2023 REWIND: HOT TOPICS IN EMPLOYMENT LAW

By: Corinne S. Rockoff, Esq.

I. AMENDMENTS TO THE ELLIOTT-LARSEN CIVIL RIGHTS ACT

A. What is the Elliott-Larsen Civil Rights Act?

1. The Elliott-Larsen Civil Rights Act, 1976 PA 453 ("ELCRA") is Michigan's Civil Rights Act.

2. ELCRA prohibits discrimination against individuals based on various attributes including race, age, religion and sex, in various contexts, including employment.

B. What's different about ELCRA?

1. On March 16, 2023, the Governor signed a bill into law that expanded ELCRA's prohibitions on discrimination to prohibit discriminatory treatment based on a person's sexual orientation, gender identity, or gender expression.

2. Section 102(1) of ELCRA, as amended, now reads:

   a. The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, sexual orientation, gender identity or expression, height, weight, familial status, or marital status as prohibited by [ELCRA], is recognized and declared to be a civil right.

3. Section 202(1) of ELCRA, as amended, now reads in pertinent part:

   a. An employer shall not do any of the following: (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment ... (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity or otherwise adversely affects the status of the employee or applicant...

C. Understanding ELCRA's new protections.

1. How does ELCRA define sexual orientation, gender identity and gender expression?

   a. Section 103(l): "Sexual orientation" means having an orientation for heterosexuality, homosexuality, or bisexuality or having a history of such an orientation or being identified with such an orientation.

b. Section 103(f): “Gender identity or expression” means having or being perceived as having a gender-related self-identity or expression whether or not associated with an individual’s assigned sex at birth.

2. How can we differentiate between those core concepts?

   a. The Genderbread Person

   b. Sex: Physical traits that we understand as “sex characteristics”.

      i. Examples: Body hair, voice pitch, genitalia, chromosomes.

   c. Orientation (also called Attraction): The categories of person that an individual is romantically or sexually attracted to.

      i. Examples: Homosexual, heterosexual, asexual.

      ii. Note that the amended ELCRA only addresses heterosexuality, homosexuality, and bisexuality specifically.

   d. Identity: An individual’s internal experience of their own gender.

      i. Examples: Woman, man, agender, bigender.

   e. Expression: How an individual exhibits gender in the way they present themselves to the world.

      i. Examples: Haircut (short vs. long), makeup, clothing, mannerisms.

3. Applying the amended ELCRA to the Genderbread person.

   a. If our Genderbread person goes to work, the amended ELCRA prohibits their employer from treating them differently based on their...

      i. Sex: This requirement remains unchanged by the amendments, though our understanding of what sex discrimination means has been shifted by the Michigan Supreme Court’s ruling in *Rouch World, LLC et al v. Michigan Dept. of Civil Rights et al*.

      ii. Sexual Orientation: Who an employee is married to, dating, or attracted to.

      iii. Gender Identity: The employee’s stated gender, regardless of the relationship between their gender and any physical sex characteristics they may possess.

iv. Gender Expression: The employee's outward presentation relating to gender, regardless of the relationship between their presentation and any physical sex characteristics they may possess.

II. PROPOSED FTC RULE ON NONCOMPETE CLAUSES

A. Proposed Rule in Matter No. P201200

1. The Federal Trade Commission proposed Rule P201200 in January 2023 which, if enacted, would ban employers from imposing noncompete causes on workers.

2. The proposed addition would add a new subchapter J to 16 CFR § 910 identifying noncompete clauses as "an unfair method of competition" prohibited by law.

B. Where did this rule come from?

1. The proposed rule is based on a preliminary finding that "noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act." FTC Press Release, *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition* (January 5, 2023).

2. The FTC has been ramping up enforcement actions against various entities that impose illegal noncompete requirements on workers.

   a. One recent example can be seen in the consent judgment regarding Michigan-based companies Prudential Security, Inc. and Prudential Command Inc., which enforced noncompete clauses against minimum wage former employees who sought higher paying jobs at competitors.

C. What would Rule P201200 do if enacted?

1. The Rule would make it illegal for an employer to:

   a. Enter into or even attempt to enter into a noncompete with a worker;

   b. Maintain a noncompete with a worker; or

   c. Represent to a worker (in some circumstances) that the worker is subject to a noncompete.

2. This Rule would be applicable to employees, independent contractors, and even to unpaid workers such as interns.

D. When would Rule P201200 go into effect?

1. We don't know yet.

a. The FTC's required notice and comment period for the rule concluded in 2023, and from here, the FTC could move to finalize the rule or adopt alternatives at any time.

2. If finalized, the Rule will go into effect 60 days after it is published in the Federal Register, and provides for a 180-day compliance period from the date of publication for employers to work towards compliance.

E. FAQs about Rule P201200

1. If the Rule goes into effect, will existing noncompete language be invalidated?

a. In short, yes.

b. The Rule is retroactive, and will invalidate existing noncompete language that may already be in employment agreements or other contracts with workers.

c. The Rule also requires that employers affirmatively inform workers that any existing noncompetes are no longer in effect, and provides model language for that notice.

2. If the Rule goes into effect, will it apply to agreements not to compete in connection with a sale of a business?

a. Section 910.3 of the Rule provides an exception for noncompetes "entered into by a person who is selling a business entity or otherwise disposing of all of the person's ownership interest in the business entity" if the person is a "substantial owner of" the business entity at the time they agree to the noncompete.

i. The Rule defines "substantial owner" as someone who holds at least a 25% ownership interest in the business entity.

b. The Rule is targeted towards employers rather than sales of a business, but the exception carries a very high bar for ownership which might significantly expand its application.

3. If the Rule goes into effect, will it prohibit compensation that is contingent on non-competition?

a. Example: An employment agreement states that the employee will receive a $50,000 severance bonus, but if that employee competes then the severance bonus is void.

b. While the answer to this question isn't entirely clear, Section 910.1(b)(2) makes it clear that the FTC intends to looks to the effect of the language as opposed to its text by providing a "functional test" to identify covered language:

i. "The term non-compete clause includes a contractual term that is a de facto non-compete clause because it has the effect of prohibiting the worker from

seeking or accepting employment with a person or operating a business after the conclusion of the worker's employment with the employer."

ii. The Rule goes on to provide examples of functional noncompetes including NDAs that are so broad as to effectively prevent employment by a competitor, and terms requiring repayment of training costs which may function as a penalty to a departing employee.

III. LESSONS LEARNED IN NAVIGATING 2023'S MOST POLARIZING ISSUES

A. Stay current on developments in the law: *Groff v Dejoy*

1. *Groff v Dejoy*, 600 U.S. 447 (2023).

a. Supreme Court holding addresses religious accommodations in the workplace.

b. Prior ruling by the Supreme Court provided that an employer was not obligated to accommodate an employee's religious beliefs if it would cause the employer to bear more than a "de minimis" cost. *See Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1997).

c. The facts in *Groff:*

i. 2012: Gerald Groff is hired as a mail carrier for USPS.

ii. 2013: USPS enters into an agreement with Amazon that provides that USPS carriers will now deliver Amazon packages 7 days a week.

iii. Groff requests that, due to his religious observance of a Sunday Sabbath, he should not be scheduled to work on Sundays.

iv. USPS accommodates his request for some time, but eventually disciplines Groff for his refusal to work on Sundays.

v. Once Groff realizes that he will be terminated for his refusal, he files a lawsuit against USPS.

d. The Supreme Court overturned the rule set out in *Trans World Airlines*, and held instead that an employer denying a religious accommodation to an employee must show that the accommodation would result in "substantial increased costs in relation to the conduct of the particular business."

i. Exactly how this standard will be applied, including what other courts will determine is a "substantial increased cost," remains to be seen as new law develops after the *Groff* decision.

