Legal Issues in Human Resources for the Small Company in Texas

by

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Dedication

This report is dedicated to my wonderful wife, who probably had the most difficult part of this educational experience. Thank-you for your patience, your support, and your encouragement – I couldn't have made it without you. I love you.

Abstract

Legal Issues in Human Resources for Small Companies in Texas

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This report is intended to provide a quick reference on employment law for small businesses in Texas. Many of the key regulations governing hiring, pre-employment testing, pay, benefits, leave, discrimination and harassment, and termination are summarized so employers are aware of what they must do to comply with the various laws. Recent cases are included to help employers understand how some of these laws are being interpreted in court, and to highlight the importance of understanding when the various laws apply to a company or a specific situation. Finally, recommended best practices are also provided to help managers protect the company in case of legal action, or ideally to avoid it altogether.

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INTRODUCTION

First, a fitting beginning to a paper on legal topics: a disclaimer. This report was not prepared by an attorney and should not be treated as informed legal opinion or legal advice. Employment law is a complex and ever-changing subject, and a licensed attorney specializing in employment law should be consulted when dealing with any employment-related issues.

Employment law covers all facets of the relationship between the employer and all employees, including prospective, current and former employees. Various aspects of employment are governed by federal and state statutes, and in some cases may also be covered under state contract laws; a full analysis of all elements is beyond the scope of this paper. The purpose of this report is to summarize some important federal and Texas state statutes as they existed at the time of this writing, to highlight their applicability to small businesses in the state of Texas, and to provide some guidance to employers on how to deal with issues related to these laws. Ultimately, the goal is to provide a quick reference guide on employment law for small businesses in Texas, summarizing what employers must do to comply with various laws, and offering recommendations on what organizations should do in terms of best practices to help protect the company in case of legal action, or ideally to avoid it completely.

At their root, employment laws require employers to afford their employees the right to fair compensation, the right to a safe workplace, and the right to freedom from discrimination and harassment. Many laws also exist to govern the behavior of employees to protect the employer from undue hardship and malicious actions by employees. Employers must ensure that they are aware of, and are conducting business

in accordance with all applicable laws, and also that they are aware of the protections afforded to them by law.

The following sections outline some of the important laws related to hiring, pay, benefits, leave, discrimination and harassment, and termination.

LAWS RELATED TO HIRING

A company's legal obligations toward its employees begin before it has even hired the first one. During the hiring process, employers must be careful to avoid illegal discrimination, must respect applicants' privacy and must ensure they hire only those who are legally allowed to work. The following sections outline some of the federal and Texas state laws related to the hiring process. Many issues in interviewing and hiring are related to discrimination, which is a significant topic in its own right and will be covered in a later section.

Job Descriptions and Interviewing

The job description defines to applicants the basis upon which their suitability for the position will be judged. While there are no laws specifically related to the contents of a job description, it creates the basis upon which applicants form their opinions of what the job entails and what their duties would be. As such, the company must be careful to accurately describe the position, its primary responsibilities and the required skills and expertise of applicants. During the interview process, the interviewer must be careful to accurately represent the company and the position, without embellishments. In short, the old adage applies: don't make promises you can't keep. An applicant who accepts a job offer based on inaccurate information about the job has grounds for a lawsuit for fraud. Employers should carefully review job descriptions before they are posted to ensure that they are accurate and honest. Interviewers must be made aware of the legal ramifications of employment interviews; they should be trained to avoid misrepresenting the company or the position, and to avoid over-promising the employee's opportunities. Team interviews are common and may help avoid legal problems by allowing one interviewer

to correct another's unintentional (or intentional) misrepresentations. Specific recommendations on avoiding discriminatory practices are provided in a later section.

Pre-Employment Testing

Pre-employment testing can take many forms: drug tests, credit checks, IQ tests, personality tests, polygraph (lie-detector) tests, and many others. Some of these are governed by specific laws and others are subject to privacy laws and other statutes, as described in the following sections. Discrimination-related issues are discussed in a later section.

POLYGRAPH TESTING

The Employee Polygraph Protection Act (EPPA) (29 USC 2001 *et seq*.) was passed by the federal government in 1988, and prohibits most employers from requiring current or prospective employees to submit to a polygraph test. Texas has no equivalent statute. The EPPA affects most commercial businesses, regardless of size. It does not apply to federal, state or local governmental agencies, or public agencies such as school systems or correctional institutions. Several types of commercial businesses are exempt from the EPPA, including those that provide armored car or security services, those that deal with controlled substances, or those that operate facilities that may have a significant impact on public health (such as nuclear or electric power plants, public water supply facilities, or toxic waste disposal facilities). Refer to the Act for a complete list of exemptions.

The EPPA not only prohibits employers from requiring employees to submit to a polygraph test, but also prohibits disciplining, discharging or discriminating in any way against an employee or prospective employee for refusing to submit to a polygraph. Under some exemptions to the law, as outlined in §2006, an employer may request that a

current employee take a polygraph test when certain specific conditions are met. However, even in situations where polygraph testing is permitted, the testing must be performed in accordance with the guidelines set forth in the EPPA, including that the company must use a qualified examiner who must avoid asking prohibited questions (such as questions about religious or political beliefs, matters relating to sexual behavior, and opinions regarding racial matters).

DRUG TESTING

Pre-employment drug testing in Texas is governed by several laws. Federally, the Drug-Free Workplace Act of 1988 (41 USC 701) requires that all government contractors provide a drug-free workplace. The Act does not specifically require workplace drug testing either pre- or during employment, but it does state that employers must adopt a written policy and notify employees that drug use, manufacture, possession, distribution and dispensation are prohibited and that employment is conditional upon adherence to this policy. Companies that are not currently government contractors but are planning to bid for government contracts are advised to comply with the Drug-Free Workplace Act to ensure their eligibility for those contracts. The code details the employer's responsibilities, including notifying employees of the policy and establishing a drug awareness program.

Federal Department of Transportation regulations (49 CFR Part 40) require regular drug testing (including pre-employment) of most employees who hold a commercial driver's license. The Texas Transportation Code (7 Tex. Trans. Code 644) references the federal guidelines and imposes additional requirements upon the employer, such as reporting valid positive test results and instances when an employee refuses to provide a specimen.

Texas has no broadly-applicable statute regarding workplace drug testing; laws are in place to address certain specific occupations. For example, drug testing (including pre-employment, annual and even random) is required for employees of vehicle storage facilities (14 Tex. Occ. Code 2303), towing operators (14 Tex. Occ. Code 2308), residential childcare facilities (2 Tex. HR Code 142), nursing homes (4 Tex. H&S Code 242), home and community support service facilities (2 Tex. H&S Code 142), and others. None of these statutes (including the federal codes cited above) specify a minimum company size to which they apply.

BACKGROUND CHECKS

Employers have a legitimate business interest in knowing about the past behaviors of prospective employees, and background checks can be an effective way to find this information out. Background checks can take several forms, including credit checks, criminal history, employment references, and personal references. It is becoming increasingly common for employers to perform internet searches and to check social networking websites for evidence of undesirable behavior.

A prospective employee's credit history may be a very important consideration for a position that involves handling money on a regular basis. In these cases, the Fair Credit Reporting Act (FCRA) (15 USC 1681) allows employers to request a copy of the applicant's credit report as long as the applicant provides written consent. Section 1681m of the FCRA also states that if the employer chooses not to hire the applicant based on the contents of the credit report, the applicant must be advised of their rights under the FCRA to challenge the contents of the report. Texas has no laws specifically addressing credit checks as they relate to employment.

