkers who encounter him on a city street, the presence of those same coworkers in the Black employee's workplace can result in a hostile work environment."
- If "an Arab-American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly, or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment."

The guidance significantly stretches current case law, which typically only considers outside-of-work conduct when it's carried out by an employee with direct supervisory authority, occurs at a work-related event, or occurs between coworkers who constantly work with and see each other inside the workplace. The guidance notes that the EEOC's broadened stance is in light of the proliferation of digital technology, such as electronic communications using private phones, computers, or social media accounts, that often bleeds into the workplace.

Framework of liability

Consistent with governing case law, the guidance sets forth several frameworks under which harassment claims will be analyzed. Which framework is applicable depends on the relationship of the harasser to the employer and the nature of the hostile work environment. Once the status of the harasser is determined, the appropriate standard will be applied to assess employer liability for a hostile work environment.

Automatic liability. An employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.

Vicarious liability. If harassment by a supervisor creates a hostile work environment that doesn't include a tangible employment action, the employer can raise an affirmative defense to liability or damages.

Negligence. If harassment comes from a nonsupervisory employee or nonemployee, the negligence standard is principally applied.

Expansion of liability standards that apply in harassment cases

The guidance also expands on the circumstances in which an employer may be subject to automatic liability. Since the Supreme Court's *Faragher/Ellerth* rulings, the "supervisor" designation often becomes a key issue in determining an employer's liability.

In the EEOC's view, a coworker is a supervisor if the complainant reasonably believed the coworker had the power to recommend or influence tangible employment actions (e.g., hiring, firing, and demotions) against them. This "reasonable belief" approach would allow a coworker to be considered a supervisor even if the coworker had no power to take or influence tangible employment actions against a complainant.

This guidance appears to contradict the Supreme Court's instruction to limit the supervisor's inquiry into whether the harasser actually was empowered by the employer to take tangible employment actions against the complainant.

Employer's reporting mechanism not required

An employer has an affirmative defense to hostile work environment harassment when it can show both that it took reasonable steps to prevent and correct harassment and the employee unreasonably failed to take advantage of those opportunities or take other steps to avoid the harassment.

The guidance provides that, even if the employee didn't use the employer's reporting mechanism to complain of harassment, other actions—such as filing a grievance with a union—may mean the employer has been notified of the concern, and the affirmative defense cannot be used.

Bottom line

The public is invited to submit comments and view the document via the federal e-regulation website until November 1.

Notably, EEOC guidance doesn't have the force of law, but it provides insight into how the EEOC will interpret and seek to enforce the federal EEO laws.

Regardless of changes, management and HR executives will need to continue antiharassment efforts that have been put into place over the last 25 years. Maintain clear and robust antiharassment policies, provide training, thoroughly investigate complaints of harassment, and take appropriate corrective action when an investigation indicates inappropriate conduct. Burr and Forman attorneys are well-versed in antiharassment efforts and are available to assist in this important area.

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EXEMPT EMPLOYEES

Is it 2019 or 2016? DOL proposes FLSA exempt salary threshold increase

CO | ID | MT | NM | UT | WY

by John David Gardiner, Bodman PLC

On August 30, 2023, the U.S. Department of Labor (DOL) announced a much-anticipated notice of proposed rulemaking (NPRM) that, if implemented, would increase the minimum salary for exemption under the Fair Labor Standards Act (FLSA) by over 50% to $1,059 per week (the equivalent of $55,068 per year). The agency is also proposing adding an automatic updating mechanism to the regulations. Because the salary threshold amount referenced in the NPRM is based on 2022 data (which isn't yet finalized), it's likely that the annual salary threshold would be as high as $60,000 by the time a final rule is issued.

