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NEW JERSEY
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FAMILY AND MEDICAL LEAVE

Time off with more pay: New Jersey expands family leave entitlements

by Dina M. Mastellone and Katherine E. Stuart

On February 19, 2019, Governor Phil Murphy signed an amendment into law that increases entitlements under the state's paid temporary disability and family leave statute. The new law significantly expands employees' time off, provides higher wage reimbursements, covers more family members, and expands job protections for taking the leave.

How long may employee get benefits, and at what rate?

The new law increases family leave insurance (FLI) and temporary disability insurance (TDI) payments, which are wage replenishments due when an employee takes time off from work to bond with a newborn or care for a sick loved one.

For leave periods beginning on or after July 1, 2020, the amount of weekly FLI and TDI benefits will increase to 85 percent of an employee's pay, capped at a maximum payout of $860 per week. This is a major increase over the current scheme, which allows employees to receive two-thirds of their pay, up to a maximum payout of $650 per week.

Beginning in July 2020, protected continuous leave for the care of a newborn or a sick family member will double from six to 12 weeks, and intermittent leave will increase from 42 to 56 days. Currently, employees may take only up to six weeks of FLI or TDI in a 12-month period.

New permissible reasons for leave

In addition to the increased leave time and wage replacement pay, the law expands the permissible reasons for an employee to take leave. For example, the law now applies to victims of domestic and sexual violence. An employee may take leave necessitated by her (or a family member's) status as a victim of domestic violence or sexual assault.

An employee may still take leave for his own or a family member's serious health condition or for family or temporary disability leave. The law expands the definition of "family member" to include domestic partners, grandparents, grandchildren, siblings, adult children, in-laws, and any "individual . . . the employee shows to have a close association with [that] is the equivalent of a family relationship." The expansion significantly increases an employee's ability to collect FLI.

The law currently permits payment when employees take leave for the birth or adoption of a child. The amendments modernize the law by allowing them to receive payment during other types of family expansion, including foster care

AGENCY ACTION

DOL announces new compliance assistance tool. The U.S. Department of Labor (DOL) in February announced the launch of an enhanced electronic version of the Handy Reference Guide to the Fair Labor Standards Act (FLSA). The new online version of Wage and Hour Division (WHD) publications aims to assist employers and workers with a resource that provides basic WHD information as well as links to other resources. The WHD established the electronic guide as part of its efforts to modernize compliance assistance materials and provide accessible information to guide compliance. The tool offers a new design—reformatted for laptops, tablets, and other mobile devices—and provides additional resources and related information, including plain-language videos.

DOL establishes voluntary review program for contractors. The DOL's Office of Federal Contract Compliance Programs (OFCCP) has announced the release of a new policy directive to establish a voluntary compliance program for high-performing federal contractors. The Voluntary Enterprise-wide Review Program (VERP) provides contractors with an alternative to the OFCCP's establishment-based compliance evaluations with a focus on recognizing contractors that demonstrate comprehensive corporatewide compliance and model diversity and inclusion programs. In November 2018, the agency issued a separate directive establishing early resolution procedures to allow it and contractors with multiple establishments to cooperatively resolve compliance reviews while achieving corporatewide compliance with its requirements. The OFCCP expects to begin accepting VERP applications in the fall.

Employers urged to prevent worker exposure to carbon monoxide. The Occupational Safety and Health Administration (OSHA) has issued a reminder to employers to take precautions to protect workers from the serious and potentially fatal effects of carbon monoxide exposure. OSHA says recent incidents highlight the need to educate employers and employees about the dangers of carbon monoxide exposure from portable generators and other equipment in enclosed spaces. Carbon monoxide poisoning often claims the lives of employees when fuel-burning equipment and tools are used in buildings or semienclosed spaces without adequate ventilation. In addition to portable generators and space heaters, sources of carbon monoxide include anything that uses combustion to operate, such as power tools, compressors, pumps, welding equipment, furnaces, gas-powered forklifts, and motorized vehicles. OSHA urges employers to install effective ventilation systems, avoid using fuel-burning equipment in enclosed or partially enclosed spaces, and use carbon monoxide detectors. ✤

placement, surrogacy, or conception through a gestational carrier agreement.

Who will be covered?