Criminal background checks are permitted under federal law provided there is a legitimate business reason for performing one. In general, employers are allowed to base employment decisions upon a history of convictions but not arrests. Various Texas statutes require criminal background checks for certain occupations, such as law enforcement officers (10 Tex. Occ. Code 1701), child-care administrators (2 Tex. HR. Code 43), massage therapists (3 Tex. Occ. Code 455), and employees who enter someone's house in the performance of their job duties for in-home service or residential delivery companies (6 Tex. CPR 145). No minimum company size limits are specified. In general, employers should exercise caution when considering using criminal background checks as the basis for employment decisions because the Equal Employment Opportunity Commission (EEOC) has found that minorities statistically have a higher rate of both arrest and conviction (Foreman). Employers should ensure that there is a legitimate job-based reason to request a criminal background check, and the same checks should be performed for all applicants to avoid claims of discrimination.

In general, civil litigation history investigations are discouraged for several reasons: first, they are complex and therefore tend to be expensive; second, because it is often difficult to attribute a civil suit to a specific individual, so it would be unwise to base an employment decision on uncertain information; and finally, because civil litigation often does not have a bearing on the candidate's ability to perform the job. In some cases, though, a civil litigation investigation may be very important – for example, a search for fiduciary complaints against an applicant being interviewed for a fiduciary position (Lawson).

AUTHORIZATION TO WORK

Under the Immigration Reform and Control Act (IRCA) (8 USC 1324a and 1324b), the United States Citizenship and Immigration Services requires companies to submit a Form I-9 within three days of hiring a new employee to verify that their new hire is eligible to work in the United States. Regulations describe what must be submitted and how, as well as providing instructions on what to do if the information provided by the employee does not match what the government has on file. The Social Security Administration also offers the E-Verify system through their website (www.ssa.gov) to assist in the process of confirming eligibility to work.

RECOMMENDATIONS

Apart from situations where certain tests are required by law, such as drug testing of employees holding a commercial driver's license, a good rule of thumb for employers to avoid potential legal problems is to require applicants to perform only tests that relate directly to job performance. For example, it is reasonable to require applicants for an administrative assistant position to complete a typing test because typing is a key element of job performance. Psychological, personality, IQ tests and the like should generally be avoided because they can seldom be related directly to job performance, and thus can lead too easily to legal problems. Prior to administering a pre-employment test, it should be screened to ensure that it is scientifically valid and that it is a reliable indicator of job performance. The employer should have a written policy that describes the nature of the testing and what will happen to employees or applicants who fail the test. To avoid discrimination charges, this policy should clearly state that *all* applicants must pass the test to be considered for employment, and the policy must be followed ("Testing Job Applicants"). Employers are advised to maintain documentation about how any pre-

employment tests are justified by job requirements, what measures were taken to ensure that the tests are not discriminatory, and what, if any, alternative methods of evaluation were considered. Similarly, the qualifications for the position should be supported by documentation showing the link to job performance.

Medical tests are fraught with privacy issues and so should only be required once the employer has made an official offer to the applicant, stating that the offer is contingent upon the results of the test ("Testing Job Applicants"). Again, the company should have a policy in place that states that these medical tests are required of all employees in that position, and documentation supporting the job-related requirement for the test.

Background checks should be limited to only information that is relevant to the position for which the applicant is being considered. It is best to receive written permission from the applicant prior to performing any background checks. This serves two valuable purposes: first, it eliminates the possibility of the applicant claiming that their privacy was violated, and second, the employer can legally decide not to hire the applicant if they refuse a reasonable request ("Running Background Checks").

LAWS RELATED TO PAY, BENEFITS, AND LEAVE

Introduction

Most issues related to pay, benefits, and leave are not subject to any specific regulations other than those related to discrimination, which are discussed in a later section. The following sections summarize some of the main federal and state laws governing pay, benefits, and leave, including: the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), and some Texas labor statutes. Recent cases are discussed to help employers better understand how courts are interpreting some of these laws and how their organization and policies may be affected.

Minimum Wage and Overtime

The Fair Labor Standards Act (FLSA) (29 USC 206 *et seq.*) defines the minimum wage and overtime regulations for most private companies in the United States. In general, the FLSA requires that all employers with annual sales in excess of $500,000 or who are involved in interstate commerce to pay their employees a certain minimum wage ($7.25 per hour as of July 24, 2009). The FLSA definition of "interstate commerce" is quite broad, including even phone calls to other states. The FLSA also stipulates minimum pay requirements for employees who perform piece work and those for whom tips constitute a significant portion of their earnings. Workers who are paid hourly are also entitled to overtime under the FLSA; any hours in excess of 40 hours in a week must be paid at one-and-a-half times the hourly rate. There are two classes of employees who are not covered under the FLSA: those who are exempt from both the minimum wage

and the overtime pay requirements, and those who are exempt from the overtime requirements alone. Among employees who are exempt from the overtime pay regulations are employees who are paid more than $100,000 per year, executives and professionals who are paid an annual salary that is not affected by the number of hours worked, and administrative employees. The FLSA contains some guidance for employers to determine if a position falls under one of these exemptions, but many of the descriptions are broad and subject to multiple interpretations; for example, one classification for administrative exemption is for employees "who regularly exercise discretion and judgment in their work". When these exemptions were expanded in the 2004 updates to the FLSA, many unscrupulous employers reclassified positions to make them exempt to overtime ("Exemptions FLSA"). This practice is not encouraged. Rather, employers should carefully evaluate each position and establish whether it is exempt from overtime – or risk having to defend their actions in court.

Penalties for violating the FLSA include, but are not limited to fines, imprisonment, damages, attorney's fees, unpaid wages, and unpaid overtime.

The Texas Minimum Wage Act (2 Tex. Labor Code 62) cites the FLSA to define the minimum wage and overtime pay requirements for Texas companies. In addition, Texas law requires employers to pay those employees who are subject to the FLSA regulations at least twice per month, and those who are exempt from the FLSA overtime pay requirements at least once per month (2 Tex. Labor Code 61). This statute also requires that employees who are terminated be paid no later that the sixth day after being discharged, and employees who leave for any other reason be paid no later than the next regularly scheduled pay day. These regulations apply to all companies in Texas.

The Texas Labor Code also limits the number of consecutive days certain employees can be required to work, and stipulates that employees must be given at least 24 hours off in any seven day period. Employers must also "accommodate the religious beliefs and practices of an employee unless the employer can demonstrate that to do so would constitute an undue hardship on the conduct of the employer's business" (2 Tex. Labor Code 52). These regulations apply only to employees who work more than 30 hours per week.

Paid Holidays, Jury Duty, and Family Leave

Contrary to what would seem to be common business sense, employers are not legally required to give employees paid time off. Most employers choose to do so because paid leave is a good way to attract and retain employees, to limit absenteeism and to improve employee productivity and morale. Employers must be careful to treat employees equally to avoid discrimination claims. Also, it is generally good business practice to adopt a reasonable accrual policy for paid leave and to require employees to give advance notice when they intend to take paid leave. Most employers do not offer paid leave for the birth of a child, instead requiring employees to utilize short-term disability. When an employer does offer paid leave, however, it must be offered equally to female and male employees to avoid discrimination claims ("Leave Policies FAQ"). The Family and Medical Leave Act contains provisions regarding unpaid leave for pregnancy and related conditions, and is discussed in the next section.

Employers are required to allow employees to take leave for certain events. For example, the Texas Civil Practice and Remedies Code (6 CPR 122) requires that employees grant leave (not necessarily paid leave) for employees to report for jury duty. Under this statute, employers cannot fire an employee for taking leave for jury service,

and in fact cannot even threaten to terminate or penalize an employee for performing jury duty. The penalties to the employer for violating this statute can include reinstating the employee to their former position, paying a minimum of one year's compensation, and paying the employee's attorney's fees.

