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PAID FAMILY LEAVE

Department issues important PFML updates

CT | **MA** | ME | NH | RI | VT

by Amelia J. Holstrom, Skoler, Abbott & Presser, P.C.

The Massachusetts Department of Family and Medical Leave has issued some updates that are important for employers to know. The department administers the Paid Family and Medical Leave (PFML) law, under which employees are eligible to take up to 26 workweeks of PFML each benefit year for various reasons, including leave for their own serious health condition or the serious health condition of a family member and leave to bond with children after birth, adoption, or placement. In recent weeks, the department issued two important updates regarding these two issues, along with its Fiscal Year (FY) 2023 Report.

The contribution rate is increasing

Employees (and employers at companies with more than 24 employees) fund the PFML program through contributions deducted from their wages, and employees who take PFML are paid a certain percentage of their regular pay up to a maximum based, in part, on the state's average weekly wage.

Beginning on January 1, 2024, the PFML contribution rate for businesses with 25 or more employees is increasing from 0.63% of wages to 0.88%. Of the 0.88%, 0.18% applies to the family leave portion of the law and may be paid for solely by the employee. The remaining 0.70% is applicable to the medical leave portion of the law, of which 0.28% may be paid for by the employee, with the remaining 0.42% to be paid for by the employer.

Similarly, the PFML contribution rate for businesses with fewer than 25 employees is increasing from 0.318% to 0.460%. Employers with under 25 employees may require them to pay the full 0.46% contribution.

Individual contributions are still capped by the Federal Social Security taxable maximum, meaning PFML contributions aren't paid by the employee or the employer on any income over that maximum. For 2023, that maximum was $160,200. The maximum hasn't yet been set for 2024, but employers will need to pay attention to that number.

A new notice is now required

Under the law, employers are required to give employees a written notice that includes information on the contribution rates, among other things, at the time of hire and 30 days before any contribution rate change. As a result, employers must provide notice of the new contribution rate to current employees by December 2, 2023.

The department hasn't yet issued its model notice, but employers can check the department's website for it in the near future.

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If you hire someone before January 1, 2024, but after you've already distributed the new notice to your current employees, you'll need to give them both your current notice (with 2023 rates) and the new notice (with 2024 rates).

The maximum weekly benefit is increasing

PFML provides partial wage replacement for employees up to a maximum weekly payment based on a calculation involving the employee's average weekly wage and the state's average weekly wage, which is calculated and published yearly. Initially, the maximum weekly payment was $850 per week, but it has increased significantly since then. In 2023, it was $1,129.82. In 2024, the maximum weekly benefit amount is increasing to $1,144.90.

FY 2023 Report sheds light on employee use

The department also issued its FY 2023 (July 1, 2022, to June 30, 2023) PFML Report. When compared with the FY 2022 Report, the 2023 Report sheds light on some significant differences in FY 2023 and some things that stayed the same. Here are the highlights:

In FY 2023, the department approved 143,356 applications for PFML—a 27.39% increase in approved applications over FY 2022. The majority of those—49.36%—were for an employee's own serious health condition.

Leave associated with recovery from childbirth and/or pregnancy represented 13.19% of approved applications. Notably, 62.88% of individuals who had an approved medical claim related to recovery from childbirth also had an approved family leave claim for bonding. Family leave to bond with a child following birth, adoption, or foster care placement accounted for 27.37% of approved applications, and leave for a family member's serious health condition represented 10.17% of approved applications.

A small number of approved applications were for military exigency leave and leave to care for a servicemember.

The report indicates that the department denied 16.27% of applications for various reasons, including that the individual hadn't satisfied the financial eligibility test, worked for an employer with a private plan, submitted appropriate documentation, applied for bonding leave within one year of the birth, and notified the employer of the individual's need for leave within the timelines set forth in the statute and regulations.

The report also includes demographics for approved claimants. Notably, just like in FY 2022, the age group with the most approved claims was 31- to 40-year-olds. Additionally, the report notes that the total number of claimants—just over 82,000—for which demographic data is provided doesn't equal the total number of approved claims, which is more than 143,000, because individuals can file more than one claim in a year.

Finally, the average weekly wage of individuals who applied for PFML in FY 2023 was $1,155.48, which was more than 18% lower than the average weekly wage of individuals who applied in FY 2022.

Bottom line

You should continue to check the department's website for the 2024 Contribution Notice and send that notice, as outlined above, no later than December 2, 2023. You'll also need to distribute those notices in the near future. Additionally, you should consult with your payroll providers and confirm that the correct contribution rate will be put in place effective January 1, 2024.

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PAYROLL DEDUCTIONS

Employers: Take care when recovering overpayments, debt from employees

CT | MA | ME | NH | RI | VT

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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EXEMPT EMPLOYEES

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

CT | MA | ME | NH | RI | VT

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 will 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 workweek. 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 the 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. 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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HARASSMENT

Proposed harassment guidance broadens employers' obligations under EEO law

CT | MA | ME | NH | RI | VT

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, whereby 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," whereby 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 that 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.