Effective June 30, 2019, more employees will be eligible for FLI. The new law provides job-protected entitlements to employees who work for a business with 30 or more employees, reduced from the current threshold of 50 or more employees, for each working day during each of 20 or more calendar workweeks in the then-current or immediately preceding calendar year.

Payments

Under current New Jersey law, employees must endure an unpaid "waiting period" between their last day of work and first day of entitlement to family TDI. The new amendments eliminate the waiting period.

Starting July 1, 2019, the benefits will be payable on the first day of leave. However, family TDI will not be paid simultaneously with any paid sick leave, vacation time, or other leave provided at full pay from the employer. The new law no longer allows employers to require employees to use all their paid leave, up to two weeks, before the payment of benefits. However, employers may give employees the option to use other employer-provided paid time off before they use disability benefits.

Employees will bear the burden for the entire cost of the expansion through increases in their FLI and TDI wage tax assessments.

Penalties

The new law increases penalties employers must pay for any violations:

- Employers that fail to provide required notifications and disclosures will be fined up to $1,000 and may be imprisoned for up to 90 days in certain circumstances.
- An employer's (or its agent's) refusal to permit the New Jersey Department of Labor to inspect or copy records or failure to provide any notification or disclosure to the agency or an employee will be liable for a $250 fine.

Notably, the new law also forbids employers from retaliating against employees for taking the leave or refusing to reinstate them after a period of leave because they requested or took any FLI or TDI benefits. First-time violations will cost employers up to $2,000, and each subsequent violation will cost up to $5,000. They also will be required to (1) reinstate the employee to the same or an equivalent position to the one held before the discharge or retaliatory action, (2) provide compensation for lost wages and benefits, and (3) pay the employee's attorneys' fees and costs.

Bottom line

The new antiretaliation provision goes into effect June 30, 2019, and employees will begin to receive increased benefits on July 1, 2020. Businesses with 30 to 50 employees must begin to

make sure their payroll and leave policies are compliant and follow the law's notice requirement. Regardless of size, all employers should work closely with legal counsel to ensure employee handbooks and policies are in compliance with and accurately reflect the new amendments.

For more information about the changes to the New Jersey family leave insurance law and guidance on how your business can ensure compliance, please contact Dina M. Mastellone, chair of Genova Burns' Human Resources Practice Group, at dmastellone@genovaburns.com. ✤

VOLUNTARY RESIGNATION

Recent Appellate Division ruling reminds NJ employers of the rewards of diligence

by Michael K. Fortunato

A recent New Jersey Appellate Division decision shows that even in an increasingly proemployee environment, employers can prevail in discrimination lawsuits when their supervisors and HR departments take clear and decisive actions. In the case, a former employee claimed he was fired from his job as an accounting cashier because of his age and national origin. In reality, he had voluntarily resigned after providing conflicting explanations about his unexcused absences. By working quickly to gather and document his misrepresentations and its own response, the employer avoided a lengthy, expensive trial.

Facts

Alfred Aryee, an American citizen originally from Ghana, worked for Newark Beth Israel Medical Center from 1989 to 2014 as an at-will employee (i.e., he could be fired at any time for any legal reason or no reason at all). In December 2013, he took a 10-day vacation to Ghana and was scheduled to return to work on December 30. He didn't return to work that day, however, nor did he contact Beth Israel with a justification for his absence. His supervisor telephoned him the same day to inquire about his status. Aryee's wife answered the phone and explained that her husband had injured his knee.

Aryee also was absent from work the next two days without contacting Beth Israel. He returned to work on January 2, 2014, and his supervisor immediately confronted him. This time, Aryee offered an explanation for his absences that was completely different from the one given by his wife. He stated he had been bumped from his December 29, 2013, return flight and hadn't gotten back from Ghana as scheduled.

Beth Israel asked Aryee to provide his passport and boarding pass for corroboration. The next day, knowing he couldn't produce the documents, he met with Beth Israel's HR department and was asked to put the date of his return flight in writing. He then admitted in writing that he had indeed returned on December 29 as scheduled.

During the meeting with HR, Aryee fainted and was admitted to the hospital. Beth Israel placed him on sick leave until January 9, 2014. Before returning from the leave, he provided yet another explanation for his unexcused absences—that he was overwhelmed by his mother's and wife's respective health issues.

