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EMPLOYMENT LAW BULLETIN

A Monthly Report On Labor Law Issues

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ISSUES REGARDING EMPLOYEE ACCESS TO THEIR PERSONNEL FILES

Employers have varied practices regarding what materials to add to employee personnel files, but such materials generally include on-boarding documents, acknowledgments of certain policies such as handbooks, verification of participation in training, benefit elections, absentee records, and disciplinary records. Some 19 states have laws that provide current and former employees with access to their personnel files upon request. Such requests should be of concern to employers, as they are often motivated by an employee's desire to find evidence to support some type of legal claim. A further problem, particularly in electronic filing, is that employers may be unknowingly filing additional personnel file materials when supervisors communicate with an employee with email and less formal communications, which may technically become part of the personnel file. Employees who gain access to review their personnel files can generally request copies of such materials.

Employers must, therefore, be careful as to the information placed in personnel files. A common issue relates to investigatory materials. It is advisable to create separate confidential investigatory files when there is such an investigation. These type materials may or may not be disclosed under state law, but they at least furnish an opportunity for an employer to have an argument of confidentiality, with possible protection under the attorney-client privilege.

ISSUES OF EMPLOYER ACCESS TO EMPLOYEES' PERSONAL DEVICES SUCH AS CELL PHONES, ETC.

Many employers have not adequately considered that business-related communications exist on personal employees' cell phones and other devices, and to what extent they have access to such information. It is not uncommon for employees including managers and supervisors to use their personal devices for work purposes. It creates intellectual property issues and a potential for important evidence to exist on devices outside the employer's direct control. Many laws also affect this issue, including federal laws such as the Electronic Communications Privacy Act, the Wiretap Act, and the Stored Communications Act, which restrict the interception of electronic communications with exceptions for business use and employee consent. Some states have also passed laws with strict standards, and also state privacy concepts may come into play. In addition, during litigation, it is common for plaintiffs to seek information from employee cell phones when relevant to the litigation, and employers have a legal obligation to preserve relevant information when they become aware of such actual or expected litigation, a concept known as "litigation holds." The failure to preserve such information may lead to adverse consequences to the employer in litigation.

Employers have many reasons to get data from an employee's cell phone, including for the purpose of internal investigations into misconduct or harassment. For these reasons, employers would be wise to have written

workplace policies that govern the use of personal devices and the employer's right to access data. Such policies should define acceptable use, the conditions under which access may occur, and any data security requirements. It would also be helpful to require employee consent to such actions as a condition of employment.

SETTLEMENT AGREEMENT WORDING CAN DETERMINE TAX TREATMENT

A settlement agreement of a discrimination case can be instrumental in determining its tax treatment. First, any portion of the settlement agreement is tax exempt to the extent it is for a "personal physical injury" under Internal Revenue Code § 104(a)(2). For that reason, settlement agreements should make mention of any such personal injuries, as tax exempt status works to the advantage of both the plaintiff and the employer. That is, plaintiff receives more take-home money and the employer avoids the payment of payroll taxes.

Second, Internal Revenue Code § 62(a)(20) permits deductions "for attorneys' fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination." Thus, similar tax advantages can be achieved by allocating a portion of the settlement payment to the payment of plaintiff's attorneys' fees. The bottom line is that for favorable tax treatment, settlement agreements should state how the proceeds are to be allocated. It is also wise for the settlement agreement to include a provision that the plaintiff is solely responsible for any issues pertaining to the tax treatment of the payment of the proceeds. Such agreements also generally report such income on an IRS Form 1099. For a recent tax court case addressing these issues, see *Mennemeyer v. Commissioner*, T.C. Memo 2025-80.

EMPLOYERS SHOULD BE CAREFUL IN THE WORDING OF THEIR COBRA NOTICES

Employers should be aware that the federal COBRA law requires employers with 20 or more employees to allow workers to temporarily continue their health coverage after they have been terminated or experienced a qualifying event. The statute requires employers to notify workers of their COBRA rights, dictates what information must be included, and when the notices must be sent. Employers that violate these requirements may face penalties of up to $110 per day for each affected individual. Numerous cases have been brought against employers for technical failures in these notices, resulting in large settlements. Target settled such a case for $1.6 million, and Wells Fargo for $1 million, for example.