Current proposal

This is what we can glean now from the DOL's NPRM:

- It would increase the standard salary level to the 35th percentile of earnings of full-time salaried workers in the lowest-wage census region (currently the South), which would be $1,059 per week ($55,068 annually) based on current data.
- It would apply the standard salary level to Puerto Rico, Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands and increase the special salary levels for American Samoa and the motion picture industry.
- It would increase the highly compensated employee (HCE) total annual compensation requirement to the annualized weekly earnings of the 85th percentile of full-time salaried employees nationally, which would be $143,988 per year based on current data.
- It would automatically update the earnings thresholds every three years with current wage data to maintain their effectiveness.

Under the FLSA, an employer may elect to treat an otherwise exempt employee as nonexempt. Keep in mind that you may not go the other way and elect to treat a nonexempt employee as exempt.

Nonexempt employees must be paid an hourly wage at or above the minimum wage and time and one-half base hourly pay for time worked in excess of 40

hours in a given work week. Such an election by an employer is both cumbersome and often unwelcome by existing exempt employees, however.

Past proposals

The DOL last updated the executive, administrative, and professional (EAP) exemption regulations in 2019. That update—which included setting the standard salary level test at its current amount of $684 per week (equivalent to a $35,568 annual salary)—has been in effect since January 1, 2020. In 2016, the DOL attempted to increase the salary threshold, but that initiative was initially blocked at the end of 2017 and subsequently tackled in courts.

The Department is not proposing changes to the standard duties test, consistent with its approach in both the 2016 and 2019 rules.

Public comments

The DOL welcomes public comments regarding the NPRM within 60 days from the publication date in the *Federal Register*, or on or before November 7, 2023, unless the public comment period is extended.

The exact timeline for the DOL's publication of a final rule, or when a final rule might go into effect, is murky. In 2019, the proposed rule and final rule took approximately 10 months. If this rulemaking process follows a similar route, the final rule could be in effect by the second half of 2024.

The DOL also has an acting secretary rather than a permanent, confirmed Secretary of Labor, which some have indicated violates the Senate's constitutional Advice and Consent powers. It's a virtual certainty that any final rule will be challenged in various courts.

Legal challenges

The current DOL proposal includes a severability provision, which if enforced would have the operative effect of keeping most parts of the rule in place if one piece of the rule is eventually invalidated in court.

Two legal rulings loom large as far as prospective challenges to the DOL's proposed salary-based changes to overtime exemptions under the FLSA:

- In 2017, a Texas-based U.S. district court struck down an attempt by the Obama administration to raise the salary threshold to $47,476. By focusing too heavily on the amount of money workers make instead of their job duties, the Obama DOL expanded overtime protections to workers Congress sought to exclude, Judge Amos Mazzant said in that ruling. Judge Mazzant—an Obama appointee backed by Texas's Republican senators—is still a sitting judge in the Eastern District of Texas.
- From the U.S. Supreme Court, Justice Brett Kavanaugh has recently implied that overtime laws shouldn't consider pay at all. In his dissent in *Helix Energy Solutions Group, Inc. v. Hewitt*, Kavanaugh wrote: "The [FLSA] focuses on whether the employee performs executive duties, not how much an employee is paid or how an employee is paid. So, it is questionable whether the [DOL's] regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."

The question now is whether the current proposal will share a fate with the 2016 proposal or the 2019 proposal. Keep the DeLorean at the ready, we are in for an interesting start to 2024—and beyond.

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PERFORMANCE EVALUATIONS

Importance of evaluating your employees—the good and the bad

CO | ID | MT | NM | UT | WY

by Jeffrey M. Cropp, Steptoe & Johnson PLLC

As we approach the end of another year, some of you may be gearing up for the year-end performance evaluation season. Conducting proper performance evaluations can play a critical role in your organization's ability to address issues with poor performing employees, as well as retain your good employees. The purpose of this article is to provide some guidance to help you navigate through the performance evaluation process and to identify potential legal issues that could arise.

Address issues that need to be addressed

An important part of the evaluation process is that it gives the company the opportunity to highlight performance issues and address them before it's too late. From a legal perspective, it's critical that any performance issues are identified in the performance evaluation and documented. Sometimes it's difficult to properly evaluate an employee who is underperforming and even more difficult to have a face-to-face conversation with them about those issues. If you let a performance issue slide, however, it can become difficult to take the necessary steps later to deal with the performance issues.