B. Stay current on what your employees value: the abortion debate in the workplace.

1. In the widely discussed 2022 case *Dobbs v. Jackson Women's Health Organization*, the Supreme Court overturned the 1973 ruling in *Roe v. Wade*, which established abortion as a constitutional right.

   a. While *Dobbs* was a 2022 decision, 2023 brought a follow-up wave of changes throughout the country, and has showcased the nation's shifting views on abortion nationwide.

   b. Some states enacted bans on abortion with varying requirements immediately after the *Dobbs* decision was released, and others have followed suit through 2023.

2. Data gathered since the ruling in *Dobbs* indicates that employees are attuned to their employers' practical responses to that decision.

   a. "Most employees under age 40, regardless of their political affiliation, want to work for a company that supports access to abortion. Many of these employees would consider switching jobs to preserve this access." Kim Elsesser, *More than 75% of Employees Want to Work for Companies That Support Abortion Access: Survey*, Forbes.com (Aug. 2022).

3. Employers are responding to these employees' priorities by implementing new benefits packages which specifically address these concerns.

   a. Benefits offered by some employers include:

      i. Specific extension of healthcare plan coverage to cover abortion care.

      ii. Reimbursement for costs of travel to employees who travel to a state where abortion is legal for the procedure.

      iii. Industry-specific protections against state law provisions (*e.g.*, Lyft has agreed to defend drivers against a Texas law that could punish Lyft drivers who drive customers to abortion care appointments).

4. Considerations relating to abortion access may be particularly impactful for employers operating in multiple states.

   a. State laws may apply differently depending on where your company maintains offices.

   b. The home states of each remote worker may also impose certain obligations or requirements.

5. Understand how the applicable laws may limit your ability to provide benefits in certain categories, and where pitfalls for employers may be hiding.

a. Example: Texas and Oklahoma have enacted legislation imposing criminal and civil penalties on anyone who "aids or abets" an abortion. See A. Zablocki & M. Sutrina, "The Impact of State Laws Criminalizing Abortion," Lexis Nexis (27 Sept. 2022).

b. In those states, Employers who provide travel benefits to employees for the purpose of obtaining an abortion in another state where abortion is legal could have legal exposure under those state laws.

LABOR LAW BLIND SPOTS THAT MAY SNARE YOUR ORGANIZATION

By: Rita M. Lauer, Esq.

I. OVERVIEW OF NATIONAL LABOR RELATIONS ACT ("NLRA")

A. NLRA governs relations between union employees and their employers.

II. MY COMPANY IS NON-UNION. WHAT RELEVANCE IS THIS?

A. NLRA applies to both non-union and union employees.

B. An employer can be in violation of the NLRA for the following:

1. Having certain work rules

2. Terminating/disciplining/restricting certain communication by your employees

3. Having certain severance/noncompete terms

C. If There Is A NLRA Violation, So What?

1. A violation of the NLRA is considered an unfair labor practice ("ULP")

2. ULPs usually arise from protected concerted activity

3. A ULP is filed with the Office of General Counsel

4. The procedure varies depending on whether the employee union versus non-union

5. If there is a ULP violation, employers may be ordered to pay back wages and/or post a "mea culpa" to employees

D. Work Rules and Violations of the NLRA

1. August 2, 2023 – National Labor Relations Board ("NLRB") issues *Stericyle Inc.* decision addressing unlawful work rules under Section 8(1) of the NLRA.

a. If the employee establishes that the work rule has the reasonable tendency to chill an employee from exercising their rights, the work rule is considered presumptively illegal.

2. Does the work rule have a reasonable tendency to interfere with, refrain, coerce or restrict the employee who contemplate engaging in protected concerted activity?

3. Employer must prove that the work rule advances a legitimate and substantial business interest AND employer cannot advance its interest with a more narrowly tailored rule.

III. BUT WAIT, THERE'S MORE!

A. January 11, 2024 – United Wholesale Mortgage LLC and Christopher Dennis.

1. Administrative Law Judge decision on a case out of Pontiac involving mortgage company.

B. Violation of Section 8(a)(1) of the NLRA for overbroad employment agreement, unlawful arbitration agreement and unlawful work rules.

C. Improper Work Rules:

1. Prohibited use of employer's logo and tradename without permission from employer

2. All company property "is to be used exclusively for Company business..."

3. E-mails, memos, phones to be used "exclusively for Company business..."

a. Chills employees from communicating about matters that are of common concern to employees.

IV. OTHER WORK RULES THAT MAY VIOLATE THE NLRA

A. Requirement to return of Company property and/or lists.

1. Employees may need access to contact information for customers or employees for a complaint about workplace conditions

B. Employee's use of recording media/photos.

1. Chills employee's ability to document hazardous work conditions.

C. Company office space to be used, "solely and exclusively for Company business purposes."

1. Employees have right to solicit other employees during nonworking time. This rule may chill that right.

D. Restrictions on Media and Press inquiries, "shall be directed to the Company's CEO..." Employee is not permitted to make any public statement on behalf of the Company.

1. Prohibits employees from communicating with media concerning their terms and conditions of employment.

E. Don't be too anxious about this yet – no NLRB board has gone this far in its decisions.

V. NON-DISPARAGEMENT CLAUSES

A. The NLRB does not like "non-disparagement clauses."

B. These clauses are typically found in handbooks or employee agreements.

1. Example: "Employee will not publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, officers, owners or employees, through any written or oral statement or the image."

C. NLRB holds across the board that these clauses act to prohibit employees from expressing their concerns about their working conditions, which violates the NLRA.

D. How can you fix this? Consider striking these provisions from your handbooks, rules and agreements.

VI. SOCIAL MEDIA AND DISPARAGEMENT

A. Employers cannot prohibit employees from being disrespectful or using language that injures the reputation or image of the employer.

B. However, not all employee speech regarding their employer is protected.

1. For example: Employee posting pictures on Facebook of employer event and ridiculing event. This speech was not protected. Even though it was a car dealership event, employee made demeaning comments about set up of the event, that were defamatory.

C. Be very wary about restricting your employees on social media, or making comments on social media to the employee. The NLRB is on social media too.

VII. NLRB'S SEVERANCE AGREEMENT DECISION

A. *McLaren Macomb*, 372 NLRB No 58, decision held that severance agreements with broad restrictions may violate Section 8(a) of the NLRA by interfering or restraining exercise of an employee's rights under the NLRA. For example:

1. Broad non-disparagement and confidentiality clauses;

2. Employee prohibited from making statement that could "harm the image of the employer, officers, directors, employees ..."

3. Agreement only to be disclosed to, "spouse, professional advisor, unless compelled by law to ..." disclose terms to anyone else.

B. NLRB perceives that confidentiality clauses stop employees from reporting work conditions. Decides that, "rules prohibiting employees from disclosing personnel and procedure manuals are unlawful." (*Quicken Loans Inc.*, 361 NLRB 904 (2014)).

C. Severance Agreements are Still Okay But...

1. NLRB determines violative where:

a. "overbroad provisions" affecting rights of employees to engage with one another and to improve their lot as employees;

b. Cannot restrict access to the NLRB, judicial/legislative forums, the media or various third parties; and

c. While supervisors are generally not protected by the Act, under *Parker-Robb Chevrolet*, Section 6 the Act does protect a supervisor who is retaliated against, such as being fired, because they are refusing to act on their employer's behalf in committing an unfair labor practice against employees, in other words, they are refusing to violate the NLRA per their employer's directives

VIII. REVIEW YOUR CONFIDENTIALITY CLAUSES

A. Confidentiality Clauses should not be in your work rules.

1. For example: do not prohibit employees from disclosing compensation, operational rules or terms and conditions of employment in severance agreements, work rules, employment agreements.

