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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

Convictions and Disparate Impact Claims

A federal district court in Ohio recently ruled that African American employees who were discharged after the Ohio Legislature enacted a law requiring the termination of any school employee who did not pass a criminal background check may maintain disparate impact claims against the school district *(Waldon v. Cincinnati Public School*, 118 FEP Cases 188, S.D. Ohio, 4/24/13).

The Ohio law required criminal background checks of current employees, even those whose jobs did not involve contact with children, and required the termination of any employee who had been convicted of certain charges, no matter how far in the past their crimes occurred or how little they related to the employee's present qualifications. The law did not provide for any exceptions to demonstrate rehabilitation. The affected employees all had "excellent work records." The court determined there was "no question" that plaintiffs plead a case of disparate impact, noting, while the school district apparently did not intend to discriminate, intent is irrelevant. The practice that it implemented had a greater impact on African Americans than others. The court observed, that the practice did not seek to measure technical aptitude on ability, and operated to bar employment when (employee) offenses were remote in time (and) insubstantial. The employees had demonstrated decades of good performance, and posed no obvious risk due to their past convictions. BOTTOM-LINE: Title VII trumps state mandates.

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EEOC Enforcement Priorities

At a recent conference, a EEOC Commissioner (Victoria A. Lipnic) discussed the agency's enforcement priorities, which included eliminating hiring barriers, exploring emerging workplace issues, and examining employee compensation practices. What does this mean to employers? Read on.

In regard to hiring barriers, the Commissioner discussed an employer's use of applicant screening tools, such as credit history and criminal background checks, which might have a discriminatory impact on certain protected groups. The EEOC recognizes that using credit screens in hiring might have a disparate impact on women and minorities, however, such effect is "highly debatable." The discrimination link on credit screens is not as clear as the link to criminal background checks.

Regarding criminal history checks as a screening tool, the EEOC issued an enforcement guideline in April 2012. According to the guideline, an employer may avoid disparate impact exposure/liability if it demonstrates that an exclusion based on criminal history is job-related and consistent with business necessity. The EEOC suggests that employers create a "matrix" of their available jobs and the types of criminal offenses that would screen out applicants for these positions, and then conduct an "individualized assessment" to allow job seekers with criminal backgrounds to explain themselves.

Another area highlighted by the Commissioner related to emerging employment law issues. The example used was the 2008 ADA Amendments Act which seemed to resolve the issue of whether an individual has a disability under the ADA. It is anticipated that the EEOC's focus will now shift to the areas of reasonable accommodation. This may not be good for employers because the agency is now exploring the issue of reasonable accommodation for pregnancy-related disabilities. While the EEOC recognizes that pregnancy itself is not a disability, a pregnancy-related impairment, such as a lifting restriction, might be a disability. Other emerging issues coming under EEOC scrutiny include applying Title VII's safeguards to transgender employees and protecting employees over 50 from age discrimination in hiring. The EEOC is also looking for opportunities "to examine employer pay practices" and bringing more Equal Pay Act cases.

Like the EEOC, the DOL & the NLRB and a host of other agencies continue to have employers in their sights. This makes keeping an employer's employee relations house in order through effective policy development and consistent application of these policies. You may also want to keep the phone number of an experienced employment law attorney close at hand.

Source: Bloomberg BNA, Daily Labor Report®, April 29, 2013

Not a Reasonable Accommodation

In a Seventh Circuit case, the Court held that an employee who could not lift more than 20 pounds because of a work related shoulder injury made an unreasonable accommodation request under the Americans with Disabilities Act by asking that another worker move heavy objects for her (*Majors v. Gen. Elec. Co.*, April 16, 2013).

The Seventh Circuit ruled that the employee lacks a triable ADA bias claim because she failed to show that she is a qualified individual with a disability within the meaning of the statute. The Court explained, a qualified disabled individual is an employee who can perform the essential job functions of a position, with or without reasonable accommodation. In looking at the position job description, the Court agreed that the ability to lift more than 20 pounds is an essential function of the material auditor's job. Because the employee had a permanent restriction against lifting more than 20 pounds, (she) could not perform an essential function without reasonable accommodation. The Court concluded "To have another employee perform a position's essential function, and to a certain extent perform the job for the employee, is not a reasonable accommodation and so isn't required under the ADA."

When ADA issues arise in your workplace, a call to experienced employment counsel is always recommended.
Source: Bloomberg BNA, Daily Labor Report®, April 16, 2013

Quotes Of The Month

- It is better to deserve honors and not have them than to have them and not deserve them – Mark Twain
- I am always willing to learn, however I do not always like to be taught – Sir Winston Churchill
- We make a living by what we get; we make a life by what we give – W.A. Nance
- Whatever is good to know is difficult to learn – Greek Proverb
- As I grow older I pay less attention to what men say. I just watch what they do – Andrew Carnegie
- I have often regretted my speech; never my silence – Publilius Syrus
- Knowledge speaks, but wisdom listens – Jimmy Hendrix
- We're making good time, but we're lost – Yogi Berra

Things I Have Learned

- That honesty in little things is not a little thing
- That a person's greatest need is to feel appreciated
- That achievement is largely the product of steadily raising one's level of aspirations and expectations
- That the wise man travels to discover himself
- That if you wouldn't write it down and sign it, you probably shouldn't say it
- That I have a lot to learn