Aryee resigns

Upon Aryee's return from sick leave, on January 10, Beth Israel informed him that unless he chose to resign, it would involuntarily terminate him. It further advised that if he resigned, he would receive paid time off (PTO), which he wouldn't get if terminated.

Beth Israel gave Aryee until January 13 to make a decision. He chose to quit immediately, however, by tendering a handwritten note of resignation. Approximately two years later, he filed suit against Beth Israel alleging age and national origin discrimination.

Courts' decisions

Aryee couldn't substantiate his claims during discovery (pretrial fact-finding), so the trial court granted summary judgment (dismissal without a trial) to Beth Israel. The court acknowledged Aryee hadn't been terminated. Instead, he had voluntarily resigned after misrepresenting the reasons for missing work.

The Appellate Division affirmed, stating Aryee was an at-will employee who had agreed to resign so he could receive compensation to which he wouldn't have been entitled otherwise. The court further stated he couldn't provide competent evidence to establish a *prima facie* (or basic) case of age or national origin discrimination. Nor did he rebut Beth Israel's legitimate nondiscriminatory reason for its action. *Aryee v. Newark Beth Israel Medical Center.*

Bottom line

Aryee's case at the summary judgment and appellate stages seemed "open and shut." However, the case was won not at either step but rather during the 11-day period between December 30, 2013, and January 10, 2014. Indeed, Beth Israel acted appropriately at every key moment:

- When Aryee didn't return to work as scheduled, his supervisor immediately reached out for clarification.
- When Aryee did return, his supervisor confronted him immediately and, together with Beth Israel's HR department, asked for further clarification and reasonable corroboration.
- When the employee fainted, Beth Israel didn't take an adverse employment action against him (and

open itself up to potential liability), but instead properly placed him on sick leave.

- When he returned, Beth Israel had written documentation of his conflicting accounts and misrepresentations.
- Even then, Beth Israel gave Aryee the option to resign and receive PTO. It also offered him several days to decide, eliminating any plausible claim that he had been under duress.
- Each step of the way, up to and including Aryee's resignation, the medical center required him to put things in writing.

Beth Israel's actions in 2014 helped it avoid the unpredictability of a trial in 2016. There were no missteps or indecision, which can lead to factual disputes and allow discharged employees to survive an employer's request for summary judgment. Both Aryee's supervisor and the HR department knew how to handle the situation. Similarly, you can protect your business from fabricated discrimination charges by educating your supervisory employees on how to handle these types of issues.

For more information about employment at will and terminations, please contact Michael K. Fortunato, an associate in Genova Burns' Commercial Litigation Practice Group, at mfortunato@genovaburns.com or 973-646-3284. ✤

CONFIDENTIAL INFORMATION

Appeals court tells former employees: Two wrongs don't make them right

by Erica M. Clifford

The U.S. 3rd Circuit Court of Appeals (whose rulings apply to all New Jersey employers) recently delivered disappointing news to four former employees of the Scherer Design Group (SDG) when it affirmed a district court's issuance of a preliminary injunction prohibiting them from poaching clients. The injunction was issued despite their argument that SDG had accessed one employee's Facebook accounts and monitored his messages as part of the company's investigation into the alleged theft of its internal data and client contacts.

The 3rd Circuit skirted the issue regarding the means by which SDG had found out about the theft. In the end, the fact that the employer may have violated the common law by accessing private social media accounts didn't prevent the court from entering restraints. You shouldn't read the decision, however, as giving unfettered access to your current and former employees' private accounts. That issue—the subject of the individual employees' counterclaim—wasn't settled by either court.

Facts

Chad Schwartz, SDG's director of engineering, was frustrated with his stalled attempts at becoming a partner at the engineering consulting firm, where he had worked for many years. He expressed plans to start a competing firm if his negotiations with SDG did not work out. When he was asked to sign a nondisclosure agreement in November 2017, he resigned and launched two competing firms, Ahead Engineering and Far Field Telecom, the following month.

Schwartz recruited former SDG coworkers Daniel Hernandez, Ryan Waldron, and Kyle McGinley. The trio resigned from SDG just weeks later and began working for Schwartz at the competing firms in January 2018.

SDG soon discovered the three employees were responsible for the "download of large amounts of company data in anticipation of resignation" and that the data and other proprietary information were shared with Schwartz and other associates at Ahead Engineering and Far Field.

