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Veritas™

A newsletter of Human Resources highlights, helpful hints, suggestions and reminders to assist employers in their daily interactions with employees.

Human Resources Potpourri

THREATENING TO KILL YOUR CO-WORKER MAY NOT PRECLUDE AN ADA CLAIM FOR WRONGFUL TERMINATION

So says the Ninth Circuit Court of Appeals, *Timothy James Mayo v. PCC Structure Works, Inc.* The Court held that an employee, who was terminated after making credible death threats against his supervisor and co-workers was not entitled to pursue a wrongful termination claim under the ADA.

The Ninth Circuit made the usual analysis of the ADA. Under the ADA, an employer must make **reasonable accommodations** for disabled employees who are otherwise qualified to do a particular job. According to the ADA, a "qualified individual with a disability is a 'person' … who can perform the essential functions of the position with or without reasonable accommodation." According to the Court, the "ability to appropriately handle stress and interact with others" is an essential function of "almost every job". Thus, an employee whose mental state creates a hostile environment, or whose behavior threatens the safety of other employees, cannot perform the essential functions of his or her job and can be terminated without violating the ADA guidelines.

Query: What does an employer do when an employee's conduct is less extreme, i.e. employees who are "simply rude, gruff or unpleasant" or have "anti-social" behavior?

The answer is not an easy one! While an employer is likely to terminate a potentially violent employee without fear of liability, it is not clear from the Court's decision whether the employer may terminate an employee whose conduct is extreme, but not violent.

When ADA issues arise in your workplace, a call to an experienced employment lawyer is recommended.

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INDEPENDENT CONTRACTORS OR EMPLOYEES? THEY'RE EMPLOYEES

The DOL's Wage & Hour Division issued an "Administrator's Interpretation" (Guidance) on July 15, 2015. Its main conclusion: "Most workers are employees under the FLSA". Why? You ask – because the definition of "to employ" is "to offer or permit work". According to the DOL, to make this determination one must employ the six factor "economic realities" test. Sounds easy, right? Wrong! The six factors follow:

Factor 1: Is the work performed an integral part of the employer's business?
Yes, if it is related to the employer's core products or services
No, if otherwise

Factor 2: Does the Worker's managerial skill affect the worker's opportunity for profit or loss?
An Independent Contractor relies on more than his or her job skill in performing services, thereby enhancing the opportunity to earn a profit or loss
The employee generally increases his or her earnings by working longer hours

Factor 3: What is the worker's relative investment compared to the employer's investment?
A worker's investment must be significant to be meaningful as compared to the employer

Factor 4: Does the work performed require special skill or initiative?
DOL believes only skilled workers who operate an independent business are Independent Contractors. Business skills will prevail over technical skills.

Factor 5: Is the relationship between the workers and the employer permanent or indefinite?
A "permanent" working relationship, with no specific end or deadline, indicates an employment relationship.
An Independent Contractor usually works one project for an employer and not typically for the same employer.

Factor 6: What is the Nature and Degree of the employer's control?
An Independent Contractor controls "meaningful aspects" (undefined) of the work and usually has a flexible work arrangement.

The DOL notes that the above factors are not to be applied in a vacuum and no one factor is controlling.

The DOL also appears to be moving away from the usually favored control factor to one that is more comprehensive. Thereby shifting its position to the conclusion that many independent contractor relationships are currently misclassified.

Employer Note: Re-examine your current contactor relationships. Big Brother is watching.

QUOTES OF THE MONTH

A good leader doesn't get too far ahead of his followers – Franklin Delano Roosevelt

I attribute my success to this – I never gave, or took, any excuse – Florence Nightingale

Socialism only works in two places: Heaven where they don't need it and Hell where they already have it – Ronald Regan

Every (man) believes that he has a greater possibility – Ralph Waldo Emerson

Be who you are and say what you feel, because those who mind don't matter and those who matter don't mind – Dr. Seuss

Things I Have Learned

That the biggest regrets in life are the risks that you didn't take

That you can miss a lot of good things in life by having the wrong attitude

That there is a big difference between two cloves of garlic and two bulbs of garlic

That wisdom is not how much you know but how you use what you know

That chocolate is a food group

That the best way to save money is to be too busy to go shopping

HR Potpourri

NORTHWESTERN UNIVERSITY – FOOTBALL AS USUAL?

