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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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"NO-FAULT" ATTENDANCE POLICY UPHELD AGAINST DISABILITY CLAIMS

Employers continue to be confused about how to handle absences related to disabilities, as to applying their "no-fault" attendance policies. No-fault attendance policies do not generally consider the reason for an absence, except for certain statutory exceptions, like FMLA, and consider simply the absence from work as resulting in points under their point system. However, the Equal Employment Opportunity Commission (EEOC) has long taken the position that some type of accommodation is necessary, or at least the interactive process should be used, in connection with the absences related to a disability. By and large, the EEOC has had difficulty in getting its position accepted in the courts.

The most recent application of this concept occurred in a case in which a company had consistently applied its no-fault attendance policy. *Davis v. PHK Staffing, LLC*, No. 22-03246 (10th Cir. 2023). The court pointed out that: "Indeed, she identifies no employee who received leniency under the attendance for arriving late, leaving early, or missing work altogether on an unscheduled basis for medical reasons." The court thus found that the employer was in its rights when it terminated an employee who had accumulated too many points for unscheduled absences. The court dismissed the argument that the employer failed to accommodate her disability, holding that her requests were unreasonable. The plaintiff's request to miss work on an as-needed basis wasn't reasonable because it would eliminate her regular and reliable attendance, which is an essential function of her job, according to the court. Further, the plaintiff's argument to have the company remove already accrued absent points wasn't reasonable, because the Americans With Disabilities Act (ADA) doesn't require it to rescind discipline handed out before an accommodation request.

NLRB ISSUES FIRST UNFAIR LABOR PRACTICE COMPLAINT AGAINST NON-COMPETES AND TRAINING REPAYMENT

The General Counsel of the National Labor Relations Board (NLRB), former union lawyer Jennifer Abruzzo, continues to attempt to expand the application of the Labor Act to cover everyday employment policies. The latest attack comes through an unfair labor practice complaint issued against a spa alleging it illegally made workers sign various contracts, including non-compete and training repayment agreements. The complaint was filed on September 1, 2023 against Juvly Aesthetics, Case No. 09-CA-300239. The non-compete prohibited workers from performing certain services within a 20-mile radius of any company locations for two years after leaving their jobs.

The NLRB complaint also claims the spa violated the Labor Act through a training repayment program in which employers try to make workers repay job training if they quit. The repayment provision would require workers to pay back certain training costs if they leave within a year of starting, and at prorated rates over the course of the second year. The Cincinnati NLRB Office announced that "provisions like these, that in practice cut off employees' ability to leave their job, interfere with the employees' exercising of their rights under Section 7 of the National Labor Relations Act."

The NLRB judges themselves and the full Board in Washington have yet to accept the validity of these novel theories, but it is concerning to many employers that charges and complaints are being issued on these common company policies, particularly pertaining to non-competes.

DEPARTMENT OF JUSTICE'S ANTI-TRUST DIVISION ANNOUNCES ANTI-TRUST COMPLIANCE PROGRAMS INCLUDE TRAINING FOR HUMAN RESOURCES

There is relatively recent increased attention from government enforcement authorities of anti-trust issues affecting human resource professionals. In 2016, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued their Anti-Trust Guidance for Human Resource Professionals. At the same time, they issued Anti-Trust Red Flags for Employment Practices. These guidances set forth that no-poach and wage fixing agreements are *per se* unlawful under the anti-trust laws. Red flags included agreements with other companies regarding salary or other compensation, employee benefits, or terms of employment, as well as agreements to refuse to solicit or hire another company's employees, called no-poach agreements. The guidances went on to suggest that employers should refrain from exchanging company-specific information about employee compensation or other terms of employment with another company, including internal data about employee compensation.

More recently, at a December 2023 American Bar Association Conference, DOJ's Anti-Trust Division announced that anti-trust compliance programs must include training of human resource professionals on such issues. An employer having an effective anti-trust compliance program may result in the DOJ declining to prosecute or may reduce penalties of groups that have effective programs.

The DOJ has largely been unsuccessful prosecuting employers for anti-trust violations in reference to human resource issues. For example, a 2023 ruling resulted in an acquittal of four managers of an alleged agreement to fix wages and not poach healthcare aids. A summary judgment of acquittal at the close of the DOJ's case in chief resulted from another no-poach prosecution. A third no-poach indictment was dropped prior to trial. In spite of these losses, the DOJ emphasizes it will continue to be aggressive in bringing additional prosecutions, and currently emphasizing corporate compliance programs may be another way to accomplish what it has not been able to accomplish in court.