B. Do not label an employee handbook as confidential.

1. Because handbooks contain the terms and conditions of employment and an employee's right to discuss the terms and conditions of employment is protected under the NLRA.

IX. RETROACTIVE APPLICATION

A. NLRB decisions can be applied retroactively.

B. According to the Office of the General Counsel,

1. "[W]hile an unlawful proffer of a severance agreement may be subject to the six-month statute of limitation language under Section 10(b), maintaining and/or enforcing a previously entered severance agreement with unlawful provisions that restrict the exercise of Section 7 rights continues to be a violation and a charge alleging such beyond the Section 10(b) period would not be time-barred."

C. To avoid retroactive application, advise your employees that overbroad provisions are no longer applicable.

1. "Relatedly, while it may not cure a technical violation of an unlawful proffer, employers should consider remedying such violations now by contacting employees subject to severance

agreements with overly broad provisions and advising them that the provisions are null and void and that they will not seek to enforce the agreements or pursue any penalties, monetary or otherwise, for breaches of those unlawful provisions. That conduct could form the basis for consideration of a merit dismissal if a meritorious charge solely alleging an unlawful proffer is filed."

X. PRE-EMPLOYMENT COMMUNICATION

A. Pre-Employment Offer Letter Language

1. These too can be subject of a violation if you have language that may, "restrain, interfere with or coerce an employee's exercise of Section 7 rights."

2. Confidentiality clauses – considered to have a "chilling effect" by NLRB

B. However, employers can still enforce confidentiality provisions to the extent they restrict trade secret/proprietary information

XI. LOOKING FORWARD

A. Office of General Counsel opined the following provisions in severance agreements as "problematic" because they interfere with an employee's exercise of Section 7 rights:

1. non-compete clauses;

2. non-solicitation clauses;

3. no poaching clauses;

4. broad liability releases and covenants not to sue that may go beyond the employer and/or may go beyond employment claims and matters as of the effective date of the agreement;

5. cooperation requirements involving any current or future investigation or proceeding involving the employer

a. These requirements affect an employee's right to refrain from work under Section 7

b. For example: if the employee was asked to testify against co-workers that the employee assisted with filing a ULP charge.

XII. WHAT YOU WANT IN THE CBA

A. Check your Management Rights provision, if it's not in the provision, you can't do it.

1. Recommended language:

a. Management Rights. Employer reserves the right to unilaterally change wages, hours of work, and other terms and conditions of employment. This includes but is not limited to the employer's unilateral ability to do the following:

i. Reprimand, discipline, suspend, or discharge employees for cause;

ii. Determine and revise the number of employees to be employed;

iii. Hire employees, and assign and direct their work;

iv. Set and change employee wages and pay;

v. Promote, demote, transfer, furlough, lay off, and recall to work employees;

vi. Schedule and reschedule work, jobs, shifts, and assignments;

vii. Train employees

XIII. MANAGEMENT RIGHTS

A. Conduct performance reviews of employees;

B. Determine and revise time off, sick pay, personal leave policies.

C. Set and revise standards of work quality;

D. Set and revise the operational hours of the plant;

E. Establish and revise safety standards;

F. Determine and change the staffing methods, means, and facilities by which operations are conducted;

G. Employ and/or assign work to non-unit personnel during pandemics, natural disasters, economic crashes, and other unforeseen emergency situations;

H. Implement and enforce sickness prevention policies that include but are not limited to the Employer's right to close the plant for sanitation, implement social distancing measures, require employees to wear masks and other personal protective equipment, take the temperature of employees before they enter the plant, require employees to get tested for illness, and require employees to get vaccinated;

I. Assure continuous performance of the unit's work; and

J. Determine the effects of taking any of the above-mentioned actions.

XIV. RIGHT TO WORK TERMINATION

A. Get the CBA amended to address the procedure (pre-right to work clauses) to secure dues taken out of wages.

1. Employers must have a release from the employee to take out dues.

2. Need a 90-day provision and exclusion of temporary employees from becoming union dues paying.

3. Go to Union about procedure and document all conversations with them about this.

B. Remember, you cannot take dues out of wages without a release from the employee.

WORK STRUCTURE IN THE NEW WORLD AS COMPARED TO B.C. (BEFORE COVID)

By: Andrew M. Creal, Esq.

I. INTRODUCTION

A. There is no denying that COVID-19 pandemic upended the workplace and the world as everyone in this room came to know it.

B. Government mandated shutdowns, while undoubtedly a struggle for all, did produce benefits in the workplace for both employers and employees.

C. For employers: cost savings in office space, paying employees to commute/for mileage, travel to meet with clients.

D. For employees: time spent in cars[1] while commuting, flexible hours, ability to care for children while working are all benefits.

E. However, those benefits can be offset by the basic human need to interact with other human beings.

F. The American Psychological Association in July 2023 found that 17% of U.S. Adults reported feeling lonely versus 25% in March 2021.[2] The reason for this is largely intuitive. As more people got back to work and around their colleagues and customers, the less lonely and isolated they felt.

G. For employers, this creates a duality that can be difficult to manage. On one hand, you want employees to return to the office. On the other hand, you want employees to be happy, balanced, and able to have flexibility in their jobs.

H. Before we get into how to do this, let's look at some statistics that will help contextualize these ideas.

II. REMOTE WORK DATA – EMPLOYEE PERFORMANCE, HAPPINESS, CULTURE, FACT V. FICTION

A. As of 2023, 12.7% of full-time employees work from home, while 28.2% work a hybrid model.

1. Currently, 12.7% of full-time employees work from home, illustrating the rapid normalization of remote work environments. Simultaneously, a significant 28.2% of employees have adapted to a hybrid work model. This model combines both home and in-office working, offering flexibility and maintaining a level of physical presence at the workplace

[1] US Employees Commute on Average 26.6 minutes one way to work

[2] https://www.apa.org/monitor/2023/07/young-adults-lonely-pandemic

2. Despite the steady rise in remote work, the majority of the workforce (59.1%) still works in-office. This percentage underscores the fact that while remote work is on an upswing, traditional in-office work is far from obsolete.

B. 98% of workers want to work remote at least some of the time.

1. This is an astonishing percentage in the United States for anything. When you consider 10% of Americans believe the earth is flat and 12% believe that NASA did not land on the moon, a 98% endorsement of any idea is staggering.

2. What this overwhelming figure really reflects is the American workforce's growing affinity towards the flexibility, autonomy and work-life balance that remote work offers.

C. 93% of employers plan to continue conducting job interviews remotely.

1. From the employers' perspective, the acceptance of remote work is evident as well. A remarkable 93% of employers plan to continue conducting job interviews remotely.

D. 16% of companies operate fully remote.

1. About 16% of companies are already fully remote, operating without a physical office. These companies are pioneers in the remote work paradigm, highlighting the feasibility of such models and paving the way for others to follow.

III. REMOTE WORK BY INDUSTRY AND OCCUPATION

A. It is evident that some industries and job roles are more geared towards remote work than others. Understanding these trends helps us predict the direction remote work will take in the future.

B. Industries Where Remote Work is Unlikely to Continue/Succeed:

1. Health Care (for the most part)

2. Education (pre-college)

3. Industrial Jobs

C. Industries Where Remote Work is Here to Stay/Can Be Adaptable

1. Computer and IT (Top Industry for Remote Work 2023)

2. Law (with limitations)

3. Hospitality Management

4. Travel

5. Accounting

6. Marketing

IV. REMOTE WORK BY DEMOGRAPHICS

A. A closer look at the demographics of remote work in 2023 offers fascinating insights into who is embracing this work model and how it's affecting their livelihoods.