It took nearly 18 months, but the NLRB has finally ruled on the issue of whether the university's scholarship football players were employees of the school under the NLRA and could form a union and bargain collectively over the terms of their "employment" as college football players. The board punted on this one by avoiding the question of whether or not student athletes qualified as "employees" of the University. Bottom line: Northwestern University football players cannot form a union.

This no decision likely kills the prospect of union-organized athletes at the private schools (17) in the FBS, but leaves open the question whether the Board will exercise jurisdiction in future cases involving scholarship collegiate athletes at other universities in other sports. Translated this means: the battle for scholarship athlete's status as "employees" of their teams, and their eventual unionization, is far from over.

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WORKER'S FIRING FOR MEDICAL POT USE WAS LAWFUL

The Colorado Supreme Court, in a 6-0 decision, ruled that the employer was within its rights to fire a quadriplegic customer service representative who used medical marijuana. (*Brandon Coats v. Dish Network, LLC*, Case No. 13SL394, June 2015).

The issue to be decided; whether a statute prohibiting firing workers over lawful off duty activities protected a state-sanctioned medical marijuana user. In addressing this issue, the Court held that the State's lawful activities statute does not shield workers who engage in an activity that is allowed by State law, but is prohibited by Federal law. (The discharged employee had received a license from the State (Colorado) to use marijuana for painful muscle spasms caused by his quadriplegia). The Court noted that using medical marijuana, even off duty and after work, doesn't qualify as "lawful" because the drug is banned by Federal law.

While the Colorado Supreme Court's decision is not binding in other states, it does fall in line with other State Supreme Court rulings:

2011 Washington Supreme Court held, that state's statute legalizing medical marijuana did not protect patients from being terminated by their employers if they failed a company drug test.

2010 Oregon Supreme Court held, that an employer is not required to accommodate an employee's use of marijuana to treat a disability under the state's anti-discrimination laws.

2000 California Supreme Court held, under the State's Compassionate Use Act, which shields medical users of marijuana against state criminal charges of drug possession, does not extend protection to employees and upheld the firing of a medical marijuana user.

The Colorado Court decision reinforces, for employers with zero-tolerance policies toward positive marijuana tests, that as long as marijuana is illegal under federal law, they have a "right" to prohibit it in the workplace. Until otherwise stated, use of marijuana in the employment setting still largely remains at your own risk.

When drug testing issues arise in your workplace, a call to an experienced employment attorney is recommended.

THE ADA, ALCOHOLISM AND WORKPLACE TESTING

Alcoholism is considered a disability under the Americans with Disabilities Act, as amended (ADA) and individuals who suffer from alcoholism are entitled to the protection of the Act. Employers are also prohibited from asking disability related questions (one that is likely to elicit information about a disability) or conducting medical examinations (a procedure or test that seeks information about an individual's physical or mental impairments or health) prior to making a job offer.

Under the ADA, an alcohol test is considered a medical examination, which has these stages:

Pre-Offer: ADA prohibits an employer from making any inquiries about medical conditions or disability, and prohibits alcohol testing. Questions about alcohol intake are also prohibited.

Post-Offer: After a job offer has been extended to an applicant, the employer may conduct a medical examination and ask the applicant disability related questions. If alcohol testing is conducted, the employer should test **all** individuals who receive offers in the same job category. An employer may revoke a job offer due to the results of an alcohol test if it does so for reasons that are "job-related and consistent with business necessity" (a reasonable belief; based on objective evidence).

Active Employment: An employer can test active employees if the test is "job-related and consistent with business necessity". (Test must be intended to inquire into the ability of the employee to perform job-related [essential] functions).

In today's business environment of close scrutiny by Administrative Agencies and the emphasis on strict enforcement of the laws they are responsible for administering, doing nothing is not a viable option for employers. Whether in the area of alcohol testing, or any related area of employment, it is advisable that the employer regularly review its employee handbook and the rules, policies and practices contained therein in order to meet the challenge of stricter enforcement.

When employment issues arise in your workplace, a call to experienced employment counsel is recommended.