As part of the investigation into the unauthorized removal of the confidential company data, SDG gained access to several of Hernandez's personal, password-protected accounts, including his Facebook Messenger account. For a period of several weeks, the company monitored his Facebook activity and reviewed numerous messages in which the former employees discussed the mass download of files from SDG's database.

District court's decision

After learning the former employees had surreptitiously taken the confidential company data and client files to start up the competing business, SDG sought an injunction. The former employees counterclaimed, alleging their private information was unlawfully obtained. The district court granted SDG's request for restraints, which prevented the former employees from using the company's documents or communicating with its clients.

Don't get your hands dirty

The individual employees appealed, arguing the district court should not have bothered analyzing whether SDG was entitled to an injunction because the company's secret monitoring of Hernandez's Facebook account and instant messages was itself a legal wrong that should have prevented the former employer from filing its claims. The former employees contended that since SDG had "unclean hands," it wouldn't be equitable to reward the company with an injunction. The legal doctrine of unclean hands works to bar a party in a lawsuit from filing affirmative claims if it's guilty of its own misdeeds.

In analyzing the employees' argument, the 3rd Circuit noted that while it isn't expected that everyone involved "shall have led blameless lives," the doctrine requires the initiating party to have "acted fairly and without fraud or deceit *as to the controversy in issue*." Put

another way, the doctrine applies only when there is a direct link between (1) the misconduct of the party seeking an injunction and (2) the activities sought to be enjoined.

Was there a direct connection between SDG's Facebook snooping and the former employees' unauthorized removal and use of the company data? The 3rd Circuit said no, so the employees couldn't use the unclean-hands doctrine as a shield to defeat the injunction. The court reasoned:

- The employees owed a duty of loyalty to SDG "long before the Facebook monitoring occurred";
- SDG didn't need to rely on the Facebook messages to prove company data was removed and transmitted to competitors; and
- SDG's breach of the duty of loyalty claim and any claim for invasion of privacy filed by the former employees would be entirely separate claims for which there would be separate remedies.

Because the allegations of wrongdoing on each side weren't directly connected, the 3rd Circuit found the injunction could be issued and the former employees remained restrained from using unauthorized company data or contacting SDG clients while the case continued in the district court. The fact that SDG may have subsequently broken the law with its "Big Brother-esque" tactics did not make the injunction any less warranted. Neither court has reached a conclusion yet on whether the employer's conduct violated the law. *Scherer Design Group LLC v. Ahead Engineering LLC.*

Bottom line

It's important to be mindful that high-level or technical employees may have access to sensitive internal information. If the data is critical to your company's success and survival, nondisclosure and noncompete agreements are a good idea. In some instances, however, it may be difficult to prevent a current employee's covert conduct, and the only available remedy may be litigation. If an employer can show that a former employee likely breached the duty of loyalty by transmitting confidential documents directly to competitors or took other "affirmative steps to injure the employer's business," any collateral bad acts by the employer may not cancel out the employee's wrongdoing if the two are unrelated.

Most important, this decision should *not* be read to give you the green light to snoop through current or former employees' private social media accounts or messaging applications. In the present case, the parties "hotly dispute" the means by which SDG gained access to Hernandez's Facebook account. SDG says Hernandez never logged out of his account on his work computer, while he claims he did log out and deleted his browsing history. Regardless, the dispute did not need to be resolved to determine whether the former employees should be enjoined from using the company data files they took without authorization from their former employer.

SDG may have won the battle of the injunction, but the war rages on. Though not a defense to the claims that they poached

WORKPLACE TRENDS

Most professionals negotiate salary offers, survey finds. Research from staffing firm Robert Half finds that 55% of professionals surveyed tried to negotiate a higher salary with their last employment offer, a 16-point jump from a similar survey released in 2018. Among workers in the 28 U.S. cities polled, Miami, San Diego, and San Francisco had the most respondents who asked for more pay, while Minneapolis, Philadelphia, and Cleveland had the fewest. A separate survey showed that 70% of senior managers said they expect some back-and-forth on salary. About six in 10 are more open to negotiating compensation than they were a year ago.

