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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

The DOL

"In recent years employers have faced an explosion of wage and hour lawsuits which are often driven by disagreements over how workers are classified." It looks like that trend will continue as employers cite wage and hour litigation involving exemption from the Fair Labor Standard's Act's overtime provisions as their main concern and the DOL is very willing to collaborate that concern. In 2012, a total of 4,204 wage and hour class actions were filed in state and federal courts, an increase of 11% from 2010. This leads to concern of most employers who worry about the threat of misclassification litigation or a DOL audit. Adding to that, concern are the costs associated with litigating these types of claims and dealing with the disruption to business that they create. The time is always right to have up-to-date job descriptions and performance reviews and to consider having employees describe and assess their own (job) performance to create a written appreciation of job responsibilities in the employee's own words.

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'Tis the Season to be Jolly!

In the true spirit of the Holiday Season, the friendship of those we serve remains the foundation of our success. Thank you, we appreciate and value your business. Wishing you and your family Happy Holidays and a New Year filled with peace, happiness and prosperity!

Your friends at May Oberfell Lorber

JOB DESCRIPTIONS AND THE ADA

Speaking at a recent ABA Labor and Employment Law Conference, EEOC Commissioner Chai Feldblum emphasized that, employers can help keep themselves from running afoul of the ADA by maintaining very clear job descriptions of what they expect to be accomplished in a job. If employers have clear, succinct job descriptions that lay out the essential functions of the job, it can help them better understand whether they are able to give accommodations to workers with disabilities. "The whole point of the reasonable accommodation is to enable the person to perform the job up to the standards you have established, quantitative and qualitative standards." According to the Commissioner, "that's why it's so useful to not just have in your job description a whole bunch of things, but really saying what do I expect to be accomplished from this job and how well do I expect this job to be done." "If you are really clear about those two things then the interactive process will work a lot better." When it comes to creating job descriptions, less is more.

Under the EEOC guidance, deference is generally given to an employer in determining what the essential functions of the job are and setting the level of performance expected of employees. However, this does not mean that the courts will accept anything that the employer deems to be an essential function to be essential if it doesn't reflect the reality of the position. It is important to have clear job descriptions that truly highlight the essential functions of the job rather than a laundry list of everything about how the job has typically been done. A job description that very clearly sets out the expectations for what is to be accomplished in the job will help the employer be able to see whether accommodations are necessary and whether they will work.

The ADA only covers individuals who are qualified to perform their job. If an employer engages in the interactive process and there is no reasonable accommodation that will enable the employee to do the job and no second position is available so that the person can be reassigned, the employer can still terminate the worker and remain in compliance with the law. "The whole point of the ADA is to keep people with disabilities attached to the labor force, but only if they can do the job."

Source: Law 360 Employment, Nov. 12, 2013

Quotes Of The Month

- All problems become smaller if you don't dodge them but confront them – Anonymous
- You'd be surprised by how much you can accomplish if you don't care who gets the credit – Ronald Reagan
- All great changes are preceded by chaos – Anonymous
- A good name, like good will, is got by many actions and lost by one – Benjamin Franklin
- A gentle word, a kind look, and a good-natured smile can work wonders and accomplish miracles – Anonymous

Things I Have Learned

That there are no unimportant acts of kindness

That what you pass on to your children will affect generations

That people will remember you as being a great conversationalist if you mostly listen

That dreams are where you want to go. Work is how you get there

That everybody wants to be special to someone

That goldfish don't like Jell-O

Human Resources Potpourri

Termination for Lactating is Discrimination

The 5th Circuit Court of Appeals held that an employer who terminates a woman for lactating or wanting to express breast milk at work violates Title VII (*EEOC v. Houston Funding 11 Limited*, May 30, 2013). The company had no maternity-leave policy and was too small to be covered by the FMLA. The employee, due to medical complications, remained out of work. During her absence, the employee told her employer she was breast-feeding and asked if she could express milk at work and use a back room to pump milk. The employer responded, "No" and advised the employee that her position had been filled.