Family and Medical Leave Act

SUMMARY OF THE LAW

The Family and Medical Leave Act (FMLA) (29 USC 2601-2654) was enacted in recognition of the fact that more American households were either single-parent or two-parent where both parents worked; that parental participation is important in early childrearing and the care of family members who have serious health conditions; there is inadequate job security for people with serious health conditions; and more women than men take primary responsibility for family caretaking and this could lead to potential gender discrimination in the workplace. To address these concerns, the FMLA allows employees to take up to 12 weeks of unpaid leave of absence for qualified medical purposes. During this period, the employer must preserve the employee's position or reinstate the employee to a different position with equivalent seniority, responsibilities, pay, benefits and other terms of employment.

Qualified medical purposes include, but are not limited to: birth and care of a child (including adoption or foster care), care for an immediate relative (parent, spouse or child – not including siblings, grandparents, etc.), and situations where the employee is not able to work due to a "serious health condition". The Department of Labor, Wage and Hour division clearly defines a serious health condition as an illness, injury, impairment or physical or mental condition that involves inpatient care or a period of incapacity requiring absence for more than three consecutive calendar days that also

involves continuing treatment by a health care provider. Other examples of serious health conditions include: pregnancy or prenatal care, chronic serious health conditions (e.g., asthma, epilepsy, etc.), long-term conditions for which treatment may not be effective (e.g., Alzheimer's, stroke, terminal diseases, etc.), and conditions that would likely result in incapacity for more than three days if left untreated (e.g., chemotherapy, dialysis, etc.) (U.S. Dept of Labor).

The FMLA only applies to companies with 50 or more employees for every working day of any 20-week period in the current or previous year. If an employer has multiple locations within a 75 mile radius, the law applies if the aggregate number of employees is 50 or greater. For companies with multiple locations, it is possible that the FMLA will apply to certain locations and not others. The U.S. Code of Federal Regulations provides guidance for FMLA applicability in joint employment relationships (29 CFR 825.106). Section 825.106(a) states that a joint employment situation may arise "when two or more businesses exercise some control over the work or working conditions of the employee", which §825.106(b) cautions must be determined on a case-by-case basis in light of the entire relationship between the companies. For example, a "professional employer organization" (PEO) that contracts with client employers to perform administrative functions may be in a joint employment situation if it has the right to hire, fire, assign, or otherwise control the client company's employees, rather than merely providing administrative services. In a joint employment relationship, the "primary" employer (the one that has the right to hire, fire, assign, make payroll, provide employee benefits, etc.) is responsible for giving the required notices to its employees, providing FMLA leave, maintenance of health benefits, and job restoration. In most situations, both the primary and the secondary employer must count the employee when

determining FMLA applicability and employee eligibility. More details and some examples are provided in §825.106(d).

The FMLA only applies to employees with a minimum of 12 months of service, and who have worked more than 1250 hours in the previous 12 months. Qualified employees are allowed to take 12 weeks of unpaid leave within any 12-month period. Employers are required to post these FMLA eligibility guidelines in the workplace in the languages in which employees are literate.

The employer may require that employees utilize paid leave (including vacation, personal leave, sick leave, etc.) as part of the 12-week leave provision. Holidays can be counted as part of the FMLA leave if the employee is on leave for the entire week in which the holiday occurs. In general, employees are not permitted to take the 12 weeks of leave intermittently, unless it is medically necessary. If intermittent leave is required, the employer can require the employee to temporarily transfer to a different position of equivalent pay and benefits that better accommodates intermittent leave. Prior to granting FMLA leave, the employer is allowed to ask for certification from a healthcare provider listing the illness, diagnosis, expected duration of leave, and the treatment plan. The company also has the right to seek a second (and even a third) opinion at its own expense. In addition, the company may require certification from the healthcare provider that the employee is able to resume work.

While the employee is on leave, the employer must maintain health benefits for eligible employees, but may recover premiums paid during leave from the employee if the employee fails to return from leave for reasons other than the continuation of the reason for which leave was taken.

The FMLA was amended by the National Defense Authorization Act for FY2008 (Pub. L. 110-181) to allow the spouse, child or other next-of-kin to take up to 26 workweeks of unpaid leave to care for a member of the Armed Forces, including medical treatment, therapy, and recuperation, and to allow FMLA leave for an employee for "any qualifying exigency" (as defined by the Secretary of Labor) arising out of the fact that the spouse, child or parent is on active duty.

It is important to understand that the FMLA does not guarantee job protection. An employee can be laid off while on FMLA leave if the employer can show a valid business reason – for example, that the employee would have been terminated if the employee had continued to work. In addition, employers are not required to reinstate highly-paid employees (those among the highest-paid 10 percent of employees within 75 miles). Employees who exhaust their 12-week leave allotment are no longer entitled to protection under the FMLA.

The penalties for violating the FMLA are severe; the employee is entitled to reimbursement for lost wages and benefits, interest, expert witness fees, attorney's fees, court costs and equitable relief.

There are many on-line resources available for employers, including the Department of Labor's website (www.dol.gov/esa/whd/fmla), which summarizes the law, answers frequently asked questions, and outlines employer recordkeeping requirements. Other sites contain on-line forms the employer can supply for the healthcare provider to complete, and articles containing legal advice regarding the FMLA. However, the FMLA is a very complex area of law, and employers are advised to consult with an attorney specializing in employment law for any FMLA-related issues.

RECENT COURT DECISIONS

Some recent court decisions provide clarification of some of the terms and provisions of the FMLA, and are summarized below.

The United States Court of Appeals for the Eleventh Circuit ruling in the case of *Russell v. North Broward Hospital*, 346 F.3d 1335 (11th Cir. 2003) clarified the definition of "serious health condition" under the FMLA, stating that an employee must be incapacitated for at least three, full, consecutive days.

The 5th U.S. Circuit Court of Appeals decision in *Urban v. Dolgencorp of Tex., Inc.*, 393 F.3d 572 (5th Cir. 2004) illustrates the importance of requiring employees to provide medical certification in FMLA leave situations. In this case, the employer tentatively granted FMLA leave on the provision that the employee supply medical certification within 15 days of commencement of leave, per the company's written policy and as permitted under the reporting requirements of the FMLA. The employee failed to produce the medical certification prior to the deadline, and so was terminated when she did not return to work after her non-FMLA leave allotment of 30 days had expired. The Court held that the employer had not violated the FLMA.

In 2002, the United States Supreme Court provided some relief to employers by countermanding the regulations set forth by the Secretary of Labor in 29 CFR 825.700(a), which states that if an "employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement". The case (*Ragsdale v. Wolverine World Wide, Inc.*, 531 U.S. 81, 122 (2002)) at issue involved an employee who was terminated following a 30-week absence for cancer treatments. The employee filed suit claiming that she was not notified that the 30 weeks would include her 12-week FMLA allotment, and so she was entitled to an additional 12 weeks. The U.S. Supreme

Court held that 29 CFR 825.700(a) "is invalid because it alters the FMLA's cause of action in a fundamental way: it relieves employees of the burden of proving any real impairment of their rights and resulting prejudice". Despite this ruling, employers are still advised to notify employees if leave will count against their 12-week FMLA allotment, and to have clear reporting requirements specified in the employee handbook.

Leave for Military Service

The Uniformed Services Employment and Reemployment Rights Act (USERRA) (48 USC 4301-4335) is intended to encourage non-career uniformed service and to minimize disruption to both the employee and the employer by ensuring that employees are not disadvantaged by their service, are promptly reemployed upon return from service, and are not discriminated against based on past, present, or future military service. The USERRA allows employees to take up to 5 years of unpaid leave from any single employer for the purpose of uniformed military service, including the National Guard and Reserve. Employers must also extend health coverage and employee participation in retirement benefits plans while the employee is on active duty.