2018 saw gains in female CEOs. Outplacement consultancy Challenger, Gray & Christmas, Inc., reports that the rate of women taking over the role of CEO after the removal of male bosses rose to 22% in 2018 after hovering at 18% in both 2017 and 2016. The research comes just over a year after the #MeToo movement exposed several executives with allegations of sexual misconduct, causing their removal from the CEO role. "The rate of women CEO replacements has risen steadily since 2014," said Andrew Challenger, vice president of Challenger, Gray & Christmas, Inc. "It's the highest rate of women CEO replacements since we began tracking gender data in 2013. As companies grapple with increased awareness surrounding gender equality issues, such as pay parity and eliminating sexual harassment and gender discrimination, they appear to be hiring and promoting women candidates into the top role."

Despite abundant job openings, many workers feeling "stuck." Careers website Monster's 2019 State of the Candidate Survey shows that despite millions of job openings, many workers are feeling "stuck" and unsure of how to find the right fit in a new job or different position. Monster surveyed 1,000 current full-time employees ages 18 to 65 and found that one in three Americans plans to look for a new job this year. Among 18- to 34-year-olds, the number is higher, with 48% planning a job search this year. The survey found that 54% believe the process would be easy if they had to look for a new job tomorrow, and 46% believe it would be hard. The findings also show that 75% of Americans have had a job in which they didn't feel they were a good fit.

Increase seen in funded status of S&P 1500 pension plans. Global consultancy Mercer reports that the estimated aggregate funding level of pension plans sponsored by S&P 1500 companies increased by 3% in January 2019 to 88% as a result of an increase in U.S. equity markets. As of January 31, the estimated aggregate deficit of $262 billion decreased by $50 billion as compared to $312 billion measured at the end of December. ✤

UNION ACTIVITY

Teamsters challenge effort to preempt California meal, rest break requirements. The International Brotherhood of Teamsters in February challenged the U.S. Department of Transportation's (DOT) Federal Motor Carrier Safety Administration's decision to preempt California's meal and rest break rules. The International union, Teamsters Local 848, and individual truck drivers filed a petition for review with the U.S. 9th Circuit Court of Appeals. The DOT's decision would preempt California law that provides truck drivers with a 10-minute rest break after four hours of driving and a 30-minute meal break after five hours. "We are standing united in opposition to this decision," Teamsters General President Jim Hoffa said. "Highway safety for Teamster members and the public must never be put at risk just so that transportation corporations can eke out a little more profit." A preemption of California's law could affect members of Teamsters Local 848, which represents about 7,200 workers in Southern California, many of whom are commercial truck drivers.

NEA opposes proposed changes to Title IX. The National Education Association (NEA) in February submitted comments to the U.S. Department of Education opposing Education Secretary Betsy DeVos' proposed overhaul of Title IX protections against sexual harassment and assault in schools and college campuses. A statement from the NEA said most of the attention to the proposed changes has focused on how colleges should adjudicate sexual assault allegations, but the association said changes also would have a profound impact on children in K-12 schools. The union says the proposed rules would mean schools would not focus on protecting even the youngest students. NEA President Lily Eskelsen Garcia said the proposed Title IX rules "would actually direct K-12 schools to shield harassing behaviors and discourage young students from coming forward about sexual harassment and assault."

UAW praises GM announcements. The United Automobile Workers (UAW) issued statements in February praising announcements from General Motors (GM) of continued operation of its Detroit, Michigan, Hamtramck plant and investments at other plants. UAW President Gary Jones and Vice President Terry Dittes called the Hamtramck announcement welcome news and stressed that "the UAW will leave no stone unturned" in seeking to keep the GM Warren Transmission Operations in Michigan, the GM Lordstown Assembly plant in Ohio, and the GM GPS Baltimore plant in Maryland open. Also in February, Dittes issued statements in support of a $36 million investment in the Lansing Delta Township GM plant and a $20 million investment in a GM Romulus plant in Michigan. ✤

the company's clients and took confidential company data, the former employees have filed counterclaims for invasion of privacy and tortious interference with contractual and business relations, based on the company's Facebook snooping. Those claims, along with the employer's allegations that the former employees breached their duty of loyalty to the company and misappropriated trade secrets, remain pending in the district court.