The 5th Circuit concluded that lactation is a medical condition related to pregnancy, thus terminating an employee who is lactating and wanting to express breast milk in the workplace violates Title VII.

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WARN ACT—SUDDEN EVENTS STILL REQUIRE NOTICE

The Eleventh Circuit Court of Appeals decided that an Alabama casino violated the Worker Adjustment and Retraining Notification Act (WARN) by failing to give employees any advance notice concerning its action (to close the business). (*Weekes-Walker v. Macon Cnty. Greyhound Park, Inc.* 11th Cir., 8/5/13). In a favorable finding for the employees, the Court stated that a company may be excused by unforeseeable business circumstances from giving the 60-day advance notification the WARN Act generally requires for plant closings and mass layoffs. However, "even where the defense is properly invoked, some notice must be given." The Court noted that an employer cannot invoke the "unforeseeable business circumstances" defense without having given any notice to the affected employees. Citing the statute, the Court said, an employer may order a plant closing or mass layoff less than 60 days after giving notice "if the closing or mass layoff is caused by business circumstances that were not reasonably foreseeable at the time notice would be required." An employer invoking the defense "shall give as much notice as is practicable and at that time shall give a brief statement of the basis for reducing the notification period." Further, such notice should be a specific statement that informs employees of the nature and expected duration of a layoff, the expected date, any applicable "bumping" rights, and the name and telephone number of a company contact person.

When WARN issues arise in your workplace, a telephone call to a experienced Labor lawyer is recommended.

Source: Bloomberg BNA, Daily Labor Report® 8/6/13

DEMOTION, INTERFERENCE, RETALIATION AND THE FMLA

The Sixth Circuit Court of Appeals ruled that a bank employee, who was placed in a position requiring less legal knowledge and more clerical work after returning from approved medical leave, may pursue interference and retaliation claims under the Family and Medical Leave Act. (*Crawford v. JP Morgan Chase & Co.*, 6th Cir. unpublished opinion, 8/6/13). In deciding the issue, whether the employee's post leave transfer amounted to a demotion, the Court explained that an adverse employment action was defined in Title VII of the 1964 Civil Rights Act as one that dissuades a reasonable employee from exercising his or her rights. Once the Court decided that the new position to which the employee was assigned following her FMLA was not equivalent to her old job, it felt that a reasonable fact finder could also determine that the positions were not equivalent. The next issue facing the Court was whether the transfer to a new position qualified as an adverse employment action. The Title VII definition of an adverse employment action stated by the U.S. Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White* (2006) provides that an employment action is adverse if a reasonable employee would have found the action materially adverse, so much so that it would have dissuaded him or her from making or supporting a charge of discrimination (a position adopted by five other Circuit Appeals Courts, including the Seventh Circuit). The Sixth Circuit, applying these definitions and looking at the differences between the two jobs, determined that the new assignment would qualify as a demotion, and when combined with the short time period between the employee's return to work and the new job assignment, a *prima facie* case of FMLA retaliation could be made.

When FMLA and return-to-work issues arise in your workplace, a call to an experienced Employment attorney is recommended.

EMPLOYEE ATTENDANCE POLICIES AND THE FMLA

The Sixth Circuit Court of Appeals also ruled that an employer may condition FMLA-protected leave on compliance with its usual attendance notice policies. Reversing a 2003 ruling that the FMLA did not prevent an employer from limiting an employee's FMLA rights when the employer failed to comply with a company's internal procedural requirements, the Court stated that the Labor Department's Revised Regulations (Jan. 2009) "materially altered" the regulations. The revised section (825.302(d)) provides that an employer may deny or delay FMLA leave to an employee who does not comply with the employer's usual notice requirements about unusual circumstances. The Court stated, "an employer may enforce its customary notice and procedural requirements against an employee claiming FMLA-protected leave, unless unusual circumstances justify the employee's failure to comply with these requirements." The company was therefore justified in terminating the employee for his failure to follow the call-in requirements of the company's attendance policy. (*Srouder v. Dana Light Axle, Mfg., LLC,* 6th Cir., 8/7/13).