For instance, if an employer decides to discipline or discharge an employee because of a performance issue, and if a subsequent lawsuit or grievance is filed, one of the important issues in the case will be to determine what the employee's past performance evaluations say.

If your supervisor has neglected to document the same past performance issues in the evaluation, it makes it more difficult for you to have a solid defense for your disciplinary decision. In fact, if the employee's performance evaluations don't support that the employee is a poor performer, your employee can use your own performance evaluations against you to argue that your actual reason for disciplining or discharging them was an illegal reason.

By contrast, if your supervisor has properly documented the performance issues in the evaluation, it places you in a much better position. First, it shows you have previously advised the employee about correcting the performance and that you have given them the opportunity to correct the behavior. In a lawsuit, the jury tends to like when you have been fair to the employee, and giving them a chance to correct behavior is a good way to show fairness.

Also, if there is a history of documenting and warning the employee about the performance issue, it's easier to show you had a legitimate reason for deciding to discipline or discharge them.

Be objective

To the extent you can, your performance evaluations should focus on objective factors, such as production goals or some other type of hard number. Objective factors help to remove the subjectiveness that can be associated with performance evaluations. Subjective factors based on the opinion of the evaluator can be harder to defend or explain.

While it's difficult to remove all subjectiveness associated with a performance evaluation, the more objective you can make it, the better you will be able to defend the evaluation.

Documentation

You may have heard the expression: "If it's not documented, it didn't happen." In all areas of employment law, this is a good rule of thumb to follow.

If there's an issue with an employee's performance, it needs to be documented in the performance evaluation. Verbal discussions of a performance issue, without any documentation regarding the discussions, simply isn't a good practice. In a lawsuit over a decision to discharge an employee over work performance issues, you don't want to find yourself in the position of relying on a supervisor to testify about the times she verbally talked with the employee about the issue. If it's important enough to talk with the employee about, it's important enough to document the discussion.

If your supervisor doesn't document the verbal discussions as they occur, they should certainly mention the prior verbal discussions in the employee's yearly performance evaluation. It creates a record showing the supervisor talked with the employee before about the issue and creates a record that reminds the employee again about the issue.

Q & A: Accommodating a request for worship space in the workplace

by Mark Wiletsky, Holland & Hart, LLP

Q Do employers need to provide a space for employees to worship and/or pray in the office?

The short answer is: Maybe. You must reasonably accommodate employees' sincerely held religious, ethical, or moral beliefs or practices unless doing so would impose an undue hardship.

For decades, courts held that employers could deny such requests under Title VII of the Civil Rights Act of 1964 if the accommodation would impose more than a "de minimis" cost or burden. In June 2023, however, the U.S. Supreme Court "clarified" that standard. In *Groff v. DeJoy*, the Court held that employers can deny requests for religious accommodation only if the accommodation would result in "substantial increased costs in relation to the conduct of [an employer's] particular business." The Equal Employment Opportunity Commission (EEOC) has provided similar guidance, stating that employers shouldn't try to suppress all religious expression in the workplace.

With that in mind, if an employee or group of employees ask for a place to worship or pray in the office, you should assess the request as you would any other accommodation. For example, if a conference room or other office space is available and employees can otherwise perform their essential job functions, then allowing them to use the space for worship or prayer may be appropriate. That is especially true if you allow employees to use office space for other non-work-related reasons. If you treat the request differently because the employees will be using the space to worship or pray, that will likely pose a risk of violating Title VII.

Of course, it's important to ensure that participation is voluntary, and those who choose to participate—or abstain—aren't subject to any harassment, discrimination, or retaliation. If employees attempt to impose their religious beliefs on coworkers, you might face claims from those employees.

These situations are never easy. It's important to balance everyone's interests and ensure all employees are being treated fairly and in compliance with the law.