Employers are required to notify employees of their rights under the USERRA (usually through the employee handbook or by posting them in the workplace), and may require written notice from employees of their intent to enter the service.

Regulations for job preservation vary according to the duration of the leave for service. Leave for less than 91 days requires that the employee be returned to the position in which they would have been employed had they not left to serve. If the leave for military service is longer than 90 days, the employee must be placed in a position for which they are qualified, and of similar seniority, status and pay, but not necessarily the

position they would have had had they not left. Employers must also make reasonable accommodations for employees who become disabled while serving.

However, as with the FMLA, reemployment is not guaranteed. In the case of the USERRA, the employee may not be entitled to reinstatement if they employer's circumstances have changed significantly enough that reemployment is impossible or unreasonable, or if it would impose undue hardship on the employer. The USERRA does not specify a minimum company size to which the law applies.

If an employer is found to have violated the USERRA, the employee may be awarded lost wages and benefits, as well as reasonable legal fees. The Employer Support of the Guard and Reserve (ESGR) has established an ombudsman service to assist in resolving conflicts related to the USERRA. Employers and employees should consult the ESGR website (www.esgr.org/userra.asp) for details.

Benefits

Companies in Texas are not required by law to provide health or other benefits plans for employees, but these plans can be important in attracting and retaining high-quality employees. In fact, many employees consider benefits plans to be an important aspect of their total compensation and are often willing to work at a lower salary in exchange for superior benefits. However, health benefits can be very expensive for the employer, especially if the company is small and thus has very little buying power with the plan provider. Small companies are well-served to enlist the services of a health benefits broker to aid in the selection and administration of health benefits plans. Benefits are not limited to primary healthcare, but may also include retirement or pension funds, disability insurance, paid and unpaid leave, and life insurance. Again, employers

are not required to provide paid benefits to employees, but if they do, all employees must be treated equally to avoid discrimination claims.

In addition to providing equal access to benefits packages, under the Employee Retirement Income Security Act (ERISA) (29 USC 1001-1003) employers must notify employees of eligibility standards, claims procedures and the rights of participants in the plan. Section 1001 of the ERISA states that it was enacted because of the growing size and scope of benefits plans, the increasing interstate nature of benefits plans and their significant implications on the economic well-being of employees and their beneficiaries, as well as income tax revenue for the Federal Government. The ERISA should be consulted to determine what information employers are required to provide to beneficiaries of the benefits plans they offer.

Recommendations

The following paragraphs offer some FMLA-specific recommendations.

First and foremost, employers must understand if the FMLA even applies to their specific situation with respect to the size of the company and the employee involved. Preserving a position for an employee on unpaid leave can be burdensome on a small company, so the employer should carefully consider whether or not leave can or should be granted. Clearly-stated policies in the employee handbook are recommended to ensure that employees understand if the FMLA applies and what the employer requires in terms of use of paid leave, notice of intent to take leave, etc. Employers who are not covered under the FMLA may still choose to grant extended unpaid leave, and this policy should be clearly stated in the employee handbook.

Companies are also advised to exercise their rights to require certification from the healthcare provider that the employee is able to return to work.

Audrey E. Mross recommends that employers who are subject to the FMLA include a section in their employee handbook outlining the company's policy statements, and that it be organized in a chronological manner to facilitate rapid assessment of eligibility (Mross). She recommends beginning with an assessment of the employee's eligibility for FMLA leave, followed by an analysis of the qualifying event. The onus is on the employer to determine if the condition is serious based on the guidelines provided by the U.S. Department of Labor. Next, the employee handbook should specify what the employer requires of employees in terms of notification of impending leave. It is the responsibility of the employer, not the employee, to determine if the leave will be FMLA leave. The handbook should outline the company's policies in terms of use of paid and unpaid leave as part of the 12-week allotment allowed under the FMLA, as well as any other policies related to pay and benefits while the employee is on leave. For example, the employer should specify how benefits are accrued while on FMLA leave, or how FMLA leave might affect an employee's annual bonus. Finally, the employee handbook should detail the employer's policies regarding the employee's return to work, including any requirements regarding notification of intent to return to work, or certification of suitability to return to work from the health care provider. The employer should also describe the terms of any termination policy for failure to return once FMLA leave has expired.

LAWS RELATED TO DISCRIMINATION AND HARASSMENT

Introduction

Discrimination has been much in the news recently with the on-going case of the firefighters in New Haven, Connecticut. This case serves to illustrate the complex and highly-charged nature of discrimination in employment as it challenges what would seem to be the fundamental purpose of anti-discrimination law – that is, to prevent discrimination against visible minorities and other protected classes. In the New Haven case, the white male firefighters challenged this assumption and forced the Supreme Court to re-examine and re-define anti-discrimination in the United States. The following sections outline some of the primary statutes related to employment discrimination – Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) – summarizing the code and some key court decisions to help employers interpret their application. Full analysis of each of these laws is well beyond the scope of this paper – in fact, each law could be the subject of its own paper. Instead, some general recommendations follow at the end of the section.

Title VII of the Civil Rights Act of 1964

SUMMARY OF THE LAW

Title VII of the Civil Rights Act of 1964 (Title VII) (42 USC 2000e) prohibits discrimination on the basis of race, color, religion, sex, or national origin in all aspects of employment, including advertising for positions, interviewing, hiring, compensation, terms, conditions, privileges, and termination. It also prohibits segregation or

classification of employees or applicants in any way that would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect" their status as an employee because of race, color, religion, sex, or national origin. Employers must also avoid practices that tend to have a disparate impact with regard to any of the protected classes (race, color, sex, etc.), meaning that an employer must not implement an employment policy that, while not intended to be discriminatory, tends either to favor a certain group of individuals or negatively impact a certain group of individuals. For example, a test of physical strength as a condition of employment would tend to favor men over women and would therefore be illegal, providing it does not fall under one of a few exceptions to the code as discussed below. In general terms, an unlawful employment practice is one where race, color, religion, sex, or national origin was a motivating factor for that practice.

The simplest exception to Title VII is that the regulations only apply to companies with 15 or more employees for every working day of 20 consecutive work weeks in the current or previous year. Title VII does not apply to situations where the position or access to the premises at which the position is located is subject to any requirement imposed in the interest of national security (for example, a company that handles sensitive or secret information may be required to hire only U.S. citizens). Also, under Title VII, businesses are also allowed to extend preferential treatment to Indians who live on or near a reservation. With respect to discrimination on the basis of religion, this is permitted only if the employer can demonstrate that it is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship. The Equal Employment Opportunity Commission (EEOC) states that "an employer can show undue hardship if accommodating an employee's

religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation" (EEOC, "Religious Discrimination"). For example, a business that is only open on Saturdays could demonstrate that it would be an undue hardship to employ an individual whose religious beliefs prohibited working on Saturdays.

The other main exception to Title VII is where the employer can prove that a certain characteristic is a bona fide occupational qualification, or BFOQ, that is reasonably necessary to the normal operation of that particular business or enterprise. A simple example is that a company can legitimately preclude women from applying for a position as an attendant in a men's restroom. To invoke the BFOQ exception, the employer must be prepared to prove that no individual who does not possess the certain trait is qualified to perform the job.

The regulations also provide some specific guidance with respect to some of the protected classes. For example, sex discrimination includes, but is not limited to, discrimination on the basis of pregnancy, childbirth, or other related medical conditions. Race discrimination includes any different treatment on the basis of a race-linked characteristic (e.g., skin color, facial features, etc.), or a condition which predominantly affects one race (i.e., sickle cell anemia, which predominantly affects African Americans) (EEOC, "What is 'Race' Discrimination?").

