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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

In the World of HR

We are all familiar with Employee Handbooks, they are usually written by employers for employees and provide an overview of the company history, its mission and vision, employment policies, procedures and rules and contain a prominent disclaimer; "Nothing in the handbook creates a contract of employment between the company and its employees."

In a recent New Jersey case, a company went an extra step and included a mandatory arbitration agreement to their handbook. The agreement required employees to arbitrate any and all employment related claims against the company. (*Raymours Furniture Company, Inc. v. Rossi*, (D.N.J. Jan. 2014).

Not so fast said the Court, after an employee sent a demand letter to the company alleging various claims of discrimination and the company demanded arbitration pursuant to the handbook. The Court held, the arbitration clause was unenforceable, stating that the clear disclaimer on the handbook's first page, "This Handbook is not a contract of employment . . . ." did not expressly exempt the arbitration policy. As such, the handbook did not clearly and unambiguously confirm the employee's agreement to arbitrate. The Court also noted that the company's reservation of rights language, to change the contents of the handbook at any time without notice, further affected the arbitration provision by rendering it illusory and unenforceable.

Questions related to developing or revising an Employee Handbook should always be referred to experienced employment counsel.

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TO ALL VERITAS™ NEWSLETTER READERS

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Thank you!!

OBESITY, A DISABILITY UNDER THE ADA

We first addressed this subject in the March 2012 issue of Veritas™. At that time we noted there was a split in the Circuit Courts on the subject of obesity as an impairment under the ADA. Nonetheless, the U.S. District Court for the Eastern District of Louisiana held that the plaintiff, who was severely obese at all relevant times (during her employment), her obesity caused her to have diabetes, congestive heart failure and hypertension. Diabetes was a covered ADA disability that lead to plaintiff's heart problems which in turn made plaintiff a "qualified individual" under the ADA. Now fast forward to 2014. A Missouri federal judge ruled on April 24, 2014 that a former employee of a car dealership was fired from his job due to his weight, a disability within the meaning of the Americans with Disabilities Act. (*Whittaker v. America's Car-Mart, Inc.*, U.S.D.C., Eastern District of Missouri).

The plaintiff, who said he could fully perform the "essential elements" of his job as the general manager of the dealership without any special accommodations, also claimed he was "canned" because of his weight. According to the Court, the plaintiff sufficiently pled a claim that his severe obesity is a disability within the ADA. Further, the dealership regarded him as having a physical impairment and being substantially limited in one or more major life activities, walking.

The EEOC has previously noted that merely being overweight doesn't usually amount to an impairment and as such, have the law's protection but severe obesity, a body weight more than 100 percent above that norm, crosses the threshold into being a protected disability and there is no requirement to prove an underlying physiological basis.

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

EMPLOYER DISCRIMINATION AND HARASSMENT POLICIES

In the world of Human Resources and employment law, one thing is certain, things will change and fast. Employers who have well drafted and comprehensive anti-discrimination and anti-harassment policies in their organization are a step up on those employers who do not. Here are a few suggestion that may be helpful:

- All discrimination and harassment policies should include detailed guidelines for reporting discrimination and harassment
- Consider a zero-tolerance policy for any forms of discrimination or harassment
- Apply the policies consistently to all employees
- Train your management and other employees on a regular basis
- Make sure your policies cover proper conduct and use of social media

For more information about this subject, please see the MOL website at http://maylorber.com/insights

QUOTES OF THE MONTH

- There are seven days in a week and someday isn't one of them – Anonymous
- Judge a man by his questions, rather than his answers – Voltaire
- Lots of folks confuse bad management with destiny – Kin Hubbard
- If your dreams don't scare you, they're not big enough – Anonymous
- Your attitude, not your aptitude, will determine your altitude – Zig Ziglar
- Whoever said "winning isn't everything" . . . lost – Anonymous

Things I Have Learned

- That there is no substitute for paying attention
- That it's okay to not know the answer
- That we are judged by what we finish, not by what we start
- That you should never call your identical twin ugly
- That even when I have pains, I don't have to be a pain

HR Potpourri

EEOC Sues Auto Zone ... Again

The EEOC has filed a lawsuit in Federal Court (*Equal Employment Opportunity Commission v. Autozone, Inc.,* U.S. Dist. Court, N.D. of Illinois) accusing the auto parts retailer of violating the ADA by firing employees who took too much time off related to their disabilities. The employees claimed the company didn't provide reasonable accommodations to disabled employees who could otherwise perform their jobs. One employee, who had a herniated disc in his spine, claimed he was not allowed to sit during portions of his work shift when he was not required to stand, the other employee, who suffered from migraines, was refused a schedule change aimed at decreasing the likelihood of her headaches. When refused those kinds of accommodations, the employees took time off form work because they were not feeling well due to their disabilities, and were fired. The EEOC has reiterated "the obligation to provide reasonable accommodations for qualified individuals with disabilities has been the law of the land for over two decades, and businesses large & small, operating coast-to-coast have found ways to bring their operations into compliance with the law.