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Train your evaluators

Depending on the size of your organization, you could have multiple supervisors involved in evaluating employees. Because not everyone thinks the same way in evaluating employee performance, there's a risk that each supervisor will evaluate their employees differently.

For instance, if you have a five-point scale, with one being the lowest score and five being the highest score, one supervisor may have a tendency to award the highest score while another may have a tendency to award a lower score. This creates the possibility of having inconsistent evaluations among your employees based on the same level of performance. As a result, you may not obtain an accurate measure of how an employee is performing or whether any issues need to be addressed.

To address this potential dilemma, it's important to provide some training to individuals who complete the performance evaluations. The training should provide some guidance on what the point scale means on the form and the company's expectations for how that point scale is to be applied.

While it may not completely stop this dilemma from arising, some training will place the supervisors in a better position to understand how you want the employees to be evaluated and how the evaluation form is intended to be used.

Self-assessment

You should consider having your employees complete a self-assessment of their performance. This helps to show the employees what you think is important about their work performance, and it provides you with a view into how the employee thinks he performed over the past year.

If there's a significant difference between how the employee thinks he performed and how the supervisor thinks the employee performed, it's important to address that difference so the employee and the supervisor develop a similar understanding of how the employee is performing. Also, some employees may recognize if they have a problem area and may admit in their own self-assessment that there's an area that they need to fix.

Retain good employees

While you certainly want to address problem areas when they arise, you will also want to use the performance evaluation process to provide positive feedback to employees when it is deserved. This positive feedback not only tends to assist with keeping your employee on the same productive path, but it also may help you to retain your good employees.

Your good performers want to hear when they are doing well, and you should positively reinforce their good performance. While we live in a time where employees jump from employer to employer, telling your good performers in a performance evaluation that their work is appreciated is a simple step you can take to help keep them with your company. An employee who feels underappreciated may be more likely to look for other opportunities.

Bottom line

The yearly performance evaluation process is an important part of any good business practice. It helps to keep your good performers moving in the same direction, and it helps to identify problem areas that need to be addressed.

If you find you need to discipline or discharge an employee for work performance issues, failing to conduct proper performance evaluations could place you in a difficult and potentially expensive position.

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RETALIATION

Retaliation: The most successful discrimination claim

CO | ID | MT | NM | UT | WY

by Roberta Fields, McAfee & Taft

A retaliation claim can be successful even when the original discrimination claim fails to establish a violation of law. The same laws—federal and typically state laws—that prohibit discrimination based on race, color, sex, religion, national origin, age, disability, or genetic information also prohibit retaliation against individuals who oppose discrimination or participate in an employment discrimination proceeding.

Why are the laws written this way? Well, if employees are unwilling to come forward and speak out or are unwilling to participate when someone else has alleged a complaint, then discrimination cannot be addressed. In other words, retaliation is illegal because it has a "chilling" effect on the willingness of individuals to come forward.

Employment protections

Individuals who file a claim believing they have experienced discrimination are protected. Individuals who are interviewed, or give statements, or who testify about the alleged wrongful employment action are also protected.

What kind of "participation" activity is protected?

- Filing a charge, internal complaint, or lawsuit alleging discrimination;
- Being a witness in an investigation or formal proceeding of a charge or lawsuit;
- Communicating with a manager or supervisor about discrimination or harassment;
- Answering questions during an employer investigation of discrimination or harassment;
- Refusing to follow company practice, policy, or management orders that would result in discrimination;
- Resisting sexual advances or intervening to protect others;
- Requesting a disability or religious accommodation; and
- Asking managers or coworkers about salary information to uncover potentially discriminatory wages.

This isn't a complete list. Any activity that brings discrimination to light is protected under discrimination laws. Each of these examples describes behavior that must be protected so discrimination in the workplace can be investigated and eliminated.