1. The highest percentage of remote workers are aged 24 to 35.

The age group most likely to work remotely are those aged 24 to 35. Within this demographic, 39% work remotely full time and 25% do so part time. This suggests that the younger workforce values the flexibility and autonomy offered by remote work, which could have implications for businesses looking to attract and retain this talent group.

The downside is that younger workers often need more guidance, training, and more experienced support before they are able to perform their jobs at high levels. This imbalance should not be lost on employers.

Education also plays a significant role in remote work accessibility. Those with higher levels of education have a better chance at remote work. This is likely due to the type of work available at each education level. For example, postgraduate work typically involves more cognitive labor, which can be performed anywhere.

2. A higher percentage of men work remote than women.

In terms of gender, there is a higher percentage of men who work from home than women. Specifically, 38% of men work remotely full time, and 23% part time. Comparatively, 30% of women work remotely full time, and 22% part time.

3. Remote workers on average earn $19,000 more than in-office workers.

Remote work also seems to have a positive impact on earnings. Remote workers earn an average of $19,000 more than those in the office.

Remote workers make an average of $74,000, while in-office workers typically have an average salary of $55,000

Why is this? Primarily, cost savings. Vehicle stipends, office space, the savings we discussed earlier allows employers to preserve more resources and use that to attract workers, and pay them more.

V. REMOTE WORK PREFERENCES (HOW DO EMPLOYEES FEEL ABOUT REMOTE WORK?)

A. As remote work becomes more prevalent, it's important to understand workers' sentiments towards this evolving model. Surveys and studies offer revealing insights into workers' preferences and how remote work impacts their lives.

1. 57% of workers would look for a new job if their current company didn't allow remote work.

One of the most compelling statistics indicates that 57% of workers would consider leaving their current job if their employer stopped allowing remote work. This figure underscores the value that workers place on the flexibility and autonomy associated with remote work.

It also underscores the *perception employees have about their employers* who take a hardline position against an employee's preference to be flexible.

2. 35% of remote employees feel more productive when working fully remote.

Productivity is another significant factor that influences workers' remote work preferences. Thirty-five percent of remote employees feel more productive when working fully remotely. This could be due to reduced commute times, fewer in-person distractions or the ability to design a work environment that suits their needs.

On the other hand, 65% of workers do not feel more productive when working fully remote. Employees may be distracted by demands in the home, may detract from their ability to focus solely on their job duties.

3. 69% of remote workers report increased burnout from digital communication tools.

The transition to remote work is not without its challenges. Sixty-nine percent of remote workers experience increased burnout from digital communication tools. The constant stream of digital communication can lead to mental fatigue, underscoring the need for proper work boundaries and digital wellness strategies.

4. 53% of remote workers say it's harder to feel connected to their coworkers.

Another challenge associated with remote work is the lack of face-to-face interaction. Surveys of remote workers report finding it harder to feel connected to their coworkers. Yet, 37% feel that remote work neither hurts nor helps with connection to coworkers. This highlights the need for effective communication and team-building strategies in a remote setting.

VI. HTTPS://WWW.FORBES.COM/ADVISOR/BUSINESS/REMOTE-WORK-STATISTICSRETURN TO WORK MANDATES – LEGALITY, PITFALLS AND OTHER CONSIDERATIONS

A. Employers are within their rights to require employees to return to work in person.

1. There are no laws stopping employers from creating rules around in-person work and holding their employees accountable to be there in-person.

2. Any regulations to this effect are now null and void (think pandemic era Executive Orders, PPP loan requirements)

B. Employers generally have a lot of latitude to fire employees for non-compliance with these demands.

1. This presumes said employees are "at-will" which, most employees are.

2. If there is an issue with an employee's non-compliance or refusal to return to in-office work and the employee may only be fired "for-cause," it is best to consult an attorney as to the ramifications of such adverse action.

3. At-will termination could be as simple as an employee not showing up to work when required, because the employee claims to maintain the right to work remotely when company policy dictates otherwise.

C. Possible Exceptions to Return to Work Mandates and Things for Employers to Consider:

1. ADA Accommodations (must make reasonable accommodations for mental, physically disabled employees);

2. Title VII Requirements – to avoid the appearance of discrimination based on a protected class, make sure you treat all employees in similarly situated situations the same with respect to remote work;

3. Firing a whistleblower who may have brought corporate bad behavior to the company's attention; or

4. Firing someone for taking FMLA leave they are legally entitled to.

5. These exceptions apply regardless of whether remote work is offered, so employers should already be on alert for these types of litigation exposure. However, if contemplating terminating an employee for violating remote work policies, it is best to consult an attorney to ensure all potential exposure is considered and mitigated.

VII. THE NEXT FIVE YEARS – OPTIMAL POLICY, RETAINMENT AND RECRUITMENT OF TALENT VS MEETING THE NEEDS OF YOUR BUSINESS.

A. By 2025, 32.6 million Americans will be working remotely.

1. Looking ahead, the future of remote work is here to stay, whether employers like it or not. According to Upwork, by 2025, an estimated 32.6 million Americans will be working remotely, which equates to about 22% of the workforce. This projection suggests a continuous, yet gradual, shift toward remote work arrangements.

B. Those who opt for a hybrid work model report the highest average salary at $80,000, as compared to those who work either fully remote or fully in-office.

1. This suggests a balanced approach may be optimal. This may be attributed to the flexibility and balance that hybrid work offers, enabling workers to maximize their productivity and potentially take on more responsibilities.

C. Research shows that employers can save $11,000 per employee when switching to remote work.

1. While the challenges are noteworthy, remote work also offers significant financial benefits for employers. Research shows that employers can save $11,000 per employee when switching to remote work. These savings come from reduced costs associated with office space, utilities and other resources.

   In essence, while remote work offers tangible benefits including flexible hours and cost savings, it also presents challenges such as digital burnout and reduced social connection. Employers and employees need to work together to maximize the benefits while effectively addressing the challenges to create a healthy and productive remote work environment.

D. Remote Work Trends

1. The shift toward remote work has brought several notable trends to the forefront, shaping how companies and employees approach this model of work.

2. 60% of companies use monitoring software to track remote employees

   The use of monitoring software is one trend that has gained traction. As many as 60% of companies now rely on such tools to track remote employees. While these tools can aid productivity and accountability, they also pose privacy considerations, highlighting the need for transparency and consent in their use.

3. 73% of executives believe remote workers pose a greater security risk.

   Cybersecurity has also become a major concern for businesses. A significant 73% of executives perceive remote workers as a greater security risk. This concern stresses the need for robust security protocols and employee education about safe digital practices in a remote work setting.

   This is particularly critical in areas like law and finance where confidentiality of client information is paramount.

4. 32% of hybrid workers report they would take a pay cut to work remotely full time

Another trend that showcases the preference for remote work is the willingness of employees to accept financial trade-offs. A surprising 32% of hybrid workers state they would consider a pay cut to work remote full time. This reflects the high value workers place on the flexibility and autonomy remotely work provides and could potentially impact how companies structure compensation in the future

Each of these trends provides valuable insights into the evolving dynamics of remote work. As we continue to adapt to this new work landscape, understanding these trends will be crucial in shaping effective remote work policies and practices.

Questions?

THANK YOU FOR YOUR TIME!!!

PAY NOW OR PAY LATER: HOW TO RESPOND TO A WAGE AND HOUR AUDIT AND AVOID VIOLATIONS

By: Kathleen H. Klaus, Esq.

I. THE WAGE AND HOUR AUDIT PROCESS.

A. Why Me?

1. The Department of Labor enforces over 180 separate federal statutes, including the Family and Medical Leave Act ("FMLA") and the Occupational Safety and Health Act ("OSHA").