Harassment is considered under Title VII to be a form of discrimination. This includes ethnic slurs, racial jokes, offensive or derogatory comments, or verbal or physical conduct. Sexual harassment includes unwanted demands for a romantic or

sexual relationship, unwanted behaviors or communications of a sexual nature, requests for sexual favors, sexual advances, or physical conduct of a sexual nature (EEOC, "Sexual Harassment").

Title VII does not, however, require quotas – employers are not required to give preferential treatment to any individual or group to correct an imbalance between the representation of a certain group at the employer as compared to the community at large. It is also not permissible to reduce an employee's pay or benefits in order to comply with the law.

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing Title VII by developing standards, guidelines, and policies defining the nature of employment discrimination, by investigating complaints of discrimination, and by acting on behalf of employers whose employees refuse to cooperate in implementing the provisions required by the Act. If an employee believes he or she has been discriminated against on the basis of belonging to one of the protected classes, they may contact the EEOC who will then serve notice of the charge on the employer and undertake an investigation. The EEOC is not permitted to make public the charge or the results of the investigation. If the investigation shows that there is no reasonable cause to believe the charge is true, the EEOC may dismiss it. If the investigation shows that there are grounds for the charge, the EEOC will attempt to use "informal methods" (i.e., mediation, persuasion, conferences, etc.) to resolve the unlawful employment practice. Ideally, EEOC investigations should take less than 120 days. Legal action is also an available remedy, and some recent court decisions are discussed in a later section.

RECENT COURT DECISIONS

On June 29, 2009, the U.S. Supreme Court decided in favor of the plaintiffs in the case of *Ricci v. DeStefano* (U.S. Supreme Court, Case No. 07-1428, 2009) – more commonly known as the New Haven firefighter case. In the case, twenty firefighters from New Haven, Connecticut, who were denied promotions were found to be victims of illegal racial discrimination. What makes the case somewhat unique is that the firefighters were white. The background information of the case follows, along with a summary of the Court's decision and its implications on employment discrimination law.

The City of New Haven developed objective examinations to identify the firefighters who were best qualified for promotion to lieutenant and captain during the next two years, and the order in which they would be considered. The examinations were administered to 118 candidates, 27 of whom were black. When the results were tabulated, none of the black candidates scored high enough to qualify for any of the fifteen open lieutenant and captain positions, so the city refused to certify the test results because of the statistical racial disparity, and promoted no one. The plaintiffs, all of whom passed the examination, claimed that they had been discriminated against on the basis of their race, in violation of Title VII. The city claimed that they were justified in discarding the test results because they could have faced a Title VII action for adopting a practice that had a disparate impact on minority firefighters. Both the District Court and the Second Circuit court found in favor of the defendants. In reviewing the facts of the case, the Supreme Court held that the City's action did in fact violate Title VII.

This case highlights an apparent contradiction in Title VII in that the law prohibits race-based employment decisions, but also requires employers to avoid tests that produce disparate results. In their majority decision, the Supreme Court attempted to address this

contradiction without actually changing any of the underlying aspects of the law, recognizing that the "disparate impact provision of Title VII … serves an important purpose by preventing employers from using tests that aren't valid and have a racially exclusionary effect". The Supreme Court stated that employers should adopt "strong basis in evidence" approach when deciding whether or not to reject an employment practice. Specifically in the New Haven case, the Court found that the City did not have a strong basis in evidence that they would have been liable under a Title VII suit for disparate impact because the promotional test met the guidelines required by §§2000e-2(k)(1)(A) of Title VII: the exam was job-related and consistent with a business necessity, and there was no equally valid, less discriminatory alternative that the City refuse to adopt. Further, the Court stated that employers could not use "fear of litigation alone" to justify a decision based solely upon race.

The Supreme Court's decision gives some relief to employers who endeavor to engage in nondiscriminatory practices by setting the standard that, if they acted in good faith, they need not chance a disparate treatment action out of fear of disparate impact liability because the strong basis in evidence should show that their actions were lawful under Title VII.

Americans with Disabilities Act

SUMMARY OF THE LAW

The Americans with Disabilities Act (ADA) (42 USC 12101-12213) applies to all private employers with 15 or more employees for every day of 20 consecutive work weeks in the current or previous year. The ADA protects from discrimination people who have a disability and are qualified for the job they are seeking or holding. In other words, employers are not permitted to discriminate on the basis of disability if the

individual can perform the essential job functions with or without reasonable accommodations being made on the part of the employer. This applies to all aspects of employment, including application, interviews, testing, hiring, job assignment, evaluation, compensation, training, medical exams, leave, benefits, and termination. So, several key questions must be answered: first, what is a disability; second, what are reasonable accommodations; and third, when must reasonable accommodations be made? These are discussed in the following paragraphs.

Section 12102(1)(A) of the ADA defines a disability as a "physical or mental impairment that substantially limits one or more major life activities", which subsection 12102(2)(A) clarifies as including activities such as walking, talking, seeing, hearing, and learning, as well as major body functions, such as digestive, neurological, circulatory, reproductive, and others. Disability is determined on a case-by-case basis, but generally includes such conditions as confinement to a wheelchair, blindness, deafness, certain mental illnesses, and learning disabilities – anything that prohibits the employee from performing a broad range of jobs. The ADA does not offer protection for the use of illegal drugs, nor does it offer protection if the use of alcohol prevents job performance. It does, however, offer protection for use of alcohol if job performance is not affected, and for employees who are recovering alcoholics. Other conditions, such as obesity and nicotine addiction, are more difficult to classify. For example, simple obesity is not considered to be a disability, where morbid obesity is because it restricts major life activities (*Andrews v. Ohio*, 104 F.3d 803 (1997)). The ADA Amendment Act of 2008 (Pub. L. 110-325) broadened the scope of what can be considered a disability under the ADA by removing the consideration of ameliorative treatments (e.g., an insulin-dependent diabetic will now be considered to be disabled, but would not have been prior

to enactment the ADAAA) (Hyman). Several courts ruled that nicotine addiction was not covered under the ADA because it did not substantially limit a major life activity or because it was not regarded as a disability (for example, *Sutton v. United Airlines*, 527 U.S. 471 (1999)); the status of nicotine addiction under the ADAAA has not yet been determined and is the subject of much legal debate (Hyman).

Employers are required under the ADA to make "reasonable accommodations" for an employee's disability. These may include physical changes to the work environment (i.e., installing access ramps), restructuring job duties, installing special equipment or software, modifying the employee's work schedule, allowing extra leave for medical purposes, etc. For example, an employee who suffers from Attention Deficit Hyperactivity Disorder (ADHD) may be placed in a private office to minimize distractions, or a telecommunications device for the deaf (TDD) phone may be provided for an employee who is hard of hearing (DelPo). The ADA requires that the employee notify the employer of the nature of the disability and request reasonable accommodations, and to work with the employer to determine a suitable solution. For example, an employer may agree to provide a sign language interpreter for certain events (such as company-provided training or large group meetings) for a person who can otherwise rely on lip reading during the normal course of work (EEOC, "Q&A about Deafness"), whereas providing a full-time sign language interpreter would likely fall into the category of an "undue hardship".

There are two main exceptions to the "reasonable accommodation" requirement. First, the employer is not required to make reasonable accommodations if the employee would not be able to perform the job even if reasonable accommodations were made. For example, sight is an absolute requirement for an airline pilot and no amount of

accommodation would allow a blind person to perform the essential job function of flying the airplane ("Disability Discrimination and the Law"). The other exception is where expense or difficulty makes the accommodation impractical and causes and undue hardship on the employer. This is determined on a case-by-case basis based on the nature of the disability, the financial costs of the accommodations, and the employer's financial resources. For example, it would be difficult for a large, multi-national corporation to claim that providing a TDD phone would cause an undue hardship, or conversely, it would not be reasonable to expect a small company to make significant structural modifications to its facilities to allow wheelchair access.