Examples of retaliatory actions

A company cannot fire, demote, harass, or otherwise retaliate against a person for engaging in protected activity. The following are examples where the Equal Employment Opportunity Commission (EEOC) found retaliation:

- A manager placed information about prior discrimination complaints in an employee's personnel file to prevent her from obtaining a promotion.
- Two panelists who were interviewing candidates for a promotion were involved in either current or prior discrimination complaints filed by one of the employees.
- An employer took away a perk (use of a company car) from an employee who had recently filed a discrimination claim.
- An employee was given a lower performance appraisal than was warranted.
- An employee was transferred to a less desirable position.
- An employee received increased scrutiny.
- Management made work more difficult by purposefully changing a work schedule to conflict with family responsibilities.
- Management engaged in verbal or physical abuse with an employee.

Close proximity in time is also a factor reviewed by courts and the EEOC to determine when an action against an employee is retaliatory. The closer in time the alleged retaliatory behavior is to the charge or the participation in the discrimination proceeding, the more likely it will be found to be retaliation.

If someone files a charge, or participates in an investigation, are they protected forever? No. You're free to discipline or fire workers if the reason is nondiscriminatory and nonretaliatory. However, you will carry the burden of proof to establish a nondiscriminatory and nonretaliatory reason for the action.

The EEOC will file suit against companies that allegedly retaliate. In a recent news release, it announced it had filed suit against TCI of Alabama, a recycler of electrical equipment at a plant in Pell City, Alabama. According to the lawsuit, after a female filed an EEOC discrimination charge for failure to hire based on gender, TCI interviewed a management employee who supported the allegation saying TCI had a longtime practice of not hiring female laborers. When the company was unsuccessful in getting the manager to change his statement, it terminated his employment. The EEOC filed suit on his behalf seeking money damages, compensatory and punitive, and injunctive relief to prevent such unlawful conduct in the future.

Best practices

Here are some best practices you should consider implementing to reduce your liability for retaliation claims:

- Have a policy that your company will not tolerate discrimination or retaliation and that employees who come forward in good faith will be protected.
- Have a policy that provides several ways for employees to complain about discrimination (e.g., hotline, HR, certain executives).
- Investigate every complaint.
- Document performance so that when you want to terminate an employee who has complained or participated, you will have documentation of poor performance before the discrimination charge was filed.

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†PAYROLL DEDUCTIONS

Employers: Take care when recovering overpayments, debt from employees

CO | ID | MT | NM | UT | WY

by Jodi R. Bohr, Tiffany & Bosco, P.A.

There are three broad categories of deductions employers make from employee paychecks. The first, legally required deductions, comes in the form of income tax and wage garnishments. The second, deductions on employees' behalf, is withholdings for insurance premiums or charitable contributions. The third category—and the focus of this column—is deductions for the employer's benefit. Employers may seek to take deductions for overpayment, employee theft, or docking for cash shortages and breakage. When doing so, you must follow both federal and state law to avoid possible penalties and liquidated damages.

Be proactive

Whether an employer will be successful in recovering an overpayment or a loan from an employee depends in large part on its diligence in implementing and maintaining the right policies and documents. For starters, employers should consider adopting policies that address deductions from pay for overpayments, loans, or employee theft.

The policies should explain that the employer will make deductions from employees' pay under these circumstances. While not required in Arizona, a best practice is to have employees sign an acknowledgment of receipt and understanding of this policy.

If the money an employee owes is a result of a loan, the employer should require the individual to sign a promissory note outlining the terms of the loan, the mechanisms for repayment (during and following employment), and the consequences for failure to repay the loan. The promissory note should also include an authorization to deduct "payments" during employment and that the employer will deduct the full amount permitted by law from the final paycheck if the loan remains outstanding when the employee ends employment.

Deductions must comply with applicable laws

The Fair Labor Standards Act (FLSA) allows employers to deduct wage overpayments from future wages even if the deduction causes the employee's wages to fall below the minimum wage. Depending on the state the employee resides in, some state laws may conflict with the FLSA for the employee's benefit.

For example, Arizona law only allows deductions from an employee's paycheck for overpayment so long as the deductions don't cause the worker's pay to fall below Arizona's minimum wage. If the deduction for the total overpayment would cause the employee's pay to fall below the minimum wage, the employer would need to take deductions over several pay periods to comply with Arizona law.