Accordingly, the EEOC found reasonable cause to believe the retailer discriminated against them and asked Auto Zone to engage in efforts to voluntarily eliminate its discriminatory practices, when they did not, the lawsuit was filed. The agency noted "The aggrieved individuals would not have been discharged, but for absences that were inextricably linked to their disabilities that defendants declined to excuse."

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WORK FROM HOME – THE NEW TREND?

The Sixth Circuit Court of Appeals, reviving an Americans with Disabilities Act lawsuit, rendered a decision that may find favor with other Courts. The Court's ruling, an EEOC case against Ford Motor Company (*EEOC v. Ford Motor Co.* (6th Cir. April 22, 2014)), centered on an ex-Ford Motor Company employee with irritable bowel syndrome, who sought telecommuting as an ADA accommodation, an issue that could lead to more employees asking to work from home. Will this change the notion that the "workplace" as we know it will no longer mean an employer's brick & mortar place of business? Will it also mean that attendance at the workplace no longer requires showing up in an employer's physical location? Will employers (and the EEOC) be rethinking what attendance means in today's workplace? Will the assumption that attendance is an essential job function become just another factor in an employer's business judgment that will be further analyzed?

For many reasons, the workplace of today is very different from the workplace of twenty years ago. The laws have changed and so have the players, employers and employees alike. While all jobs would not fall under the telecommuting umbrella, i.e. firefighters, police, etc., the employer's obligation under the ADA is to have an interactive dialogue with a worker who seeks an accommodation to carry out a job's essential function.

The Sixth Circuit's ruling, that the "workplace" is anywhere that an employee can perform their job duties, should make employers stop and think about the proposed cons of any request to telecommute to accommodate a disability. Although the Court did not say telecommuting is appropriate for all jobs in all circumstances, the board language of the opinion does open the door for other employees to request telecommuting in a variety of new situations. An employer's instant response of "that won't work" could create a problem for the employee who wants to fight the request. The reason for the denial better be a good one, supported by strong documentation/evidence.

Employers should take note of their work rules and policies and consider updating those relating to telecommuting and job descriptions that make an employee's physical presence an essential part of the job thereby rejecting outright any work from home request. A blanket policy rejecting such requests may become more difficult to defend. It may be time for employers to rethink the longstanding policy that the physical site of the employer's facility or plant is the workplace. The Court's decision makes sense and may even be viewed as "persuasive authority" for other jurisdictions to follow. If that happens, you do not want to get caught on the outside looking in.

THE UBIQUITOUS BOARD

When it comes to workplace policies, the National Labor Relations Board seems to be everywhere, and it has not been pretty (for employers). In *Hills and Dales General Hospital*, the NLRB determined that the hospital's seemingly innocuous policies prohibiting negativity and gossip in the workplace and requiring employees to represent their employer in a positive and professional manner, violated the National Labor Relations Act. This decision follows several others in what appears to be the Board's crusade against "vanilla workplace policies," which in their opinion prohibits activity protected by the NLRA (Section 7).

In this case, the language of the hospital "Values and Standards of Behavior" policy, a policy developed jointly by management and hospital employees, came under Board scrutiny. The Board determined that the policy prohibitions on "negative comments" and "negativity or gossip" and that employees represent the hospital in a "positive and professional" manner, were overbroad and ambiguous. Accordingly, such language could cause employees to reasonably construe as discouraging them from engaging in protected activity.

Compounding this illogical ruling was the Board's distinguishing the phrases "ethical manner" from "professional manner". Their logic, combing "positive" and "ethical" was "significantly narrower" in scope than combining "positive" with "professional", which they found illegal

So where does this leave the employer? It appears, using Board logic, that phrases such as "negative comments" and "negativity or gossip" cannot be used but the phrase "positive and ethical" is fine but don't use "positive and professional," that is unlawful. Say what? We are becoming more convinced, the NLRB is willing to strike down anything they believe is overbroad and ambiguous that could, in their view, be construed as discouraging employees from engaging in protected speech.

Employers, in addition to seeking advice and counsel from an experienced employment attorney, you should also carefully review all such policies, in handbooks or elsewhere, to ensure they do not restrict protected activity, and hope you guess right.