For more information on confidential information and covenants not to compete, please contact Erica M. Clifford, an associate in Genova Burns' Employment and Labor Law Practice Group, at eclifford@genovaburns.com or 973-646-3293. ✤

DELAYED RETIREMENT

Know the legal issues you face when employees work past 65

According to the Bureau of Labor Statistics (BLS), about one-third of Americans between the ages of 65 and 69 are still employed. That number has been steadily rising, and it's expected to reach 36 percent over the next five years.

Several developments over the past few decades are contributing to this trend. On the bright side, Americans are living longer, and many simply choose to work longer as a result. On the not-so-bright side, the Great Recession made a huge dent in workers' retirement savings. Many lost their jobs and were forced to take lower-paying positions, which had a negative impact on their retirement accounts. The older they were when the recession hit, the harder it may be for them to make up their losses. Let's look at some of the legal issues you may encounter with these employees.

Mandatory retirement

Long gone are the days when employers could force employees to retire when they hit 65, regardless of their position in the company or the type of work performed. Under the Age Discrimination in Employment Act (ADEA), mandatory retirement is allowed only in very limited circumstances.

First, the ADEA allows what it calls "compulsory retirement" for employees who are 65 or older and were employed as a bona fide executive or high policymaker for the two-year period before retirement. "Bona fide executive" is defined to include "top-level employees who exercise substantial executive authority over a significant number of employees and a large volume of business." A "high policymaker" is someone who plays a significant role in the development of corporate policy, such as a chief economist or chief research scientist. Both exceptions are interpreted narrowly.

A mandatory retirement age also is allowed if it is a bona fide occupational requirement. This exception is very narrow and is primarily available for employees in positions in which safety is of particular concern (such as pilots).

Medicare eligibility

Much confusion abounds about how employees' eligibility for Medicare when they turn 65 affects their entitlement to

employer-sponsored health benefits. In addition to the ADEA, employers must satisfy the Medicare secondary payer (MSP) rules, which govern whether their health plan or Medicare is considered primary coverage (when employees have both).

In general, Medicare is considered primary if the employer has fewer than 20 employees, but it is secondary for those that have 20 or more employees. When Medicare is secondary, the MSP rules prohibit the employer from involuntarily terminating an employee's health coverage because he is enrolled in Medicare.

Nevertheless, many employees will choose to drop their health coverage when they enroll in Medicare, and that's fine. Do not, however, pay (or offer to pay) their Medicare premiums after they drop their employer-sponsored coverage. That would be considered an unlawful incentive (for employers with 20 or more employees) for employees to drop their group health coverage under the MSP rules.

Similarly, the ADEA prohibits employers from excluding active employees (or their spouses) from coverage solely because they are Medicare beneficiaries. There is an exception called the "equal benefit or equal cost" standard, but it is narrowly construed and difficult to meet.

HSA contributions

If you offer a group health plan that allows employees to contribute to a health savings account (HSA), you need to have a clear understanding of how an employee's ability to participate in the plan is affected by Medicare eligibility.

There generally are two core requirements for an employee to contribute to an HSA:

- They must be enrolled in an HSA-qualified high-deductible health plan (HDHP); and
- They must not have any other "disqualifying coverage."

Because Medicare is considered disqualifying coverage, employees are no longer eligible to contribute to an HSA after they are on Medicare. They may, however, continue to participate in the underlying HDHP.

You may see sources suggesting that all employees who turn 65 are prohibited from contributing to an HSA. That misconception is based on the belief that anyone who turns 65 is automatically enrolled in Medicare (and therefore disqualified from contributing to an HSA). However, automatic Medicare enrollment happens only if the individual has filed for Social Security benefits.

So, in short, employees who work past 65 may still be eligible to contribute to an HSA if:

- They have not filed for Social Security benefits;
- They have not otherwise enrolled in Medicare (or have other disqualifying coverage); and
- They are enrolled in your qualifying HDHP.

On the other hand, once an employee applies for Social Security benefits, she will be enrolled in Medicare and will be ineligible to contribute to an HSA. Remember, however, that even in such a situation, the employee should be allowed to stay on the HDHP if she so chooses.

Final thoughts

As the workforce participation rate for older workers increases, you need to have sound policies for dealing with them in a nondiscriminatory fashion. Get ahead of the game by reviewing your policies, revising any that are noncompliant, and developing new ones if necessary. ✤

DISABILITY DISCRIMINATION

Walmart greeter fiasco provides important employment lessons

Have you ever walked into a Walmart and been greeted by an employee—frequently disabled or elderly—who seemed to have no responsibilities other than to welcome customers to the store? Did you ever wonder what the point of the position was or why a corporation the size of Walmart would pay so many people to do it?