As an example, a court allowed the case to proceed on the basis that the plaintiff had plausibly alleged the company's COBRA notices improperly omitted the specific deadline for electing coverage and included contradictory statements about when payment was due. *Marrow v. E.R. Carpenter Co.*, 2025 BL 291011 (M.D. Fla., 8/18/25). The court did indicate in declining to certify the case as a class action, that the facts cast doubt on the worker's claim she suffered injuries stemming from the company's faulty COBRA notices.

FEDERAL CIRCUIT COURT UPHOLDS CLAIM AGAINST DEI TRAINING

In June, the U.S. Supreme Court ruled that federal equal opportunity protection laws apply equally to all workers regardless of race, gender, and other protected characteristics. *Ames v. Ohio Department of Youth Services.* Another ruling in 2024 by the same Court found that a plaintiff need only show that they experienced "some harm" and unfavorable treatment. *Muldrow v. St. Louis.* The U.S. Federal Court of Appeals for the Second Circuit recently allowed a white former executive to continue a claim alleging that a "reasonable jury" could find his employer's implicit bias training created a hostile environment. *Chislett v. New York City*

Department of Education, No. 24-972 (2nd Cir., 9/25/25). The training allegedly described "white culture" as "supremacist," and "toxic," suggesting that employers should avoid using terms like "white privilege" with their anti-bias training. The opinion did indicate that mandatory implicit bias training is not inherently illegal, but it also stated it can give rise to a hostile environment claim if the training discusses a particular race with "a constant drumbeat" of "negative language." The result is that anti-bias training should not stereotype a racial group. On the other hand, in a case last year, the Seventh Circuit ruled that objection to participating in mandatory DEI training on the belief that it contains discriminatory content wasn't enough to show that plaintiff was discriminated and retaliated against.

EMPLOYERS SHOULD BE CAREFUL CHARGING SMOKERS EXTRA FOR HEALTH COVERAGE

Federal law allows employer-sponsored health plans to charge smokers a penalty, but the plan will violate the Employee Retirement Income Security Act (ERISA) if those workers are not given a reasonable alternative to avoid paying the fee. One such alternative is participating in a smoker cessation program that complies with certain legal requirements. Dozens of employers have been sued in recent years over their smoker penalties, resulting in a number of expensive class-wide settlements. A recent district court ruling offers employers some hope in such situations. *Williams v. Bally's Mgmt. Grp., LLC,* 2025 BL 395336 (D.R.I., 11/4/25). In this ruling, the employer wasn't required to retroactively reimburse the tobacco penalties paid by workers who later completed a quit-smoking program. The court read the Department of Labor (DOL) regulations as only requiring such a reward if the smoker satisfied the alternative standard. The court refused to follow DOL's interpretation of the regulations. The court also addressed whether the company's disclosures about their tobacco penalty program were sufficient, including whether they tracked the DOL's sample language.

Editor's Note: This case addresses contested legal issues and advice of counsel should be sought about such programs.

THE ISSUE OF BLACK WORKER'S USE OF ANTI-BLACK RACIAL SLUR

An employer recently successfully defended a lawsuit where the plaintiff claimed the discrimination laws "effectively enshrine a right for any person to use any slur which applies to their own protected characteristic in the workplace." The plaintiff argued that the term "has cultural significance for African-Americans and is a word that has a different connotation when used within the African-American community than it does to others who are not African-American." The employer defeated the claim that the employer should not have fired him for using the slur under his breath after he walked away from the conversation with another co-worker. *Murray v. Verizon Wireless LLC*, 2025 BL 361884 (E.D. Pa. 10/8/25).

EMPLOYER ASKED APPLICANTS TO SWEAR THEY ARE NOT GOING TO LEAVE

Employers have been reading about the use of non-compete agreements and the like, and are increasingly concerned as to their use. One interesting practice is developing among the financial industry in New York, with major financial firms asking junior bankers to confirm their loyalty on a regular basis in an effort to limit leaving to go to other talent-hungry firms. Goldman Sachs allegedly asks new analysts to certify every three

months that they haven't already lined up jobs elsewhere. J.P. Morgan also allegedly tells incoming hires that they will be fired if they are caught accepting offers of a future job somewhere else before they complete their first 18 months at the firm.

Editor's Note: The question is whether other employers should seek certain verbal assurances from applicants. There does not seem to be anything illegal about this practice, provided it is applied consistently. On the other hand, such a commitment appears to be one lacking a strong basis for enforcement, but it would appear to be a moral inducement to remain at the employer.

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