HR Potpourri

Fast Food Industry Under Attack

In an attempt to replenish declining membership, the AFO-C10, SEIU and other similar unions have begun partnering with so called "alt. labor" work centers (community, labor and religious organizations) to target restaurant workers and other traditionally non-organized employees, a/k/a the fast food workers. To get the public's attention a series of fast food restaurant strikes in major cities, like New York and Detroit, have occurred. The fast food industry, for a variety of reasons, is a fairly soft target for the unions and the unions are preparing for battle with this untapped industry. The fast food industry cannot afford to sit back and wait to see what happens. The unions are committed and well organized and this industry must develop a well thought out strategy to take a stand against them and do it now. Stay tuned on this one. The battle is far from over.

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Withdrawal Liability – When is the Owner Liable?

The Court of Appeals ruled that a company owner who leased property back to the company was engaged in a "trade or business" sufficient to warrant holding the owner personally liable for the company's $3.6 million withdrawal liability from a multiemployer pension fund (*Central States., Se. & Sw. Areas Pension Fund. v. Nagy*, 7th Cir., 4/22/13).

The Court noted that the Multiemployer Pension Plan Amendments Act (MPPAA) "protects multiemployer pension plans and their beneficiaries by preventing the withdrawing employers from ducking their pension obligations." The "key question" in this case was whether the company owner, who held the entire interest (Corporation Owner & Lessor), was engaged in an unincorporated trade or business. The Court stated that the proper test was "whether the activity in question is undertaken (1) for the primary purpose of income or profit; and (2) with continuity and regularity." "When the owner of a withdrawing company leases property to that Company, the 'bright line rule' that such activity qualifies as a trade or business sufficient to warrant the imposition of personal liability." According to the Court, this bright line rule serves the purpose of MPPAA. "Where the real estate is rented to or used by the withdrawing employer and there is common ownership, it is improbable that the rental activity could be deemed a truly passive investment. In such situation, the likelihood that the true purpose of the 'lease' is to split up the withdrawing employee's assets is self-evident." EMPLOYER BEWARE. The MPPAA treats all commonly controlled trades or businesses as a single employer for purposes of assessing withdrawal liability.

When labor law issues arise in your workplace, a call to an experienced labor attorney is recommended.

Duty to Reassign Disabled Employees

The U.S. Supreme Court, on May 28, 2013, declined to review the Seventh Circuit's ADA Ruling (*United Air Lines, Inc. v. EEOC, U.S.*, cert. denied) which decided whether an employer violates the ADA by allowing disabled employees who are unable to perform their current job to apply for reassignment to vacant positions, but then choosing the best qualified candidates even if that means the disabled individual does not get the job. According to the Seventh Circuit, the ADA requires an employer to reassign a disabled employee to a vacant job for which he (she) meets the minimum qualifications, absent a showing of undue hardship. According to the Department of Justice, which submitted a brief on behalf of the EEOC, an employer is not obligated to accommodate the disabled individual, or to promote the disabled individual if no equivalent or lesser vacant position exists. The ADA "provides that 'reassignment,' not merely the opportunity to apply for it, is a reasonable accommodation." The Seventh Circuit's approach "…. properly balances the remedial goals of the ADA with the legitimate interests of employers in those limited situations where the statute's reassignment obligation is triggered."

Source: Bloomberg BNA, Daily Labor Report®, May 28, 2013

Equal Opportunity Harassment

A divided Minnesota Supreme Court holds that a restaurant and motel may be held responsible for the sole owner's sexual comments, advances and unwanted touching of three female former employees even though their boss's sexually explicit conduct was not directed exclusively at women. According to the Court, the companies may be held responsible for the owner's abusive conduct despite his behaving similarly toward male workers (*Rasmusson v. Two Harbors Fish Co. d/b/a Lou's Fish House,* Minn. 5/22/13). The Court also found that under the Minnesota Human Rights Act, hostile environment claims are distinct from claims for sexual harassment by "submission or rejection" and do not require a showing of loss of pay or another employment benefit to succeed. A sexual harassment plaintiff does not need to show the conduct was directed at her because of sex in order to establish employee liability.

Looks like the days of the Equal Opportunity harasser are over. When sexual harassment arise in your workplace, a call to an experienced employment lawyer is recommended.

Source: Bloomberg BNA, Daily Labor Report®, May 23, 2013

Discharge for Lactating, Expressing Milk Is Title VII Sex Discrimination

The First Circuit Court of Appeals holds that subjecting a female employee to an adverse employment action because she is lactating or expressing breast milk "clearly imposes upon women a burden that male employees need not – indeed, could not – suffer" and thus would violate Title VII (*EEOC v. Houston Funding II, Ltd.*, 5th Cir. 5/30/13). The appeals Court also rejected the notion that lactation is not a "related medical condition of pregnancy" for purposes of the Pregnancy Discrimination Act. The Court stated, "It is undisputed in this appeal that lactation is a physiological result of being pregnant and bearing a child."

Source: Bloomberg BNA, Daily Labor Report®, May 31, 2013