The employment-related aspects of the Americans with Disabilities Act are enforced by the EEOC. The Department of Justice's Americans with Disabilities Act website (www.ada.gov) contains a wealth of information about the ADA, recent court decisions, guidelines for small businesses, FAQ's, etc.

RECENT COURT DECISIONS

The ADA contains three primary requirements for a successful discrimination suit: first, that the employee is disabled; second, that the employee is qualified to perform the essential job functions; and third, that the employee suffered a negative employment action (for example, termination, being passed over for promotion, etc.) as a result of discrimination by the employer because of the employee's disability. The following cases illustrate to employers the importance of understanding that all three conditions must be met.

In the case of *Baucom v. Holiday Co.*, 428 F.3d 764 (8th Cir. 2005), Baucom, who suffered from back and heart problems, alleged that his district manager ordered that his hours be reduced to force him to quit because his age and disability were "a hindrance".

The U.S. 8th Circuit Court of Appeals reviewed his history of hours and found that they exhibited the amount of variability that would be expected for his position as assistant manager of a convenience store. The court, therefore, held that Baucom did not establish that he had suffered a negative employment action and therefore could not make a claim of discrimination under the ADA.

According to a decision by the U.S. 4th Circuit Court of Appeals in the case of *Taylor v. Federal Express Corp.,* 429 F.3d 461 (4th Cir. 2005) Federal Express did not violate the ADA when it fired an employee with a back injury because the injury did not substantially limit the employee in work, a major life activity. A vocational consultant presented evidence that Taylor was still qualified to work in any of more than 130, 000 open positions in the region, and Taylor himself admitted he retained the ability to engage in a wide variety of daily activity, so the Court found that his back injury was therefore not considered to be a disability under the ADA. This decision was based upon the Supreme Court's guidance in *Toyota Motor Mfg., Ky., Inc. v. Williams,* 534 US 184 (2002) that the terms "substantially limit" and "major life activity" should be narrowly construed, and that an impairment that only slightly restricted a small range of tasks that are not central to most people's daily lives did not meet the definition of disability set forth in the ADA.

Finally, in *Kleiber v. Honda of America Manufacturing, Inc.,* 485 F.3d 862 (6th Cir. 2007) the U.S. 6th Circuit of Appeals found in favor of Honda when they did not allow Kleiber to return to work following an off-the-job accident because he could not show that he was qualified to work in any position at Honda, and therefore Honda was not required to make reasonable accommodations for him, and was entitled to terminate his employment without violating the ADA.

Age Discrimination in Employment Act

Employees forty years and older are protected from discrimination in employment by the Age Discrimination in Employment Act (ADEA) (29 USC 621-634). Employers are prohibited from giving preferential treatment to younger employees to the detriment of older employees. This applies to all terms and conditions of employment including hiring, firing, compensation, job assignments, shift assignments, promotions and demotions, and discipline. It is also unlawful to discriminate against older employees when downsizing (including by forcing them to take early retirement), and to reduce the wage rate of any employee in order to comply with the ADEA. In addition, the ADEA prohibits reducing life insurance, health, or other employee benefit plans for older employees, with the provision that the actual payment made or cost incurred by the employer on behalf of an older employee need not be higher than the cost incurred for a younger employee.

As with Title VII, "bona fide occupational qualification" (BFOQ) can be used as an exception to the ADEA – it is permissible to discriminate on the basis of age if there is a legitimate, job-related requirement. An employee who feels they have been discriminated against on the basis of age may petition the EEOC to investigate the situation, but the burden is on the employee to prove that adverse action was taken on the basis of age.

Lilly Ledbetter Fair Pay Act of 2009

The Lilly Ledbetter Fair Pay Act (LLFPA) (S.111-181) was signed into law by President Barack Obama on January 29, 2009. The LLFPA amends Title VII, stating that the statute of limitations for filing an equal pay discrimination claim resets with each

discriminatory paycheck, rather than starting only on the date upon which the discriminatory pay was decided (as the Supreme Court had ruled in the case of *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)). Employees are entitled to recover back pay for up to two years preceding the filing of the charge. The LLPFA similarly modifies the ADA and the ADEA. As a practical matter for employers, this law reinforces the importance of retaining documentation regarding decisions of how pay is determined to ensure that they can be defended in the future – potentially even after the people who made the decision are no longer with the company.

Immigration Reform and Control Act

In addition to the authorization to work aspect discussed above, the Immigration Reform and Control Act (IRCA) (8 USC 1324a and 1324b) makes it illegal for employers to discriminate against employees or prospective employees on the basis of citizenship or national origin. Again, this applies to all aspects of employment, including hiring, firing, compensation, job assignments, shift assignments, training, discipline, promotions, etc. The IRCA also makes it illegal for employers to hire or retain employees who are not legally authorized to work in the United States. Companies are required to verify that their employees have a valid U.S. passport, resident alien card, alien registration card, or other proof of eligibility to work (such as a Social Security card, driver's licence, etc.), and to complete and maintain a Form I-9 for all new employees. The Department of Homeland Security, in conjunction with the Social Security Administration, has launched the E-Verify system to assist employers in verifying employment eligibility for their new employees. Use of this system is currently free and voluntary, but certain federal contractors will eventually be required to use the system (the current deadline is September 8, 2009).

The IRCA applies to all companies with 4 or more employees, and the penalties for violating it can include fines of up to $3000 per illegal employee, and even a prison sentence of up to six months for habitual offenders.

Equal Pay Act

Section 206(d) of the Fair Labor Standards Act is referred to as the Equal Pay Act (29 USC 206(d)), which can be summarized as: “equal pay for equal work”. Specifically, the Equal Pay Act requires that employers pay men and women the same wage for performing work that is equivalent in terms of skill, effort, and responsibility. Some exceptions are allowed for seniority systems, merit systems, and piece work. The Act also requires that the employer not reduce the pay of any employee to achieve this parity between genders. The Equal Pay Act applies to all employers, regardless of size, and is enforced by the EEOC. As stated above, the penalties for violating the Fair Labor Standards Act include, but are not limited to fines, imprisonment, damages, attorney’s fees, unpaid wages, and unpaid overtime.

Texas Labor Code

Chapter 21 of Title 2 of the Texas Labor Code affirms the commitment of the State of Texas to Title VII, the ADA, and the prevention of employment discrimination in the state. This statute summarizes the basic components and clarifies some of the more disputable terms in the various laws (e.g., disability, BFOQ, etc.), and gives the Texas Workforce Commission the power to investigate and otherwise act on complaints. Subchapter C describes how Texas law aligns with the various federal statutes, subchapter E sets out the guidelines for administrative review and the statute of limitations for complaints. The statute also sets forth the relief available to employees

who have been discriminated against, including reinstatement, the possibility of back pay, paying of court costs, compensatory damages, and punitive damages (2 Tex. Labor Code 21).

Recommendations

Discrimination, even unintentional, can occur at any stage of the employment process, including the job posting, interviewing, hiring, promotions, pay, benefits, and termination. Employers must understand workplace anti-discrimination laws and what their responsibilities are as an employer. The following sections provide some recommendations for employers.

PRE-EMPLOYMENT INTERVIEWS AND TESTING

Employers must be careful to avoid discrimination throughout the pre-employment phase, including posting for an open position, the interview process, and any pre-employment testing or questionnaires. Job postings should include an accurate description of the primary duties of the position, working hours (if significantly different from a standard work day), any job-essential characteristics an applicant must exhibit, and any other information that would allow prospective candidates to determine whether or not they are qualified for the position. Employers are also recommended to include a statement to the effect that the employer is an equal opportunity employer.