Recovering overpayment from former employees

Recovering overpayments from former employees can be tricky. Employers may need to make swift decisions if the final paycheck hasn't been issued. It's best to contact the former employee first to request the money, especially if the overpayment can't be fully deducted from the final paycheck.

Making payment arrangements may increase the likelihood of full recovery of the overpayment. If the employee ignores attempts to collect or refuses to pay back the overpayment, the employer will need to consider the next best course of action. If the final paycheck hasn't been issued, the employer can deduct the maximum amount permitted by law. If overpayment remains, the employer may need to consider whether legal action should be taken or whether to treat the overpayment as bad debt.

In deciding whether to take legal action, employers should consider employees' resources. If an employee doesn't have resources to collect, legal action may be useless and expensive. And this past December, Arizona made it increasingly difficult to collect on a judgment or garnish wages.

A word to the wise

Employers should be prepared to address overpayment, theft, or loans and how to collect the money, especially from a departed employee. Once the overpayment is discovered, priority one is to correct the problem. This will reduce the overpayment that needs to be recovered and prevents the recurrence of recover issues.

When in doubt about what you can deduct from an employee's wages and when, contact qualified legal counsel to obtain guidance on the proper course of action.

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EMERGENCY PREPAREDNESS

Facing the storm: Natural disasters trigger need for employer preparation

CO | ID | MT | NM | UT | WY

by Tammy Binford

Extreme natural disasters—fires, floods, hurricanes, and more—increasingly dominate news coverage. But the full effect of such tragedies outlasts the headlines. And it's not just fires and storms. Extreme heat events also threaten the health and safety of people all around the world.

Employers are certainly not immune. In fact, the increasing number and severity of natural disasters make it more essential for employers to develop plans that will get them back in business and enable them to help employees recover when disaster strikes.

Making plans

Dangerous weather and other natural disasters often shut down operations, but even after reopening, businesses can expect absenteeism and turnover because employees will continue to suffer a disaster's effects. Also, when employees do manage to return to work, they often will be less productive because of worries about their future.

Employers can cope with the possibility of natural disasters by developing business continuity plans. Writing for *Forbes* in September 2022, Holly Welch Stubbing—CEO of E4E Relief, a company helping businesses respond to crises—advised creating a people-focused plan that includes evacuation planning, data storage and security, internal crisis communications, organizational recovery, and a return-to-work strategy.

Stubbing advised creating a team made up of key stakeholder groups of the organization, including IT and operations. The team should be able to conduct a risk assessment and business impact analysis that will provide the information and insight needed to develop plans for recovery.

Stubbing emphasized the importance of understanding the long-term effects for employees. They may not be able to return to work quickly, and they likely will suffer the effects of unexpected expenses and losses not easily overcome.

"HR leaders are crucial in sustaining the values of the organization and optimizing adaptability for unexpected conditions," Stubbing wrote. "While we can't predict when and where disasters will strike, we can ensure we stand ready to provide a compassionate response to our most important asset—our people."

Legal obligations

Employers also must be aware of legal obligations related to disasters, including some federal laws that are implicated.

Fair Labor Standards Act (FLSA). Even if a business is closed for a time, employees classified exempt under the FLSA must be paid their full salary if the business is closed for less than a full workweek. But the employer can require exempt employees to use accrued leave for that time.

Employees classified nonexempt under the FLSA are required to be paid only for hours they work and, therefore, aren't required to be paid if the employer can't provide work because of a natural disaster.

However, nonexempt employees who work fluctuating workweeks and receive fixed salaries must be paid their full weekly salary for any week in which any work was performed.

Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act requires employers with at least 100 employees to give at least 60 days' notice of plant closings and/or mass layoffs.

An exception exists when the closing or layoff is a direct result of a natural disaster, but the law still requires employers to give as much notice as is "practicable." If an employer gives less than 60 days' notice, it must prove the exception is justified.