2. This presentation covers audits of an employer's obligations under the Fair Labor Standards Act ("FLSA"), a New Deal era statute passed in response to the Great Depression.

a. The Wage and Hour Division may also audit FMLA, some immigration laws, employee benefit plans and regulations concerning the garnishment of wages.

b. Most common audits over:

i. Minimum wage

ii. Overtime

iii. Employee classification

(A) Is the employee "exempt" from the wage and hour laws because of the type of work the employee performs?

(B) Regulations on this issue are in a constant state of flux.

iv. Child labor laws

v. Unpaid work

(A) Donning and doffing

(B) Post-shift security screens

vi. Recordkeeping

3. What triggers a Wage and Hour audit?

a. Employee complaints

i. These are confidential

ii. The DOL does not even have to confirm that an employee complaint was filed

b. Policy/targeted industry or locations

c. Random selection

B. How Do I Know?

1. You will get a letter in the mail or by email. ***Not required*** but it is typically done so that records will be available.

2. Typically provide for short notice, often less than a week.

3. This notice provides for on-sight "visit" that includes review of records and employee interviews.

C. What Do I Do?

1. Contact your attorney.

2. Designate a point person. This is to control what information is provided to the DOL.

3. Do not make or destroy evidence.

4. Do not retaliate against any employee you think may have filed a complaint.

5. Cooperate. It is an adversarial process, but it does not have to be contentious.

6. Keep notes of every interaction, every document produced, etc.

D. What Will Happen?

1. Opening conference or meeting to discuss what the auditor intends to do.

2. Auditor will review records and interview employees.

3. The process is not supposed to disturb your business operations.

a. Find a place for the auditor to review records and interview employees.

4. Employee interviews are to verify the information in the records, including hours worked and the job duties for those employees whom you claim are exempt.

a. You may not participate in employee interviews, but may be interviewed.

b. May have an attorney for managerial employees, but not other employees.

5. The auditor may ask for additional records. If the auditor believes there was willful non-compliance, the auditor may ask for three years of records.

6. When the investigation is completed, the auditor will call a meeting to reveal the results of the audit and provide a written report.

    a. May assess fines, back wages, etc.

    b. May make recommendations on improved processes

    c. You may agree with the findings and negotiate a settlement

    d. You may appeal and litigate in court

II. COMMON WAGE AND HOUR VIOLATIONS AND PENALTIES OWED

A. More investigators and investigations, but less money recovered

B. Current DOL appears to be targeting specific industries and regions

C. What are potential penalties:

1. Backpay

2. Liquidated damages equal to the backpay

3. Attorneys' fees and costs

4. Fines

III. HOW TO CONDUCT AN INTERNAL AUDIT AND RESOLVE VIOLATIONS PROACTIVELY

A. Employee classification

1. Law is constantly changing on this issue

2. "Default" is that employees are ***not*** exempt

3. Annual or semi-annual review of job descriptions and actual work performed by employees in "grey area" and independent contractors

B. Review overtime and rate of pay calculations

1. This is important if you have employees who work in different jobs where rate of pay is different.

2. Non-discretionary bonuses must be included.

3. This is a calculation issue, but you have to make sure you are using all of the correct information.

C. Review recordkeeping

1. Make sure time records are accurate and employees are signing in and out at appropriate times.

2. Review time off and leave policies to make sure they are compliant and being followed.

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LEAVE IT TO US: EMPLOYER'S GUIDE TO LEAVE LAWS

By: Mariel G. Newhouse, Esq.

I. INTRODUCTION

A. There are a number of laws that govern when, how much, and what kind of leave an employer is required to given an employee.

B. It can be difficult to understand which laws apply to your business and when those laws are implicated by an employee's actions.

C. Characteristics of Leave/Time Off and Questions to Ask Yourself:

1. Paid v. Unpaid

   a. Do you offer all employees paid leave? If so, do you offer unpaid leave upon the exhaustion of paid leave? If not, do you offer unpaid leave for those employees who are not eligible for paid leave?

2. Legally Required v. Discretionary

   a. Are you up to date on all legally required leave? Do you offer more than what is required?

3. Earned v. Accrued

   a. Is the leave earned in one lump-sum on an anniversary? If so, is the anniversary the date of the employee's hire, the first of the calendar year, or some other date applicable to all employees?

   b. Or is the leave accrued by the employee over time?

4. Use it or Lose it v. Paid Out

   a. What happens to the leave at the end of the year or separation? Does the employee lose the leave if it is not used? Do you offer to pay for any unused leave?

   b. Under the Paid Medical Leave Act ("PMLA"), if your policy uses a pro-rata accrual method, then you must permit a carryover of unused benefits of up to 40 hours.

D. These materials focus on the following:

1. The various types of leave that are required or optional.

2. Recent developments in federal and Michigan leave laws and how these developments may impact your existing policies.

3. Trends we are seeing from employers.

II. THE ALPHABET SOUP

A. Deciphering the Letters:

1. Family Medical Leave Act ("FMLA")

2. Americans with Disabilities Act of 1990, as Amended ("ADA")

3. Pregnant Workers' Fairness Act ("PWFA")

4. Providing Urgent Maternal Protections for Nursing Mothers ("PUMP Act")

5. Michigan's Persons with Disabilities Civil Rights Act ("PWDCRA")

6. Michigan's Paid Medical Leave Act ("PMLA")

7. Paid Time Off ("PTO"), which can include any of the following:

a. Vacation days

b. Personal time

c. Sick/medical leave

d. Holidays

e. Bereavement leave

f. Parental leave

g. Jury duty/witness leave

h. Caregiver leave

i. Voting time off

j. Paid leave for school activities

B. Federally Required Leave – FMLA and the ADA

1. There is currently no federal law generally requiring private employers to provide paid sick leave.

2. However, certain employers are required to provide unpaid, job-protected leave.

3. Family Medical Leave Act

    a. Unpaid, legally required

    b. Covered Employer: 50 or more employees during a 20-week period of the calendar year or the previous calendar year

        i. This is the TOTAL number of employees, regardless of whether the employees are part-time, temporary, or seasonal.

        ii. Once an employer meets the requirements of a Covered Employer, it is covered as long as it has 50 or more employees for at least 20 work weeks in the current or previous calendar year.

        iii. Integrated Employer Test: Employers with common management, interrelation between operations, a centralized control of labor relations, and degree of common ownership/financial control will be treated as a single employer. This means that for FMLA purposes, the employees of all integrated employer entities must be counted to determine whether the employer is covered under FMLA.[1]

    c. Eligible Employee: worked for the employer for at least 12 months (need not be consecutive), for at least 1250 hours in the past year, and work at a location that employs at least 50 people within a 75-mile radius.

    d. Requirements: eligible employees receive 12 weeks of leave in a 12-month period for:

        i. Birth of child or placement of child with employee for adoption or foster child care, and to bond with newborn or newly-placed child;

        ii. Care for spouse, son, daughter, or parent who has a serious health condition, including incapacity due to pregnancy and for prenatal medical care;

        iii. Serious health condition that makes employee unable to perform the essential functions of the job, including incapacity due to pregnancy and for prenatal medical care; or

[1] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf at pg. 11.

iv. Any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or called to covered activity duty status.[2]

e. How to count the 12 weeks:

i. Calendar Year

ii. Any fixed 12-month period (e.g., employee's anniversary date, fiscal year)

iii. First date employee takes FMLA leave

iv. "Rolling" 12-month period

f. Coordination with Other Leave:

i. FMLA is not required to be paid; however, employers may be more generous than the minimum requirement of the law and pay employees for some or all of FMLA leave.

ii. Employers may require other paid leave to run concurrently with FMLA.

iii. The standard should be applied uniformly to avoid a claim of unlawful discrimination. For example, if a female employee receives six weeks of paid FMLA leave to bond with her child, the employer should extend the same benefit to a male employee who is using FMLA to bond with a new child. Employers should be careful not to make assumptions about who is a primary caregiver, if the policy incorporates a distinction between primary/secondary caregiver.