During the interview process, employers must be careful to avoid asking illegal questions – that is, those that focus on the membership of the applicant in one of the protected classes under Title VII (race, color, religion, national origin, sex), or that would tend to discriminate against prospective employees on the basis of one of the protected classes because employers are not permitted to take these factors into account in their hiring decisions. Often there are questions the employer may legally ask that illicit the

desired information without violating anti-discrimination laws. For example, it would be unlawful to ask an applicant if they had ever been arrested because of the presumption of innocence, and because statistics show that minorities are arrested at a disproportionately high rate as compared to whites (Foreman), creating a disparate impact under Title VII. Instead, the employer could ask if the applicant had ever been convicted of a crime. As another example, it would be unlawful for an employer to ask an applicant if they were planning to start a family soon as this might lead to a disparate impact to women, who tend to take more time off for the birth of a child because they are more likely to be the primary caregiver. Instead, the employer could lawfully ask if the prospective employee's personal or family obligations would interfere with their ability to keep the hours or meet the travel requirements of the job ("Conducting Job Interviews").

The simplest rule of thumb is to focus on the applicant's ability to perform the essential job functions by preparing a list of questions ahead of time. This helps the interviewer avoid potentially discriminatory questions, and helps avoid unconscious illegal behavior that may arise from implicit biases. In addition, structured interviews have been shown to lead to better hiring decisions because all applicants are asked the same questions, thereby facilitating direct comparison, and because the interview will remain focused on the prospective employee's knowledge and skills, and their ability to do the job (Lewis, "Hiring"). Another good rule of thumb is to treat all prospective employees the same, regardless of age, sex, race, disability, etc., requiring the same medical tests (if any), performing the same background checks, and applying the same cutoffs to test scores.

ANTI-DISCRIMINATION POLICIES AND INVESTIGATIONS

Employers are encouraged to adopt clear policies regarding harassment and discrimination in the workplace and to document them in the employee handbook. The employee handbook should define harassment and discrimination, state that the employer has a no-tolerance policy, and state that wrongdoers will be disciplined or terminated. Employees should be trained on the policy and be reminded of it regularly ("Preventing Sexual Harassment").

If a complaint is made, it must be handled properly to ensure that the issue is dealt with quickly, fairly, and lawfully. Most large organizations have a legal department that would take the lead in investigating a discrimination or harassment complaint; most small businesses, however, do not, and instead rely on either management or a Human Resources (HR) department to handle these situations. Unfortunately, due to the complexity and ever-changing nature of employment law – a situation that may be further exacerbated for employers with locations in multiple states – it is often difficult even for an HR professional to stay abreast of the most recent changes to the law, let alone a senior manager who is primarily occupied with running the company. For this reason, it is advisable that any manager or employee who may be asked to investigate a discrimination claim (or indeed, fulfill any other legal function) to receive periodic training on the current state of employment law. In addition, companies should consider belonging to an organization (such as the Society for Human Resources Management) or subscribing to a service that will inform them of any changes to employment laws. Perhaps the most useful benefit of such practice would be to ensure that non-lawyer employees understand when a lawyer should be contacted – for example, if an employee files a discrimination claim with a federal agency ("Guidelines").

Having an established procedure documented in the employee handbook, as recommended above, will help ensure that the employer does not inadvertently forget something, and will reduce the likelihood of claims of unfair treatment. Regardless of whether a process is pre-established or not, the employer should start by taking all claims seriously – failure to investigate a complaint could lead to legal action.

The investigation should start with the employer appointing a senior company official outside of the complainer's chain of command to lead the effort, if possible ("Guidelines"). The investigator should interview the complainer, understanding the details of the complaint and ensuring that the employee understands their rights in terms of filing a complaint with the EEOC or other appropriate government agency. Next, the investigator should interview the accused and any witnesses, taking care to maintain confidentiality throughout the process. Corroborating or refuting evidence should be compiled, and written records should be maintained whenever possible. The investigation must culminate in appropriate action being taken against the wrongdoer(s), whether this is no action if no wrongdoing is found, sensitivity training or reassignment (of the wrongdoer) for a minor infraction, or even termination for a severe offense.

Finally, employers are encouraged to be proactive in preventing harassment and discrimination in the workplace by establishing clear policies, offering sensitivity training (especially to supervisors), and by holding regular meetings to ensure the policies are understood and followed.

LAWS RELATED TO TERMINATION

Introduction

There are certain reasons an employer can never use to fire an employee, including, but not limited to, discrimination, retaliation for asserting their rights under anti-discrimination laws or worker's compensation (which is not discussed in this report), complaining about Occupational Health and Safety Act violations, and whistle blowing. Otherwise, most employees in Texas, and the United States, are considered to be "at will" unless otherwise specified in their employment contract, which means they can quit or be fired at any time for any reason, or for no reason at all. The following sections outline some laws related to termination, followed by some recommendations for employers on how to handle the often difficult subject of terminating an employee.

Consolidated Omnibus Budget Reconciliation Act

Congress passed the Consolidated Omnibus Budget Reconciliation Act (COBRA) (29 USC 1161) in 1986 to require employers to extend group health coverage for former employees, their spouses, and dependents for up to 18 months (36 months in some extenuating circumstances) following voluntary or involuntary termination of employment for any reason other than gross misconduct. These regulations apply to all companies with 20 or more employees (including full- and part-time) for 50 percent of the typical business days in the previous calendar year. The beneficiary must be notified of their right to elect COBRA coverage within 60 days of employment termination.

The COBRA regulations were expanded by the American Recovery and Reinvestment Act (ARRA) of 2009 (Pub.L. 111-5) to include a 65 percent government

subsidy of continuation premiums for up to nine months (to be paid upfront by the employer and deducted from Social Security and Medicare taxes). "High-income" individuals – generally, those with annual income greater than $145,000 for an individual, or $290,000 for a married couple filing jointly – are required to pay the full premiums themselves.

Texas also has a statute, commonly known as a mini-COBRA law, that extends COBRA coverage to employers with as few as two employees. The Small Employer Health Insurance Portability and Availability Act (28 Tex. Admin. Code 26) requires all small companies in Texas (those with 50 or fewer employees) to extend group health plan benefits for up to 6 months provided the employee was employed for at least three months and accepts the COBRA option within 31 days of employment termination.

WARN Act

Companies with more than 100 employees are required to provide notice 60 days in advance of plant closings or mass layoffs under the Worker Adjustment and Retraining Notification (WARN) Act (20 USC 639). Plant closings are defined as the shutdown of an employment site resulting in loss of employment for 50 or more employees; mass layoffs are defined as loss of employment for 500 or more employees, unless the loss of employment for 50 to 499 employees accounts for more than 33 percent of the workforce. This reduction in workforce includes hourly and salaried workers, and even managerial and supervisory employees. The WARN Act offers only three exceptions to the sixty day notice requirement: natural disaster, unforeseeable business circumstances, and a faltering company (which the Act says must be narrowly construed). Penalties for failing to provide this notice can include back pay and benefits for every employee for the period of violation.

Non-Compete and Non-Disclosure Agreements

Intellectual property ownership and protection must begin when the employee first reports for work and must continue throughout employment, but these issues become critical upon termination of employment. The employee handbook should state the employer's policies regarding ownership of anything invented on company time or using company resources, and should detail the employees' duties regarding the protection of confidential information. For additional protection, many employers also include non-compete or non-disclosure clauses in employment contracts. However, non-compete clauses can be difficult from a legal perspective because of their element of restraint-of-trade. In Texas, non-compete agreements are covered under the Covenants Not to Compete Act (CNCA) (2 Tex. Bus. & Comm. Code 15.50-15.52).