Occupational Safety and Health Act (OSH Act). Since natural disasters can create workplace hazards, the Occupational Safety and Health Administration (OSHA) provides a number of resources outlining emergency preparedness and responses related to weather and other natural disasters. (See osha.gov/emergency-preparedness.)

Far-reaching effects

The effects of disasters go beyond the local level and reach around the world. The United Nations Development Programme—a U.N. agency focused on overcoming poverty and achieving sustainable economic growth and development—published a report in April 2016 titled "Climate Change and Labour: Impacts of Heat in the Workplace."

Among the key findings:

- Excessive workplace heat is an occupational health and productivity danger. High temperatures and

dehydration cause heat exhaustion, heat stroke, and even death. Letting workers slow down work and limiting their hours can protect them from heat danger, but those steps also reduce productivity, economic output, and income.

- The southern United States is among the areas around the world identified as a highly exposed zone.
- Future climate change will increase losses.
- Heat extremes affect the habitability of regions, especially in the long term, and may already constitute an important driver of migration internally and internationally.
- Actions are needed to protect workers and employers now and in the future, including low-cost measures such as assured access to drinking water in workplaces, frequent rest breaks, and management of output targets. ■

HIRING

Using social media to screen job candidates? Know the legal, ethical concerns

CO | ID | MT | NM | UT | WY

by Tammy Binford

Checking job candidates' social media posts has become common practice. Even if an employer enlists a separate company to conduct a formal background check, a hiring manager or HR professional may take a quick look at the candidate's internet presence. That practice may seem to be a fast, easy way to get to know a potential employee early in the hiring process, but it also presents legal and ethical challenges.

Q & A: Electronic distribution of employee handbooks is legal, even if tied to a acknowledgement

by Ryan B. Frazier, Kirton McConkie

Q Can the distribution of employee handbooks be done electronically if employees still must sign a document acknowledging they received it?

The short answer is yes. Employee handbooks are books or compilations of an employer's policies and procedures that are provided to employees. They introduce employees to the employer and educate them about an employers' rules, procedures, and benefits.

The law typically doesn't require you to have a handbook or provide one to employees. Federal law certainly doesn't require an employee handbook. But some federal and state laws require employers to provide employees with certain information, so they understand their legal rights. And some states do require specific things be set forth in a handbook. A best practice is for you to create and maintain a handbook and make it available to all employees.

Traditionally, employers physically passed out their handbooks to employees. An employer usually handed out the handbook when it onboarded an employee. To ensure the employee read and became familiar with the handbook's contents, the employer required or asked its employees to sign an acknowledgment of receipt.

Today, handbooks can be electronically provided. Employers can easily, instantaneously, and inexpensively deliver handbooks directly to employees electronically. Electronic handbooks can be effortlessly updated and modified. And the customary acknowledgements can be "signed" electronically. Plus, electronic circulation of a handbook avoids wasting paper through printing hard copies. With electronic handbooks, you need to take steps to make sure employees receive the handbook through your electronic systems.

Nothing in federal or state law prohibits you from electronically passing out employee handbooks. That is the case even if you require the employee to sign an acknowledgement of receipt. Most states and the federal government have laws that recognize electronic or "digital" signatures as enforceable and as binding as physical signatures. You should note that some states have legal requirements applicable to such signatures for them to be recognized by law. In each case, the key is that the signer—in this case, the employee acknowledging receipt and possibly the reading of a handbook—manifests their intent to sign the acknowledgment. Of course, there's a risk an employee could challenge whether there was actual intent to sign if the acknowledgment is automatic or triggered simply by "logging on" to your computer system or by opening a document.

One thing you should remember is that having an electronic handbook doesn't necessarily satisfy legal requirements to circulate certain information to employees. As most employers know, many federal and state laws require employers to "post and keep posted" at all times certain information regarding employees' legal rights.

