SUMMER 2015

TAKEAWAYS

LEGAL EMPLOYMENT INFORMATION YOU CAN APPLY TO YOUR BUSINESS

TAKEAWAYS provides highlights of the most significant New York, New Jersey and Connecticut legal developments from the past quarter, together with action items for your business. U.S. Supreme Court decisions have dominated this past quarter, while on the legislative front Connecticut and New York City have adopted new employee privacy protections.

Levy Employment Law, LLC helps businesses identify and resolve workplace issues* before *they result in litigation.

We leverage HR best practices to mitigate risk for employers by:

- *designing and building Human Resources policies with supporting systems,*
- *training HR staff, line managers and employees,*
- *troubleshooting workplace concerns, and*
- *defending charges filed with the EEOC and state and local administrative agencies.*

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RECENT U.S. SUPREME COURT DECISIONS PRESENT A MIXED BAG FOR EMPLOYERS

Expand Pregnancy Protections under Federal Law

Protections for pregnant employees have been broadened on a national level as a result of the United States Supreme Court's holding in *Young v. United Parcel Service, Inc.* (Mar. 25, 2015). Reviewing a claim from a UPS driver who was forced to go on leave during her pregnancy because the temporary lifting restriction imposed by her doctor disqualified her from delivering packages under the company's policies, the Court held that pregnant employees may be legally entitled to accommodation of their pregnancy-related work limitations, even if those limitations do not meet the threshold of an ADA-protected "disability"…*(see pg. 4)*

Impose Limits on EEOC Powers

The Supreme Court imposed limits on the EEOC's discretion in *Mach Mining LLC v. EEOC* (Apr. 29, 2015), holding that the EEOC's say-so was insufficient to establish compliance with the agency's legal obligation to attempt conciliation measures with an employer….*(see pg. 4)*

Heighten Protection of Religious Practice

The Supreme Court sided with the EEOC in *EEOC v. Abercrombie & Fitch Stores, Inc.* (June 1, 2015), holding that an employer cannot refuse to hire a job applicant in order to avoid accommodating a religious practice when doing so would not impose an undue hardship….*(see pg. 4)*

Special Note for NYC Employers

The NYC Human Rights Commission is now legally mandated to conduct at least five investigations per year, beginning October 1, 2015, that test for employment discrimination in hiring, and to annually report on its investigations to the City Council beginning March 1, 2017.

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LIFE'S LESSONS*

Real Issues…Reconstituted Facts

By Tracey I. Levy

How to deal with an employee's disability is an issue that seems to flummox managers. There is the alphabet soup of obligations under the ADA, the FMLA, GINA and HIPAA, not to mention state and local laws, and there is the sometimes uncomfortable reality of managing the team when adjustments have been made. Two classic scenarios are those of the good performer who needs a lot of support, and the middling/poor performer who seems to be looking for excuses. This issue we will focus on how to appropriately help the employee found deserving; next issue we will tackle the bad performer.

Lucy is a top performing quality control specialist at ABC Co. and a long-term employee. Lucy approached her manager, Frank, and advised that she will need about a month off, very soon, because her doctor says she needs surgery. She also mentioned ongoing treatment. Lucy is anxious about how to get the work done and about her health. Frank reassures her, then calls HR in a panic - what does he do now? Can he ask Lucy what is wrong with her? Should he send her home now to be safe?

Stay Calm, and Get Documentation

No decisions can be made about Lucy until the company has confirmed the timing and duration of her leave request. ABC Co. also needs information regarding whether the ongoing treatment will impact Lucy's work and, if so, what she may need by way of an accommodation. This information can best be obtained by asking Lucy to provide medical certification, and the U.S. Department of Labor has a standard healthcare provider certification form for the FMLA that can be adapted for this purpose.

The completed form should be submitted directly to HR, not to Frank. No one should ask Lucy what she has been diagnosed with, nor should she be sent home in advance of her surgery unless that is part of her doctor's recommendation.

HR should review with Frank the feasibility of accommodating a period of absence and other limitations that are documented in the medical certification. The fact that Lucy is a long-tenured, top performing employee who Frank wants to help actually is not a relevant factor. Rather, relevant considerations include the size of the team, budget, and feasibility of temporarily absorbing Lucy's work or bringing in a temp. HR may also want to discuss with Frank (and explore with Lucy's doctor) whether she can perform any of her work from home during her ongoing treatment as an alternative to additional leave time.

Make it a Dialogue

Once HR and Frank are on the same page, they should review with Lucy what accommodations they can offer and consider any alternatives she suggests. Legally, the goal is to identify *a* reasonable accommodation, which need not be the one requested by Lucy. For most companies, it is unlikely the leave and work from home accommodations considered here would meet the accommodation exception for an undue hardship, and thus they would need to be granted. (FMLA-eligible employees would be entitled to this duration of leave).

Once agreement has been reached on an approach, it would be prudent for HR to memorialize the agreed arrangement. This can be done in a letter or memo, or informally in an email. The important thing is that it is documented and shared with Lucy and Frank so that everyone has the same understanding.

Once agreed, the company needs to follow through on the accommodation and hold Lucy's position for her while on leave. Recertification may be periodically requested with respect to the ongoing treatment.

