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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

We all know that the ADA prohibits employers from discriminating against protected individuals with respect to terms and conditions of employment, including compensation.

Query: Do these restrictions prohibit an employer from reducing bonuses paid to employees who miss extensive periods of work during the bonus measurement period? According to the Second Circuit Court of Appeals (*Davis v. N.Y.C. Department of Education,* Oct. 2015), an employer can reduce the amount of a discretionary bonus based on the disabled employee's absences from work.

In this case, based on four months of missed time from work due to medical problems and jury duty, the employee's $3,000 bonus was reduced to $1,000. The teacher's CBA gave the administrative committee the discretion to allocate the bonuses. The Court found the bonus was not determined in a discriminatory manner because the plaintiff missed more time from work than comparable employees. It should be noted that employees taking ADA or FMLA leave can have such bonuses reduced based on their absences, but only if such reduction falls within the terms of the bonus plan.

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Season's Greetings

Best wishes to you and your family for a happy holiday season and a new year filled with peace, happiness and prosperity.

We appreciate and value your business and your association with us as a client and friend of the firm.

The Labor & Employment Team at May Oberfell Lorber.

EMPLOYER WORK RULES VIOLATE FEDERAL LABOR LAWS

The D.C. Circuit Court of Appeals determined that three of Hyundai America Shipping Agency's workplace rules violated federal labor laws because they could be interpreted to stifle either union activity or discussions of employment conditions.

The Court determined that Hyundai's confidentiality rule was overly broad, limiting the right of employees to discuss their employment. Hyundai was not able to convince the Court that its business reason to ban discussions related to maintaining confidentiality during investigations satisfied the legitimate business reason requirement.

The Court also determined that Hyundai's rule instructing workers to only share information on the company's electronic communications system with "authorized persons" could be interpreted by a "reasonable" employee to be a limit on their sharing of employment terms and conditions.

Finally, on Hyundai's working hours rule, the Court distinguished between the use of the term "working hours" rather than "working time", in the rule prohibiting employees from doing anything other than work during the period. According to the Court, "working hours" could be construed to include break times, while "working time" excluded them.

When handbook and workplace rules issues arise in your workplace, a call to an experienced employment attorney is recommended.

QUOTES OF THE MONTH

Diversity: "the art of thinking independently together" — Malcolm Forbes

The biggest seller is cookbooks and the second is diet books – how not to eat what you've just learned to cook — Andy Rooney

You can never find yourself until you face the truth — Pearl Bailey

Our lives begin to end the day we become silent about the things that matter — Martin Luther King, Jr.

Vision is the art of seeing the invisible — Johnathon Swift

Things I Have Learned

That it's not what you have in your life but who you have in your life that counts

That every day we are offered twice as many opportunities as misfortunes

That I've never regretted the nice things I've said about people

That you are never too old to try something new

That if you like yourself and who you are, then you'll probably like almost everyone you meet regardless of who they are

HR Potpourri

OSHA Fines Could Increase by 82%

In Section 701 of the recently signed budget deal bill entitled "Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015" there is a provision that allows OSHA to make a catch-up adjustment for not having been authorized to increase penalties since 1990. The result, likely increases up to 82% in safety penalties for employers. This means that the current maximum $70,000 fine for repeat and willful violations would grow to a maximum of $125,438 and the $7,000 maximum fine for serious and failure-to-abate violations would increase to $12,744. The changes would go into effect by August 1, 2016.

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FMLA ABUSE: YOU CAN DO SOMETHING ABOUT IT

The FMLA provides a variety of protections to employees and their families, abuse is not one of them. So says the Tenth Circuit Court of Appeals which upheld an airline's decision to terminate an employee for lying when asked about her FMLA leave. (*Rowe v. United Airlines, Inc.*, 10th Cir. 2015).

Plaintiff Rowe and her husband were both flight attendants for United. Rowe suffered from migraine headaches, had used intermittent FMLA leave for several years and was always allowed to do so by United. In the instant situation, Rowe and her husband were planning a family trip to Taiwan. When they arrived in Taiwan, Rowe claimed she was unable to return to Denver in time to work her next scheduled shift because of a migraine headache, and requested FMLA leave.

Upon her return to Denver, Rowe met with her immediate supervisor who questioned her about the missed shift. After a long investigation (three months), United learned that Rowe never searched for a return flight on United's internal computer system and never attempted to buy a regular or discount ticket that would have allowed her to return in time for her shift. Rowe next met with a senior supervisor, who terminated her employment due to lying about her illness so that she could skip work.

A lawsuit was filed by Rowe claiming United discriminated and retaliated against her for lying about her reason for using FMLA leave. Rowe also claimed United's investigation was dishonest.

The Tenth Circuit did not agree. According to the Court, the evidence established that the more senior supervisor who terminated Rowe believed she was lying. The Court was also persuaded by the documents used by the decision maker that showed Rowe never tried to schedule a return flight. Finally, the Court noted that United had a history of approving Rowe's prior FMLA leaves. Therefore, even if the decision maker was wrong in his assessment, he had an honest belief that Rowe was lying and trying to abuse FMLA and that was enough to terminate her employment.

The moral of this story: Honesty is still the best policy.

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

NEW FMLA FORMS AND THE GINA SAFE HARBOR

The June 4, 2015 *Veritas*™ News Alert informed its readers of the newly issued and revised FMLA forms that would not expire until May, 2018. Copies of the new forms were also provided. Now, about six months later, we are providing this reminder. As stated in the News Alert, the most notable change in the new form was related to medical certification and the Genetic Information Nondiscrimination Act (GINA) "safe harbor" language.

GINA is an antidiscrimination law designed to prevent individuals from facing discrimination based on the release of genetic information. The Act prohibits employers from using genetic information in making employment decisions. However, the law does provide a safe harbor. Under GINA, employers are prohibited from requesting genetic information, but they may receive it anyway in response to requests for medical information.

To avoid violating the GINA requirements, employers can provide a warning to the employee and the healthcare provider to not provide any genetic information to the employer as a result of the employer's information request. If this warning is given, any genetic information obtained by the employer is deemed inadvertent and not in violation of GINA.

Hopefully, all employers are using the new FMLA forms, which includes the language that briefly warns employees and healthcare entities not to provide information about genetic tests and services. Although the language in the form is only one sentence, it does fulfill the safe harbor objective in the GINA regulations.

Issues that arise in your workplace regarding FMLA and GINA requirements should be referred to an experienced employment attorney.