4. Americans with Disabilities Act ("ADA")

a. Covered Employers: employers with 15 or more employees.

b. Covered Employers must provide reasonable accommodations to employees with disabilities unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the safety of the employee or others in the workplace.

[2] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf at pg. 11

i. Unpaid leave can be considered a "reasonable accommodation" consistent with the ADA's purpose to require employers to change the way things are customarily done to enable employees with disabilities to work.[3]

ii. If leave is required as a reasonable accommodation, the employer generally must welcome the employee back to the individual's former position at the same rate of pay.

(A) However, if leaving the position open would cause an undue hardship, the employer must consider the employee for an open position for which the employee is qualified.

C. State Mandated Leave

1. Michigan Persons With Disabilities Civil Rights Act ("PWDCRA")

a. Unpaid, mandated.

b. Applies to employers with one or more employees.

c. An employer may be obligated to provide unpaid leave where the employee has a disability that requires leave, the leave does not pose an undue hardship on the employer, ***and the employee in Michigan makes the request within at least 182 days of having reason to know of the need for an accommodation***.

d. Employers with fewer than 15 employees are generally not required to restructure a job or alter the schedule of employees as an accommodation under this Act.

2. Michigan Paid Medical Leave Act ("PMLA")

a. Paid, mandated, accrued OR earned.

b. Employers with 50 or more employees must provide paid medical leave.

c. Eligible employees are non-exempt employees who worked an average of 25 hours per week in the previous calendar year.

i. Note: the statute Is silent as to whether new employees are eligible when they have not worked in the prior calendar year. Many employers are providing paid medical leave to new employees who are expected to and actually do work an average of 25 hours per week.

[3] MCL 1210(14). Furthermore, job restructuring only applies to an employee's minor or infrequent duties relating to a particular job held by the person with a disability. MCL 37.1210(15).

d. Structure for granting paid medical leave – two options

i. Accrual: Employees accrue paid medical leave at a rate of at least one hour of paid medical leave for every 35 hours worked. If the accrual method is chosen:

(A) The employer is not required to allow an employee to accrue more than one hour of paid medical leave in a calendar week.

(B) The employer must allow the employee to carry over up to 40 hours of unused accrued paid medical leave from one year to the next.

(C) The employer is not required to allow an employee to use more than 40 hours of paid family medical leave in a single benefit year.

ii. Lump Sum: Employees receive at least 40 hours of paid medical leave at the beginning of the benefit year. If the lump sum method is chosen:

(A) The employer may prorate the paid medical leave for employees hired in the middle of a benefit year.

(B) The employer is not required to allow employees to carry over any of the paid medical leave to another benefit year.

iii. Presumption of Compliance/Fill-In-The-Gap Policies:

(A) Employers are presumed to be compliant with the PMLA if they provide at least 40 hours of paid leave (regardless of whether the paid leave is classified as vacation, sick, paid time off, etc.) to all eligible employees.

(B) If a policy is partially compliant, employers can create narrow policies to "fill-in-the-gap" between the paid leave granted to eligible employees

iv. Use of Paid Medical Leave

(A) Employers are permitted to require an employer to wait until the 90th calendar day after commencing employment before using accrued paid medical leave.

(B) Leave must be used in one-hour increments unless a different policy is set forth in the handbook or employee benefit document.

(C) Employers may set notice, procedure, and documentation requirements; however, employee must be allowed at least 3 days to provide supporting documentation.

(D) Leave may be used for any of the following:

(1) Physical or mental illness, injury, or health condition of employee or family member;

(2) Medical diagnosis, care, or treatment of employee or family member;

(3) Closure of employee's primary workplace by order of public official due to public health emergency;

(4) Care of employee's child whose school or place of care has been closed by order of public official due to public health emergency;

(5) Employee or family member's exposure to a communicable disease that would jeopardize the health of others as determined by health authorities or a health care provider; and

(6) For care, counseling, victim services, relocation, and/or participation in a civil or criminal proceeding after domestic violence and sexual assault.

3. Crime Victim Leave

a. Unpaid, mandatory

b. Employees in Michigan who are victim to a crime are entitled to take an unpaid leave of absence to attend judicial proceedings related to a crime. Employers may not threaten to discharge or discipline – or actually discharge or discipline – an employee who is a victim subpoenaed by a prosecuting attorney to attend court for the purpose of giving testimony or if they are a victim's representative who attends or desires to attend court to be present during the testimony of the victim.

c. Employees are considered a victim representative of a crime victim if they are:

i. The guardian or custodian of a deceased victim's child;

ii. The parent, custodian, or guardian of an assault victim under the age of 18; or

iii. Designated to act for an assault victim suffering from physical or emotional disabilities.

d. This leave is different from PMLA, which may be used to attend civil or criminal proceedings arising out of domestic violence or sexual assault.

D. Other Common Types of Paid Time Off ("PTO")

1. Note: these can be offered to employees as unpaid time off. Additionally, other states may require some of these leaves.

a. Vacation days

b. Personal time

c. Sick/medical leave

d. Holidays

e. Bereavement leave

f. Parental leave

g. Jury duty/witness leave

h. Caregiver leave

i. Voting time off

j. Paid leave for school activities

III. RECENT DEVELOPMENTS IN MICHIGAN AND FEDERAL LAW

A. Earned Sick Time Act ("ESTA") v. Paid Medical Leave Act

1. ESTA was adopted by the legislature and subsequently amended in December 2018 by passage of the PMLA

a. Michigan Court of Claims held that the "adopt and amend" strategy was unconstitutional.

b. Michigan Court of Appeals reversed the Court of Claims ruling the amended version of the statute was valid and enforceable.

2. Oral Arguments heard before the Michigan Supreme Court on December 7, 2023

3. If the Court of Appeals decision is reversed:

a. ESTA will apply to employers with at least 1 employee

b. An additional category for use of leave will be added for meetings at a child's school or place of care related to the child's health or disability, or the effects of domestic violence on the child

c. 1 hour of leave for every 30 hours worked – no cap on the amount earned; however, employers can cap the amount used at 72 hours

d. No more than 7 days' advanced notice may be required

B. Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act")

1. Effective December 29, 2023, with changes to the remedies effective April 28, 2023.

2. Amends the Fair Labor Standards Act ("FLSA") by expanding workplace protections for all new mothers, not just non-exempt employees (those eligible for overtime). Requires employers to provide all nursing employees with a private space (other than a restroom) and a reasonable amount of time to express breast milk for up to one year after a child's birth.

a. Employers are not required to compensate the employees during these breaks as long as the employee is not performing any work.

b. If an employee is not completely off duty for the break's entirety, the break is considered "hours worked," and the worker must be compensated for such time.

3. Employers with 50 or more employees must comply. Employers with fewer than 50 employees may be exempt if they can show that compliance would impose an undue hardship.

4. Provides additional remedies for employees: An employer who violates an employee's right to reasonable break time and space to pump breast milk are liable for legal and equitable remedies under FLSA

a. Remedies: recovering unpaid wages, reinstatement, front and back pay, compensatory damages, and liquidated damages.

b. Employees may choose to file a complaint with the Wage and Hour Division or a private cause of action seeking the appropriate remedies.

i. If employee chooses to file a private lawsuit, the employee must provide the employer with at least ten days to become compliant after the initial request for space.

C. Pregnant Workers Fairness Act ("PWFA")

1. Signed into law on December 23, 2022. Effective June 27, 2023.

2. Applies to public and private sector employees with 15 or more employees.

3. Mirrors and expands protections contained in the ADA. Employers must make reasonable accommodations for employees with a known physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. In other words, unlike

under the ADA, the condition does not have to qualify as a "disability" in order to receive protections.