Well, apparently, Walmart's powers that be were wondering the same thing. In February, the company announced it would eliminate "greeters" and replace them with "hosts," who would perform a wider variety of tasks. Because some of the responsibilities for the host position are more physical than simply greeting customers, there was an immediate outcry that the company was eliminating the jobs of disabled workers who served as greeters nationwide.

Walmart quickly went into damage control mode and announced it would make every effort to find jobs for their greeters with disabilities. The company says that was always its intent and it was merely clarifying its policy. Assuming that's true, what appears to be poor planning and communication may have exposed the company to potential discrimination claims—not to mention the public relations fiasco for a company that already has a less-than-stellar reputation for its employment practices.

What lessons can be learned from Walmart's mistakes? Read on to find out.

Identify potential adverse impacts

Before eliminating an entire job classification, assess whether it will disproportionately harm employees in a protected class. In Walmart's situation, while the backlash has mostly focused on the decision's impact on disabled greeters, it also could give rise to similar concerns about age discrimination (because so many of their greeters are elderly).

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4-17 The New Formula for Winning Performance Management: How to Use Ongoing Feedback and Mentoring for Yearlong Success

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4-23 ADA, FMLA, and Workers' Comp: Untangling Legal Obligations When Federal and State Leave Laws Intersect

4-23 Light Duty and Return-to-Work Programs: Successful Strategies to Get Injured Employees Back to Work Safely

4-24 Nix Incivility from Your Workplace: How to Build and Foster a Culture of Respect and Civility

4-25 HR Recordkeeping in California: Updates on Legal Guidelines on What to Keep, What to Destroy, and Why with Employee Records

4-25 Multistate Employers Payroll Tax Pitfalls: How to Correct the Most Common Errors Before They Result in Costly Penalties

4-26 DOL's New Overtime Exemption Rule: How to Prepare Now for $35,308 Minimum Salary Basis

4-30 Onboarding: How to Effectively Integrate New Employees Beyond a One-Day Orientation for Better Engagement and Retention

5-1 'Just Get in Line' and Other Immigration Myths: A Webinar Primer for Employers to Avoid Legal Risks

5-3 EEO-1 Report Filing Deadline May 31, 2019: How to Comply so You Don't Get Fined

If it appears that eliminating a position will have an adverse impact on a protected class of employees, identify ways to reduce that impact, such as offering the employees other jobs they can realistically perform. For example, Walmart says it will try to reassign disabled workers to assist customers with the self-checkout lanes.

Consider prioritizing disabled employees for reassignment

Think ahead about your obligations to offer another position to disabled employees as opposed to someone who isn't in a protected class (or is in a different protected class). It's unclear whether Walmart intends to offer alternate jobs for elderly greeters who aren't disabled or greeters who are neither elderly nor disabled. There is no requirement under federal law to give priority for job reassignment to older workers or members of any other protected class.

The Equal Employment Opportunity Commission (EEOC), however, has taken the position that employers should grant disabled employees priority consideration for open positions, even if they are less qualified for the job than other interested employees. Some federal courts of appeals that have considered the issue have gone so far as to say disabled employees must be offered an open position if they are qualified for it, regardless of any other considerations.

Other appeals courts have disagreed with the EEOC, ruling only that disabled employees should be allowed to compete for open positions. And other courts haven't considered the issue yet (a ruling from the 4th Circuit is expected later this year).

While this issue will likely make its way to the U.S. Supreme Court, in the meantime, employers with operations in multiple states should work with their attorneys to determine whether they are required or allowed to prioritize disabled employees (or any other members of a protected class) for reassignment.

Reevaluate hiring strategy

Finally, try not to be overly reliant on disabled employees to fill any one position. Just as you shouldn't exclude disabled employees from jobs they are capable of performing, you shouldn't offer those jobs only to disabled individuals. Doing so could set you up for problems if you someday decide to eliminate the position. Similar concerns would apply for other protected classes. Give some serious thought—and preferably consult with your attorney—about whether your hiring decisions make you vulnerable in the event you have to eliminate a position in the future. ✤

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