AI HIRING BIAS IS NEW FOCUS OF EEOC

The Equal Employment Opportunity Commission's (EEOC) Strategy Enforcement Plan for 2024-2028 published in the Federal Register last year specifically addresses discriminatory recruitment and hiring practices that involve an employer's use of Artificial Intelligence (AI) and machine learning to target, recruit, and screen potential applicants or make hiring decisions. In a case brought by the EEOC on a claim filed during 2023, the EEOC filed suit and negotiated a settlement with an employer who allegedly used software to weed out older job seekers. In another claim and conciliation agreement with the EEOC, an employer agreed to change its programming code to remove discriminatory key words that the EEOC said unlawfully blocked American workers from the company's job ads. In a case brought against Workday, Inc., a staffing agency, the private plaintiff contends that the AI systems the software company uses to assist businesses in hiring decisions illegally screens out Black, older and disabled job applicants. *Mobley v. Workday, Inc.*, N.D. Cal. No. 3:23-cv-00770.

It should be noted that in October, President Biden issued an Executive Order that governs federal agencies' use of AI. According to the text, the Department of Labor (DOL) was directed to examine federal agencies' support to workers displaced by AI and write guidelines for federal contractors on preventing discrimination in hiring systems driven by AI,

and the Attorney General was directed to coordinate with agencies to insure enforcement of existing laws regarding civil rights violations and discrimination. The Order includes requiring DOL to develop principles to mitigate potential harms from AI-based tracking of workers' activities and productivity. The information is mostly left to the various federal agencies to develop, and it remains unclear as to how far they can stretch their statutory authority to enforce many of these provisions.

KEYS TO ADDRESS EMPLOYEE DISSATISFACTION AND ACTIVISM

We are in a new age of employee dissatisfaction and activism. There were critical labor shortages during the pandemic, and increased concerns about employer responses, and workers are increasingly asserting their rights and making demands upon their employers. Public approval of labor organizations is at a new all time high, and the public is increasingly siding with workers in disputes with their employers. Workers are constantly reminded in the media of their rights and about union gains. Labor organizations are preaching that labor "cooperation" should be replaced by labor "confrontation."

While the solutions to these issues are complicated, this writer is quite confident in expressing the following suggestions. While employees prefer to resolve issues with their immediate supervisors, employees also want to have the right to address their concerns with higher-level managers who have the authority to make decisions. Further, higher-level management, who is aware of potential morale or dissatisfaction issues in the workplace, is more likely to be able to address and potentially find solutions to the issues without confrontations. Therefore, employers could start with evaluating their internal systems for resolving employee complaints or concerns and staying informed about conditions in the workplace.

The answer is simply not to say that the employer has an "open-door" policy. This writer has rarely seen a company that does not claim to have such a policy. Therefore, this writer always asks the question, and asks for some examples of how the open-door policy has been used in the past. If the employer does not have an effective open-door policy, the claim of having such a simple solution shows the company's policies lack effectiveness and credibility.

Perhaps a starting point is to insist that first line supervisors are aware of and follow an expressed company policy of open communications to address employee concerns. The policy must be expressed to supervisors by higher management as a top if not the top company priority. Second, employers need an effective means of receiving communications and concerns from employees. A start is to allow employees to bypass first line supervisors where appropriate, such as when the supervisor is the source of the problem, to communicate concerns or appeals to higher management. Third, employers should have systems to keep up with what is going on in the workplace to avoid contentious issues before they become confrontational.

In former times, HR had the responsibility to conduct walk-arounds in which employees on the floor were asked simple questions like: "How are things going," and "Are there ways we can help you do your work better," and questions of that nature. Such questions were given to evaluate employee morale and open the door to employees expressing concerns. Unfortunately, this HR practice seems to be in the past.

Employers therefore have considered other outlets of learning employee concerns, such as question boxes or anonymous platforms to bring issues to management. This writer has successfully used the practice of employee "get togethers," in which upper management meets with a cross-section of employees in the facility on a monthly, quarterly, or some other periodic basis. An announcement of the meeting is posted and includes the employees randomly selected to attend. The meetings are often held over a lunch, with upper management giving an update of happenings at the facility, and responding to employee questions and comments. Surprisingly, a majority of employee comments are often directed towards making the business better, rather than gripes. In any event, such meetings are simply one way to facilitate open communications between employees and upper management, and improve the employer's protection against future workplace disputes and confrontations.

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