4. Remedies: lost income, "compensatory damages," and punitive damages up to a statutory cap based on employer size.

IV. IMPACTS ON YOUR EXISTING LEAVE POLICIES

A. Updates to your Handbooks

1. Have you tripped the 50-employee wire?

2. Do you have a policy that complies with the PWFA? With the PUMP Act?

B. Do you need to create a sick leave policy/fill-in-the-gap policy or are you presumed compliant?

V. TRENDS OBSERVED IN PRACTICE

A. Forbes Advisor published its 2024 statistics for paid leave in the United States:[4]

1. 28 million Americans do not have any paid vacation or holidays

2. 31% (almost one third) of US employees do not have access to PTO

3. 52% of employees work even when using PTO

4. Average Number of Days:

a. 11 paid vacation days

i. Private sector: 15 days after 5 years of service; 17 days after 10 years of service; 20 days after 20 years of service

b. 8 sick days

i. Generally, the longer an employee has been employed, the more sick days the employee has to use

ii. 8 days for full-time; 6 days for part-time

c. 7.6 paid holidays

[4] https://www.forbes.com/advisor/business/pto-statistics/

i. Even though there are 11 federal holidays, the national average is 7.6, with 21% of employees receiving only 6 holidays per year.

5. Parental Leave:

a. 2018 U.S. Bureau of Labor Statistics:

i. 17% of companies offered paid parental leave

ii. 89% offered unpaid parental leave

iii. New York is the most generous state with a program allowing parents to take up to 12 weeks of Paid Family Leave at 67% of their pay

B. WTW 2023 Leave, Disability and Time-off Trends Survey[5]

1. Employers choosing to modify paid leave, time off, or disability programs to support attraction and retention strategies

2. Enhanced parental leave, bereavement leave, and caregiver leave.

3. Unlimited leave: 12% have a policy, up from 9% two years ago. 16% anticipate offering unlimited PTO to exempt employees in the next two years

a. 31% of companies reporting this type of program for directors and executives; 9% considering it over the next two years

C. Increase in use of "Paid Time Off" rather than separate vacation and sick leave policies.

D. The rise and fall of unlimited leave policies

1. Pros

a. PMLA – "presumed compliance"

b. no need for "separate buckets of leave"

c. reduces HR hours

d. Attractive benefit for top talent

2. Cons

[5] https://www.wtwco.com/en-us/news/2024/01/majority-of-employers-will-change-their-leave-programs-in-the-next-two-years-wtw-survey-finds

a. Abuse?

i. Although statistics show that most employees do not abuse unlimited PTO, there are those that will

(A) This can put stress on the team

b. Can encourage anxiety and burnout

i. Not all employees like the ambiguity of unlimited leave, especially your best employees - Employees will try to guess what the "real" number of hours for leave, which can result in taking less time than if there was an accrued model

ii. Hard working employees are less likely to take leave → causes burn out and they leave

c. Not all managers will apply the policy equally

i. Some managers may be less willing to accept the unlimited PTO policies for their employees

E. Flex Time

1. This is often seen used as a four-day work week. Employers can also offer flex time to permit an employee to make up time taken for an appointment rather than requiring the employee to use PTO.

2. Flexibility in a job has become the primary driver for individuals switching from typical office hours to a flexible gig.[6]

a. 63% of individuals say that setting their own schedule makes gig work more attractive.

b. 44% of US respondents say they would consider leaving a full-time role for contingent work if it permitted a four-day workweek.

c. 53% of individuals who already made the switch attribute it to interest in flexibility and work/life balance.

3. Data indicates that employers are already moving in this direction.[7]

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[6] https://www.forbes.com/sites/bryanrobinson/2024/02/06/new-flexible-jobs-making-a-2024-comeback-what-that-means-for-your-career/?sh=21490f9e3a39

[7] https://finance.yahoo.com/news/rise-little-flex-time-shorter-093000418.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAKYrrDE240L3XbJmWy

a. In February 2023, Britain completed the world's largest trial of a four-day work week with a 92% success rate.

b. Q4 of 2023 saw a 400% increase in jobs offering a 4-day workweek, 4.5-day week, or a 9-day fortnight compared to Q4 2022.

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WHO THE HECK ARE WE HIRING? LEGAL ISSUES WITH ONBOARDING: BACKGROUND CHECKS, PRE-EMPLOYMENT TESTING, AND EMPLOYEE SOCIAL MEDIA

By: Jordan M. Small, Esq.

I. BACKGROUNG CHECKS AND FCRA ISSUES

A. How does the FCRA affect hiring?

1. When employers run background checks through a company in the business of compiling background information, they must comply with the Fair Credit Reporting Act (FCRA)

2. What is "background information"?

a. Credit reports

b. Criminal record checks

c. "Consumer report"

3. FCRA Best Practices

a. All applicants must sign a background check authorization form.

b. Do not seek background information from references or prior employers prior to obtaining this authorization.

c. Place information in personnel file, except if name of person making the reference would be disclosed.

4. State-Level FCRA Issues

a. In recent years, states have enacted laws that add requirements greater than FCRA policies.

i. Arizona, Georgia, California, Maine, Massachusetts, Minnesota, New Jersey, New York, Oklahoma, and Washington

b. Some states, such as Minnesota and Oklahoma, require an employer to provide the subject of the check an opportunity to check a box to receive any report provided by a FCRA.

i. You must be aware of any state-level FCRA requirements before requesting or acting on a background report

5. Notice requirements

a. Employers must notify a job candidate before and after adverse action is taken based on information received from a consumer report

i. Pre-Adverse Action Report

ii. Adverse Action Report

6. FCRA Damages

i. Consumers may seek their actual damages arising from an FCRA violation

ii. Consumers alleging a willful failure to comply with an FCRA requirement may seek actual, statutory, and punitive damages

iii. May recover costs and reasonable attorneys' fees

II. JOB-RELATED TESTING

A. What issues can employers encounter when conducting job-related testing?

B. How can we understand and handle the potential legal issues surrounding the usage of pre-employment testing to evaluate candidates?

1. Assessing job candidates through testing

a. Assessments are general predictors of a candidate's future performance and behavior

i. Precautions

(A) Should always be used in combination with other tools in the selection process

(B) Ensure the assessment has a high degree of validity

(1) How has the test been externally validated?

(2) Is it supported through court decisions, or used by other large companies?

2. Science-based assessments to screen candidates

a. Applicant Tracking Systems

b. Leadership Assessments

i. Meyers-Briggs Assessment

ii. Emotional Intelligence Assessments

c. Behavioral and Motivator Assessments

i. DISC and Motivators Assessment

d. Skills Assessments

i. Hard skills

ii. Work sample

iii. Cognitive ability

3. Hiring assessments and discrimination

a. Hiring assessments should not discriminate based on protected characteristics such as race, color, ethnicity, religion, national origin, sex, gender identity, sexual orientation, age, familial status, disability, or genetic information.

b. Discrimination risks

i. Hiring assessments should measure traits and skills that **are important to job performance**.

ii. Assessments based on criteria that are unnecessary to job performance risk creating artificial or discriminatory barriers to employment opportunity.

c. Risks of discriminatory hiring assessments

i. **February 2024:** Hospital Housekeeping Systems, LLC (HHS), will pay $520,000 as part of settlement with EEOC.

(A) Company required employees to take an Essential Functions Test (EFT) at hire, annually, and upon the return from a medical leave of absence, **even when portions of the test were not job-related.**

ii. **August 2020:** Walmart settled a nationwide sex-discrimination complaint with the EEOC for $20 million.