Q & A: Tech can help you distribute your employee handbook

by Meaghan Murphy, Skoler, Abbott & Presser

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

Yes, distribution of employee handbooks can be done electronically and be just as effective as paper acknowledgment forms employees sign. Depending on the technology you have at your disposal, you have different options to ensure you have confirmation that employees received a copy of the handbook.

For example, an employer that primarily communicates with employees via email may allow employees to electronically sign, date, and email the acknowledgment form from their individual company email account or allow them to write in an email from their individual company email account that they received and reviewed the employee handbook.

If you provide access to the employee handbook via company intranet, you may allow employees to check a box acknowledging they received and reviewed the handbook and electronically signing and dating on the company intranet.

What's important is that you can show employees were given a way to access a copy of the handbook (e.g., a link or an attachment) and that they responded by acknowledging as much in a way that's attributable to them (e.g., an email from their company email account).

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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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PERFORMANCE EVALUATIONS

Importance of evaluating your employees—The good and the bad

CT | MA | ME | NH | RI | VT

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 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 be 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 they 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.

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 employees think they performed over the past year.

If there's a significant difference between how the employees think they performed and how the supervisor thinks the employees performed, it's important to address that difference so the workers and the supervisor develop a similar understanding of how the employees are 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 employees on the same productive path but 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 when 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

CT | MA | ME | NH | RI | VT

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, give statements, or testify about the alleged wrongful employment action are also protected.

What kind of "participation" activity is protected?

- Filing a charge, an internal complaint, or a lawsuit alleging discrimination;

- Being a witness in an investigation or a 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.

Q & A: Tech can help you distribute your employee handbook

by Maureen James, Skoler, Abbott & Presser

Q Are there any stipulations regarding when a business can dictate the timing an employee must abide by to call off/request time off without disciplinary action? For instance, are we allowed to require a 24-hour notice for a call-off, and if that isn't met, can we take disciplinary action?

In Massachusetts, employers can require employees to provide notice before using earned sick time. The law states that "when the use of earned sick time is foreseeable, the employee shall make a good-faith effort to provide notice of this need to the employer in advance of the use of the earned sick time."

The state attorney general (AG) has been tasked with enforcing this law and, in guidance, specifically addresses advanced notice, advising employers that they have the ability to require up to seven days' advanced notice of the anticipated use of such time.

The AG's guidance also acknowledges that sick leave isn't always planned, so if the use of time is unforeseen and/or emergent, then less notice is acceptable.

Although the law allows employers to require notice before the foreseeable use of earned sick time and that employees follow their callout procedures—absent extenuating circumstances—for nonforeseeable absences, it's clear it wasn't intended to allow employers to develop inflexible requirements.

Whether the use of time was foreseeable or not and whether the reason for the use of time was emergent are issues that will be specific to the employee on a case-by-case basis. Without a firm requirement, questions and disputes will arise.

Employers are advised not to "interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under or in connection with [the law], including, but not limited to, by using the taking of earned sick time under [the law] as a negative factor in any employment action such as evaluation, promotion, disciplinary action or termination, or otherwise subjecting an employee to discipline for the use of earned sick time."

Taking disciplinary action against an employee for failing to meet the notice requirements before taking earned sick time requires a detailed review of the circumstances surrounding the event. The Earned Sick Time Law allows employers to discipline employees who abuse or fraudulently use earned sick time.

Examples of fraud or abuse may include employees' using sick time when they're late to a scheduled shift or a pattern showing an employee uses sick time on days surrounding other days off—e.g., weekends, holidays, or vacation. The law also permits employers to discipline employees who fail to follow their normal callout procedures, unless there are extenuating circumstances that prevented them from doing so.

Other types of time off may have notice requirements, as well. For example, under Massachusetts' Paid Family and Medical Leave (PFML) law, employees are required to give notice as soon as possible for an unexpected/unplanned event. If planned, the application for leave can be started up to 60 days prior, and the state requests that employees speak to their employers at least 30 days before the intended leave. As seen in the Earned Sick Time Law, employers can't interfere with and/or retaliate against employees for taking leave under the PFML.

You should be aware that other leave laws in Massachusetts have different notice requirements.

If the leave sought by an employee isn't statutorily prescribed or protected—for example, as traditional vacation paid time off—you should have specific policies discussing your notice requirements, and you can place reasonable limitations on the use of time without proper notice in line with those requirements.

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- 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, 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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EMERGENCY PREPAREDNESS

Facing the storm: Natural disasters trigger need for employer preparation

CT | MA | ME | NH | RI | VT

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). Because 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 (U.N.) 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

CT | MA | ME | NH | RI | VT

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 an 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.

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 because 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. ■

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