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Second Quarter, 2000

## LABOR UPDATE

*Recent Developments in Labor and Employment Law*

### **REDUCING RISKS *AFTER* TERMINATION**

Most employers know that there are steps that can be taken before the termination of an employee that will help reduce the risk of being sued. Proper documentation, progressive discipline and written policies all help to eliminate potential legal exposure to discrimination and other employment-related litigation. However, many employers do not consider that their actions after termination can also affect the risk of a lawsuit. How an employer behaves after discharge can give the employee a legal claim where previously non existed.

Increasingly, terminated employees are asking their former employers for a written explanation for their termination and a copy of their personnel file. Such requests can be an early indication that trouble is brewing. An employee who makes these requests has likely talked to an attorney and is at least considering suing his or her former employer. Employers faced with such a request should promptly consult with legal counsel.

#### Requests for a written reference or reason for termination

Many employees request that their reason for termination be put in writing or ask for a written reference. Employees will often state that the request is geared towards making their job search easier. However, the employee may very well be fishing for a lawsuit.

Employee references should almost always be in writing. That way there can be no mistake about what the employer said. The references also should be restricted to the employee's dates of service and the position(s) held. Only under special circumstances and with the advice of legal counsel should additional information be provided. Unless required by law, employers should never divulge the reason for termination.<sup>1</sup> There is no advantage to the employer in doing so and it may provide a litigious ex-employee with another potential

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<sup>1</sup> A minority of states require employers to provide a former employee, upon request, with a written explanation of the reasons for termination.

claim.

Many states have passed legislation protecting employers from litigation for giving truthful references. However, it can be an expensive process to prove that the reference was, in fact, accurate. Given the recent surge of defamation suits arising from allegedly incorrect references, the best policy is to say as little as possible.

### Requests for personnel files

Most states have laws regarding employee access to personnel files and records. In Illinois, for example, the Personnel Records Review Act allows employees to review and obtain copies of their personnel records twice per year upon submission of a written request. The Act does not mandate what documents must be kept in a personnel file and acknowledges an employer's right not to keep a personnel file at all. However, the wrongful disclosure of an employee's file can lead to civil penalties and criminal charges.

When faced with a request for a personnel file from a terminated employee, it is best to contact legal counsel. Some employment documents need not and should not be disclosed.

### Silence is golden – usually

When dealing with terminated employees, limiting their access to employer-controlled information is often the best course of action. While former employees may be legally entitled to some information, employers should ensure that the information provided is reviewed for accuracy and is only furnished in accordance with applicable laws. Risk management does not end with the termination of employment. An employer that remains vigilant after the termination can minimize potential legal risks.

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## **UNIONS LOOKING TO SIGN UP EMPLOYEES THROUGH CYBERSPACE**

Officials and members of the AFL-CIO, the nations largest labor group, plan on meeting with officials from the United States Commerce Department as well as members of the Internet Corporation for Assigned Names and Numbers (ICANN) to lobby for a new Internet domain extension, .union. ICANN, the private entity responsible for assigning Internet names, is presently investigating the numerous policy questions and practical implications that such a change is likely to raise.

With the exponential growth of the Internet, the need to expand beyond the present domain extensions (.com, .net, .org., .edu, .gov, and .mil) is obvious. However, providing such a specific extension only to members of organized labor create numerous problems. ICANN will need to formulate specific guidelines regarding who will qualify for the extension. In addition, the word "union" has several meanings beyond organized labor.

But one of the biggest concerns is the impact such a change could have on union organizing capabilities. Employers worry that their employees would have easy access to

organizing messages simply by logging onto *company.union*. Once there, the employee could download and sign a union authorization card indicating union support without ever speaking to a union or company representative. Employers fear that “point and click” organizing could help unions to more easily solicit difficult to contact or decentralized workforces.

To date, few unions have used the Internet as an organizing tool. However, with the potential of *.union* on the horizon, employers are well advised to keep tabs on organizing sites on the Web.

## **BITS AND PIECES**

With unemployment rates hitting record lows and the demand for high-tech professionals rapidly increasing, the House has introduced a bill that would increase the number of available visas for foreign technical workers, known as H-1B visas, by 45,000 this year. Supporters of the bill cite studies showing that almost 270,000 high-tech jobs are currently unfilled, costing U.S. businesses \$4.5 billion annually. Some critics believe the legislation is aimed at getting younger, cheaper labor into the United States.

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A Virginia mineworker was awarded \$20,500 in damages when he was fired for missing work after being bitten during a religious snake-handling service. The plaintiff was bitten twice in two years, each necessitating a leave of absence. His supervisor approved the first leave but warned the plaintiff that he would be fired if it happened again. After the second bite, the plaintiff was fired for refusing to provide a doctor’s note supporting his absence. The plaintiff claimed that his religious beliefs precluded him from seeking medical attention. A federal court in Virginia found that the company violated federal law by refusing to accommodate the plaintiff’s religious beliefs.

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The Occupational Health and Safety Administration (OSHA) recently released proposed ergonomic standards for material handling and manufacturing production jobs. The standards, which many expect to be blocked by Congress as being too costly, have caused an uproar in the manufacturing industry. Experts claim that it will cost an average of \$150 per employee to comply with the regulations but there is no proof that the ergonomic changes will result in increased productivity or reduced workplace injury.

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It appears that the \$5.15/hr. minimum wage may be on the rise. President Clinton is promoting a Democratic bill to increase the minimum wage by \$1.00 over the next two years. The President has vowed to veto a Republican bill which would spread the increase over three years and links it to \$122 million dollars in tax breaks for small businesses and self-employed individuals.

## QUOTABLE

I believe we are on an irreversible trend toward more freedom and democracy - but that could change.

*Former Vice President Dan Quayle*

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