For example, federal laws requiring the continuous postings include the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), and the Employee Polygraph Protection Act. The information that must be provided to employees can also vary from state-to-state. You typically must "post" in a conspicuous space at the employment site certain information relating to employees' legal rights even if the information is also disseminated via a handbook. This has usually been done in a common area accessible to all employees, such as a break room or other high-employee traffic areas.

The U.S. Department of Labor (DOL) has stated that electronic posting may be used in some cases—particularly since workforces have become remote because of COVID and other factors. Electronic posting is an "acceptable substitute" for federal continuous-posting requirement only if all employees exclusively work remotely, the employees receive information from the employer electronically, and the electronic postings are available to and accessible by employees at all times. One-time required notices may be communicated via e-mail.

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What employers are doing

In June, ResumeBuilder.com surveyed 1,013 hiring managers and found that most check job candidates' social media accounts at least some of the time.

The survey found that 31% said they always look at candidates' social media, 44% said they sometimes do, and 13% said they rarely do. Just 12% said they never look at candidates' social media as part of the hiring process.

The survey also found that 41% of the survey respondents said checking social media is definitely acceptable at their organization, and 36% think it is.

The survey found 14% of respondents were unsure if checking candidates' social media is an acceptable practice at their company, 6% didn't believe it's acceptable at their employer, and 2% were sure it's not acceptable.

Most of the hiring managers who use social media as part of the candidate evaluation process (57%) said they check before the interview, and 43% said they typically view social media after the interview.

The survey found that Facebook was the most viewed social media, but smaller numbers cited Instagram, Twitter (now known as X), and TikTok. The survey didn't ask about employers' use of LinkedIn.

Dubious practices

The ResumeBuilder.com survey also turned up some risky moves employers make. Sixty-eight percent of the hiring managers responding to the survey admitted they use social media to find answers to illegal interview questions.

Federal, state, and local antidiscrimination laws prohibit employers from considering certain characteristics when making employment decisions. For example, on the federal level, Title VII of the Civil Rights Act of 1964 prohibits discrimination based on race, color, national origin, sex, and religion.

The Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with a disability, and the Age Discrimination in Employment Act (ADEA) prohibits discrimination based on age over 40. The Genetic Information Nondiscrimination Act (GINA) prohibits discrimination based on an applicant's or employee's genetic information.

Despite those legal protections for candidates and employees, some employers try to use social media to learn about protected characteristics. The ResumeBuilder.com survey found that, in order of frequency, hiring managers admitted to passing up candidates after learning their age, politics, race/ethnicity, sexual orientation, gender identity, marital status, disability status, pregnancy status, and religion.

Why check social media?

ResumeBuilder.com's survey asked hiring managers why they check social media. Signs of unprofessional behavior and illegal activity were the most likely reasons hiring managers cited for rejecting candidates.

But employers cited other reasons for checking social media posts, including to satisfy curiosity and to see if candidates are invested in their careers.

One common reason cited was to ensure a good cultural fit. That can be risky since employers may cite "fit" as a justification to reject candidates for unlawful reasons.

Such legal risks lead some employers to rely on companies that offer expertise and software designed to find information on candidates in legally sound ways.

One background check company, Accurate, says its product finds and analyzes over a dozen risk categories in social media posts, including insults and bullying, toxic language, and threats of violence. Its technology searches the top social media platforms for negative text and images, and human analysts review the results.

Employers aren't just checking social media as part of the hiring process. They also sometimes look at their current employees' activity. Staffing firm Express Employment Professionals in January released a poll it commissioned from The Harris Poll showing 88% of the managers included in the survey would consider firing employees for content found in workers' posts.

The survey showed that offenses considered grounds for firing include publishing content damaging to the company's reputation, revealing confidential company information, showcasing and/or mentioning illegal drug use, violating the company's social media use policy or contract, and showcasing and/or mentioning underage drinking. ■

MOUNTAIN WEST EMPLOYMENT LAW LETTER (ISSN 2689-7873) is published monthly for $499 per year by **BLR®—Business and Learning Resources,** 5511 Virginia Way, Suite 150, P.O. Box 5094, Brentwood, TN 37024-5094.

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