** In my years of legal practice, there are certain recurring issues that cross a range of industries and circumstances. This column presents a hypothetical factual situation as a vehicle to substantively review these recurring legal and employee relations issues.*

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CT Law Protects Employee Online Privacy, Preserves Employer Rights

Connecticut's new Law Concerning Employee Online Privacy prohibits applicants and employees from having to disclose their personal online activity to an employer. Employees may not be required to disclose log-on information or access their personal accounts for the employer to view, nor are they obligated to "friend", "link", or otherwise connect the employer with any group affiliated with their personal online account. Employees and applicants are also protected from retaliation for asserting their privacy rights in accordance with the law.

Balancing these interests against an employer's ability to monitor activity in or affecting the workplace, the law also clarifies permissible employer monitoring of online accounts including:

- Access to employer-provided, or business-related accounts;
- Access to employer-provided or subsidized electronic communication devices;
- Discipline for unauthorized transfer of the employer's confidential information or financial data to a personal online account;
- Requiring access to personal online accounts in the course of an investigation of workplace misconduct if there is specific information that the personal online account has relevant information; and
- Monitoring data transmitted or stored on the employer's network or on devices paid for by the employer.

Restrooms for Transgender Employees

OSHA's new Best Practices Guide to Restroom Access for Transgender Workers stresses the need to provide safe, convenient and respectful restroom options for all employees. It recommends that transgender employees be allowed to use the restroom that corresponds to the gender with which they identify. Also suggested are gender neutral bathrooms, either for singles or with locked stalls for multiple occupants.

NYC Adopts Unusually Broad Restrictions on Credit History Checks

Effective September 2, 2015, most NYC employers are precluded from conducting credit checks on job applicants and employees as a result of an amendment to the City Human Rights Law. New York City's law is broader than most in:

- its remedies, by virtue of its inclusion in the Human Rights Law, which makes all the private remedial relief afforded under that law available to applicants and employees;
- its definition of credit checks, which extends beyond reports procured from third parties (such as consumer credit reports and credit scores) to include directly inquiring of job applicants or employees about the details of their credit accounts or about bankruptcies, judgments or liens; and
- the limited scope of its exceptions.

The exceptions are important. Any employer or agent that is required by federal or state law or by FINRA to use an individual's consumer credit history for employment purposes is exempt from the law. For other employers, the law only excludes select positions:

- as a police or peace officer or certain public officials;
- for which bonding is legally required;
- for which the law requires security clearance;
- that are non-clerical with regular access to trade secrets (not simply handbooks, policies, or client, customer or mailing lists);
- with signing authority over third party funds or assets, or fiduciary responsibility to enter into financial agreements, of $10,000 or more; or
- with regular duties to modify digital security systems to prevent unauthorized use of the employer's or client's networks or databases.

New York City employers that currently check credit history have this summer to get their practices into compliance.

COURT WATCH

Young v. UPS EXPANDS PREGNANCY PROTECTIONS

The Supreme Court rejected Young's argument that the Pregnancy Discrimination Act "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work." A contrary ruling by the Court would essentially have granted pregnancy most-favored-nation status - requiring that accommodations granted for any other reason must be similarly available for pregnant employees.

Instead, the Court held the *McDonnell-Douglas* burden-shifting approach applied, under which Young ultimately had to show that UPS's proffered explanation for treating pregnant employees less favorably than other employees with a similar ability or inability to work was a pretext for discrimination. Young could meet her burden, the Court held, by providing evidence that UPS's policies impose a "significant burden" on pregnant workers and that its explanation for doing so was not sufficiently strong relative to the burden imposed, thereby creating an inference of intentional discrimination.

For employers, the *Young* decision necessitates greater sensitivity in considering pregnant employees' requests for workplace accommodations.

To counter the "significant burden" argument, employers must carefully assess the feasibility of accommodations requested by pregnant employees and particularly be mindful that they are necessarily temporary in nature. Although the notion of a most-favored-nation status was rejected by the Court, UPS's situation demonstrates that it can be quite challenging for an employer to explain why it will not grant a pregnant employee a particular accommodation if it is already granting that same accommodation to other types of employees.

EEOC WINS AND LOSES IN MOST RECENT U.S. SUPREME COURT EMPLOYMENT LAW CASES

Mach Mining LLC v. EEOC

The question before the Supreme Court was whether the adequacy of the EEOC's conciliation efforts could be challenged in court. The only evidence in the record concerning the EEOC's efforts were two letters - one saying a representative would contact the company to begin the conciliation process, and one saying the process had been unsuccessful. The Court rejected the EEOC's position that no judicial review was permitted, but it also rejected the company's position that courts should assess whether the EEOC engaged in good faith negotiations to resolve a discrimination claim.

Rather, in a unanimous decision, the court held that the EEOC is minimally required to give the employer notice of what it had allegedly done and which employees or class of employees have suffered, and an opportunity to achieve voluntary compliance. In reviewing the adequacy of the EEOC's conciliation efforts, courts may consider the adequacy of the notice provided to the employer and whether the EEOC engaged the employer in some form of discussion that gave the employer a chance to remedy the allegedly discriminatory practice.

EEOC v. Abercrombie & Fitch

In the *Abercrombie* case, the company had refused to hire a job applicant who wore a headscarf to her interview, which it assumed was for religious observance, because the headscarf conflicted with the company's "Look" policy for employee attire. The Court rejected the notion that the company must have actual knowledge of the need for a religious accommodation. Rather, the Court held that a claim of discrimination could be sufficiently supported by evidence that religious practice was a motivating factor in the company's decision, even if the company did not actually know for sure whether the headscarf was worn for religious or other reasons.