Section 15.50 of the Covenants Not to Compete Act states that a non-compete clause in an employment contract can be valid if it meets two criteria: first, it must be "ancillary to or part of an otherwise enforceable agreement"; and second, it must contain "limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest" of the employer. As a general rule of thumb, a reasonable constraint would be the minimum limitations that would adequately protect the employer's legitimate business interests; for example, a reasonable constraint would be restricting a former employee from contacting customers with whom they had worked directly for a period of one year following termination of employment. Three Texas Supreme Court decisions have further clarified various provisions of the CNCA, and are summarized below.

In *Light v. Centel Cellular Co.,* 883 S.W.2d 642 (Tex. 1994), the Texas Supreme Court ruled that, for a non-compete clause to be enforceable, "the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing", and "the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement". The example provided by the court is an agreement where the company promises access to confidential information (consideration) in exchange for the employee's promise not to disclose it. The *Light* ruling also clarifies the remedy for employers who omit a non-compete clause in the original employment contract: an agreement may be entered into at any time provided consideration is given to the employee in return for a promise that is not "illusory". Indeed, in this case, the employee had been with the company for two years prior to signing the agreement that contained the covenant not to compete.

Following the *Light* ruling, however, confusion still existed regarding the "at the time the agreement was made" wording of §15.50(b) of the CNCA. The Texas Supreme Court sought to address this in their 2006 decision in the case of *Sheshunoff Mgmt. Servs. v. Johnson and Strunk & Assoc.*, 209 S.W.3d 644 (Tex. 2006). In that case, the court clarified that the statute did not impose the requirement of instantaneous performance on the part of the employer, but rather that the "at the time of" wording was intended to mean that the agreement to which the non-compete clause was ancillary was enforceable at the time the covenant was entered into. This ruling significantly increased the enforceability of covenants not to compete in Texas.

A more recent case further expanded the enforceability of the CNCA. In *Frankfort Mann Stein & Lipp Advisors, Inc. v. Fielding,* Case No. 07-0490 (Tex. 2009),

the Texas Supreme Court clarified that an employer will be considered to have impliedly promised to provide access to confidential information (as consideration) to the employee if the performance of the employee's position would necessarily involve the provision of confidential information. This decision puts the focus back on the employee's job requirements and the employer's need to protect confidential information that is provided to employees to allow them to do their jobs, rather than the strict technical interpretation of the CNCA, making non-compete clauses more attractive to employers.

Because of their inherent aspect of restraint-of-trade, employers should still consider carefully before they include a non-compete clause in an employment contract. In general, employers may want to include covenants not to compete for positions that rely heavily on personal relationships and goodwill, for example to protect against losing customers if a key salesperson left the company. Otherwise, non-disclosure clauses tend to be easier to write and enforce and may be a more advisable means for employers to protect their company's intellectual property.

Recommendations

Terminations can be very emotional for both the employee and the person tasked with bearing the bad news. The following are some recommendations on how to terminate an employee.

Perhaps the best recommendation is to prepare a checklist ahead of time. This will help ensure that nothing is forgotten and will help avoid legal issues, especially related to discrimination. A checklist may also help the person doing the firing to remain professional throughout the process. The checklist should contain such items as: ensuring that company property is returned, reminding the employee of their duty to protect the employer's intellectual property, and cancelling all access to the building and

the company's computer systems. Any remaining compensation due the employee should be calculated ahead of time, and if not paid upon termination, must be paid on the next regularly scheduled pay period. In addition, any records related to absenteeism, poor job performance, or anything else related to the reason the employee is being terminated should be retained to avoid discrimination claims.

Consider the termination situation ahead of time and take the necessary precautions. If possible, the meeting should be held in a neutral location such as a conference room. The meeting should be conducted in private out of consideration for the employee, but safety should also be considered. For example, if a small-statured female is firing a large male employee, it may be prudent for someone else to be present, or for the supervisor to be positioned closest to the exit. If a male supervisor is terminating a female employee, having someone else present, or leaving the room door open will help to protect against assault claims. Consider having security present if the employee is expected to react very badly (Lewis, "Exit").

Remember that the termination meeting is not an interview or a conversation – its purpose is to deliver the message. Be honest, don't get personal, and treat the employee with dignity and respect. Explain the reason the decision was made, and be empathetic, but not compromising – this was a business decision and it is not negotiable. In general, avoid asking questions and do not engage in an argument. Don't start by asking "How are you?". Instead, say "I'm afraid I have some difficult news for you", then deliver the message that "your services are no longer required". Give the employee time to digest the news and for the supervisor to gauge the employee's reaction (Lewis, "Exit"). Some typical reactions follow.

One common reaction is hurt, anger, and disagreement. This is usually expressed through verbal attacks on the company, and disagreement about the reasons for the termination, but is usually quickly replaced with more practical concerns about compensation and outplacement. In these situations, the supervisor should remain professional and communicate the facts clearly. A more extreme version of this reaction is when the employee becomes hostile. In these cases, the employee overreacts initially, but behaves rationally once calm. The supervisor should remain calm, not react defensively, not engage in arguments, and call for help is there is a danger of violence (Lewis, "Exit").

Another common reaction is a controlled response where the hurt and anger is held in. This may often be misinterpreted as a good response, but the employee may not have accepted the reality of the situation, and might have a more significant reaction later. In this situation, the supervisor should ask questions to try to draw the employee out, making sure he or she understands the situation. Similar to the controlled response is the shocked response. The employee may be very quiet, or may cry. In extreme situations, the employee may later attempt suicide – especially if work was an abnormally central aspect of their life. Again, the supervisor is advised to be empathetic, and to try to get the employee to discuss their feelings; ask questions about the employees concerns, their home life, and their immediate plans. If the person reacts very badly, consider asking about making arrangements for counseling, or if a family member or friend is available to escort the employee home (Lewis, "Exit").

It is even possible that the employee will react well to the news. Perhaps they were unhappy in the position and that was the reason for the poor job performance.

Whatever the case, the supervisor should be aware of these various reactions and know how to respond appropriately.

Finally, after the message has been delivered and the termination checklist has been completed, the employee should be escorted to obtain their personal effects (if they were not collected beforehand), then out of the building.

CONCLUSIONS AND RECOMMENDATIONS

The purpose of this report was to provide a quick reference guide of employment law for small companies in Texas. In many cases, the recommended practices are simply to ensure the employer is complying with the law. In other cases, the recommendations are more in the form of best practices to protect the organization from law suits. Three overall recommended best practices follow.

First, employers are encouraged to have an employee handbook that clearly describes all of the organization's policies related to discrimination, harassment, leave, pay, benefits, and other aspects of employment. This handbook should be updated on a regular basis to ensure that the employer's policies comply with the ever-changing employment laws and the employer's current situation. Employees should be required to affirm that they have read and understood the employee handbook when they are hired, and on a regular basis thereafter – possibly as part of an annual performance review cycle.

Second, employers should understand the important employment laws and whether or not they apply to the organization or the specific employment situation at hand. For example, the Americans with Disabilities Act case summaries, above, illustrate the importance of understanding what requirements must be met for an employee to successfully bring suit. Similarly, employers are well-advised to understand that the FMLA only applies to employees who work more than 1250 hours per year. Understanding the basics of employment law and staying abreast of changes are essential to protect the organization from legal action.

Finally, because employment law is so complex and ever-changing, employers should consult with an employment law expert if a situation arises. Employers should keep records of all disciplinary actions taken, violations of company policies, incidents of harassment or discrimination, etc., so they can be made available to an attorney if a law suit is filed. It is also advisable to have an employment law professional review the employee handbook for compliance.

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