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LABOR UPDATE

Recent Developments in Labor and Employment Law

PROVIDING WORRY-FREE EMPLOYMENT REFERENCES

With workplace violence and sexual harassment complaints plaguing American companies, hiring officials and human resource departments are attempting to obtain more meaningful information about job applicants. At the same time, former employers are increasingly reluctant to provide more than the “name/position/dates of employment” reference for fear of exposing the company to potential defamation, negligence, and retaliation claims. However, by exercising a modicum of caution and forethought, employers can provide a meaningful reference without subjecting themselves to potential liability.

Many states, including Illinois, have passed legislation protecting companies from liability for providing references. The Illinois statute, for example, immunizes employers from giving information about former employees’ “job performance” which is true or the company, in good faith, believes to be true. However, this statute creates as many problems as it solves. What, for example, is job performance? Does the statute cover the employee’s personal behavior and interaction with co-workers? What is the meaning of “good faith”?

Moreover, the statute only provides immunity to employers for the disclosure of information. Employers may still be liable if they say too little. For example, the law does not protect a former employer who fails to inform a reference-seeker about an employee’s violent proclivities. Employers have been sued by fellow companies after a former employee commits an assault at his/her new job. Therefore, merely providing a “name/position/dates of employment” reference may not be the safest course of action.

Finally, the Illinois law does not protect the employer against retaliation suits. A recent trend is for an employee to leave a company and file a charge of discrimination in connection with the separation. In the event that a reference to a potential employer is not all the employee hoped for, the employee may then file a claim alleging that the poor reference was in retaliation for filing the charge of discrimination.

So what can employers do to protect themselves when providing references? The best protection a company can have is a waiver executed by the employee releasing any claims associated with providing a reference. This generally protects the former employer from defamation, discrimination, and retaliation claims by the employee. It also allows the employer to provide a substantive reference to prospective employers, avoiding the problems associated with the “name/position/dates of employment” reference. Other mechanisms to avoid reference problems include:

- ◆ Funnel all reference requests through the human resources department or central management in order to maintain control over the information provided;
- ◆ Ensure that the information provided is factual, justifiable, and documented;
- ◆ Require that the request and reference both be in writing. This will avoid any questions about the information provided;
- ◆ Keep records of all references given and the personnel who responded to the request;
- ◆ When in doubt, seek legal advice;

Following these simple guidelines should allow the employer to provide a “worry-free” employment reference.

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MANUFACTURER’S HEIGHT REQUIREMENTS COME UP SHORT

Is it lawful for a company to establish minimum height requirements for jobs requiring rigorous physical activity in an attempt to safeguard employees? The answer is no, according to a recent decision by a federal court of appeals in Chicago.

The case arose due to a policy at the Kohler Faucet Co. plant in Wisconsin. The company maintained a policy establishing a minimum height requirement of five feet four inches for certain positions which required heavy manual labor. The reasoning behind the requirement was that shorter people would be unable to meet the lifting requirements. To the company, the policy seemed reasonable and protected the interests of employees and employer alike.

However, the United States Department of Labor did not agree with the faucet and fixture maker. When the Department discovered the policy during an audit of the government contractor, it investigated the impact of the policy on the company’s hiring

practices. It determined that the minimum height requirement unreasonably discriminated against women who applied for the position. The Department reasoned that since women are statistically shorter than men, they were more likely to be excluded from the position, even though height and lifting ability are only loosely related. In order to make amends for the effects of their policy, Kohler agreed to pay back wages for women rejected for the position due to height and agreed to hire more women into the position.

This case exemplifies an aspect of discrimination law of which many companies are unaware. The majority of discrimination cases involve overtly discriminatory acts or policies. However, certain corporate policies and practices, even though non-discriminatory on their face, can have a discriminatory impact. Policies such as height requirements, pregnancy restrictions, and anti-drug and anti-smoking policies can lead to claims of discrimination if they are poorly drafted.

This case exemplifies the employer's need to constantly audit its employment policies to ensure that they do not authorize discrimination, either explicitly or implicitly. A policy implemented for the health and welfare of the employees may unintentionally have a discriminatory impact which can expose the employer to potential liability.

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PAVING THE WAY FOR PAID FAMILY LEAVE?

A movement has begun in several states to enable employees on leave under the Family and Medical Leave Act of 1993 (FMLA) to collect unemployment benefits. Although no state presently allows employees to receive these benefits due to medical leave, the state legislatures of four eastern states have introduced such proposals and employers are concerned that the trend may be heading West.

This movement began in response to employee complaints that even though they were entitled to take a twelve week unpaid leave under the FMLA, they could not afford to do so. One 1996 study showed that nearly one-half of eligible employees declined to take FMLA leave for financial reasons.

Several womens' and family organizations claim that sufficient state unemployment resources exist to extend the benefit to employees on leave. Employers, however, are understandably concerned that the cost of allowing employees to receive benefits while on FMLA leave would be passed directly on to employers through an increase in the employer's contribution to unemployment compensation. The Employment Policy Foundation puts the cost to employers at between \$14 billion to \$128 billion per year.

BITS AND PIECES

Cheryl Burnham, a clerk at the Los Angeles county's juvenile facility, should have seen it coming. During her night and weekend shifts, Burnham allegedly made approximately 2,500 telephone calls to a psychic hotline. After a bill of over \$120,000 arrived at the county, investigators were able to trace the calls back to Burnham, who was charged with felony grand theft and burglary. Although Burnham was immediately terminated, the County is unaware of whether it will ever recoup the cost of the calls.

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A black female employee at S.C. Johnson's Sturtevant, Wisconsin plant filed suit alleging that she was racially and sexually harassed by a co-worker. According to her complaint, this individual repeatedly berated her and others using expletives, sometimes with racial overtones. However, the court dismissed her claims because the co-worker was an "equal opportunity harasser". Because the co-worker "treated all his co-workers poorly" and made no distinction based on race, there was no illegal harassment.

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Trump Marina Hotel and Casino in New Jersey has been fined \$50,000 and has agreed to provide anti-discrimination courses for its employees as part of a settlement agreement with the state gaming board. The settlement arose out of a case where a patron requested limousine service using a voucher provided by the Casino's marketing department. Printed on the voucher at the guest's request were special instructions that read "no black driver". Because the service regularly used by the Casino had only black drivers, an alternative service was called in to accommodate the guest. According to the gaming board, the actions of the Casino constituted unlawful employment discrimination.

QUOTABLE

If there is any truth to the proverb that "one who is his own lawyer has a fool for a client", the Court now bestows a constitutional right to make a fool of himself.

Justice Harry Blackmun

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