(A) Walmart violated Title VII by using a physical abilities test that had a disparate impact on female applicants.

d. Hiring assessments should be thoroughly and regularly audited before and after deployment for discrimination and job-relatedness.

e. Widespread integration and unknown impact of artificial intelligence.

i. Studies show AI can be discriminatory

III. EMPLOYEE/JOB CANDIDATE SOCIAL MEDIA

A. How does social media interact with the hiring and employment process?

1. Social media and the workplace

a. 4.3 billion active users of social media worldwide

b. November 2022 survey found almost 40 percent of Gen Z in the U.S. spent more than four hours on social media platforms daily.

c. 90.4% of Millennials use social media actively.

2. Screening job candidates' social media

a. 70% of employers check out applicants' profiles as part of their screening process, and 54% have rejected applicants because of what they found

b. Are you legally allowed to act on this information?

c. Is it actually related to job performance?

3. Considerations with candidates' social media

a. Is the employee exhibiting a behavior that would actually affect them in **a work-related context?**

b. University of Iowa study found that social media assessments from recruiters could not accurately predict job performance or turnover intentions.

4. Social media monitoring risks

a. Is the employee exhibiting a behavior that would actually affect them in **a work-related context?**

b. *Watson v. Phila. Parking Auth., Civil Action 21-1514*: gay man was unlawfully fired as a data analyst at the Philadelphia Parking Authority shortly after supervisors discovered his LGBT status via his Facebook posts.

5. Can I make them add me on social media?

a. Michigan employers cannot ask current or prospective employees for passwords or other information in order to access private social media accounts.

b. 26 states have laws that address social media privacy and either protect employee privacy or create additional discrimination protections.

6. Negative social media posts from employees

   a. Is this protected concerted activity?

      i. One or more employees working together to address working conditions

   b. Does it address the terms and conditions of employment?

      i. What is the complained about action?

   c. Employers that discipline employees for actions and comments that fall under protected concerted activities risk committing an unfair labor practice and violating the employee's rights under Section 7 of the NLRA.

7. Social media monitoring risks

   a. Can a social media policy violate the NLRA?

   b. Could your policy be construed to prohibit discussions of wages or working conditions?

   c. Has your policy been reviewed in light of new NLRA decisions?

      i. New decisions bring more scrutiny to workplace policies

STAY CLASSY: WHY WORKER CLASSIFICATION MATTERS, COMMON MISCLASSIFICATIONS, AND THE LATEST TRENDS

By: Sydney E. Wright, Esq.

I. WORKER CLASSIFICATION: WHY IT MATTERS AND AN UPDATE ON THE LATEST TRENDS

A. Persons who are retained to render services can meet any number of classifications: employees, contractors, subcontractors, agents, and brokers. An important distinction is made between "employees" and "independent contractors."

B. Definitions: "employee" vs. "independent contractor."

1. An employee is a person retained to render services for another person or an entity in exchange for wages or salary.

2. An independent contractor is a person or entity contracted to perform work for—or provide services to—another person or entity as a nonemployee.

C. There is no single test or criteria for determining whether a worker is an employee or an independent contractor.

1. In fact, a worker may be classified as an employee for one purpose and as an independent contractor for another.

2. Different governmental agencies, and the laws and regulations governing employees and independent contractors, use different and sometimes (but not always) overlapping standards for determining worker classification. For example, the criteria and tests used by the IRS to determine worker classification differ from the criteria and tests used for classification under the Fair Labor Standards Act.

3. Contractual agreements and labeling workers as "independent contractors" are not sufficient to establish that the workers are, in fact, independent contractors as opposed to employees.

D. One unifying principle in worker classification, however, is the "right to control."

1. For employees, employers control both "what" the employees do and "how" they do it. Employees typically have established hours; work at a designated location; follow a set of directives, policies and procedures established by the employer; and are paid a regular wage or salary.

2. For independent contractors, employers control only what the independent contractor will do. Control over "how" the work will be done remains with the independent contractor. In this way, independent contractors are like self-employed entities. Independent contractors typically set their own hours, determine for themselves the best way to accomplish their objectives, and are paid when their tasks are completed.

3. In short, employers retain a great deal of control over employees and much less control over independent contractors.

E. Worker classification impacts the duties and obligations of the employer.

1. For workers classified as employees, the employer must:

a. Collect and remit taxes, including federal and state income tax withholding, FICA (both employee and employer portions), FUTA (federal unemployment taxes), and state unemployment taxes.

b. Comply with state and federal labor laws applicable to employees.

c. Comply with ERISA.

2. For workers classified as independent contractors, the employer is not required to collect or remit employment taxes. Moreover, independent contractors are generally not covered by federal labor laws.

F. The IRS utilizes various tests for worker classification.

1. In 1987, the IRS published Revenue Ruling 87-41 which included a "20-Factor Test" for determining worker classification. The 20 factors are:

a. Instructions – does the worker have to comply with instructions about when, where and how to conduct the work?

b. Training – is the worker required to be trained as directed by the employer?

c. Integration – does the worker's work constitute an integral part of the employer's business?

d. Services Rendered Personally – are the services to be rendered by the worker required to be rendered personally?

e. Assistants – does the worker hire, supervise and pay their own assistants?

f. Continuing Relationship – is the relationship between the worker and the employer ongoing or a one-off engagement?

g. Set Hours of Work – is the worker required to work specific hours?

h. Full Time Required – is the worker required to devote substantially all of their time to the business of the employer?

i. Doing Work on Employer's Premises – is the worker required to perform the work on the employer's premises?

j. Order or Sequence Set – is the worker required to perform the work in an order or sequence determined by the employer?

k. Oral or Written Reports – is the worker required to submit regular oral or written reports to the employer?

l. Payment by Hour, Week, Month – is the worker paid at a regular interval?

m. Payment of Business and/or Traveling Expenses – does the employer ordinarily pay for the worker's business and/or traveling expenses?

n. Furnishing of Tools and Materials – does the employer furnish tools and materials to worker?

o. Significant Investment – does the worker invest in and/or maintain the facilities used by the worker in performing the work?

p. Realization of Profit or Loss – does the worker share in the profit or suffer loss as a result of the work performed?

q. Working for More Than One Firm at a Time – does the worker perform more than de minimis work for multiple, unrelated employers at the same time?

r. Making Service Available to General Public – does the worker make their services available to the general public on a regular and consistent basis?

s. Right to Discharge – does the employer retain the right to discharge the worker?

t. Right to Terminate – does the worker retain the right to end the relationship with the employer?

2. Simplified Three-Factor Test.

a. Behavioral Control – does the employer control:

i. When and where the work is performed?

ii. What tools or equipment is used?

iii. What workers are hired to assist?

iv. What order or sequence the work will be completed?

b. Financial Control – does the employer control:

i. The worker's reimbursement for expenses?

ii. The worker's investment in the work?

iii. The worker's ability to work for others?

iv. How and when the worker is paid?

c. Type of Relationship – between the worker and employer:

i. Is there a written agreement describing the relationship between the parties?

ii. Is the worker eligible for, and does the employer provide, benefits like insurance, pension, vacation or sick pay?

iii. Is the working relationship permanent?

iv. Are the services provided by the worker a key aspect of the regular business of the employer?

3. Statutory Employees

a. Workers in certain occupations are considered "statutory employees":

i. Corporate officers of exempt organizations

ii. Agent-drivers or commission drivers engaged in distributing meat, vegetable or bakery products; beverages (other than milk); or laundry or dry cleaning.

iii. Full-time life insurance salespersons.

iv. Home workers performing work according to furnished specifications on materials provided, which products are required to be returned to the principal.

v. Full-time traveling or city salespersons soliciting orders from wholesalers or retailers for merchandise for resale or for supplies used in their business operations.

b. Statutory employees must be in one of four specified occupations and satisfy the following requirements:

i. Contract must specify that the worker will perform substantially all the services.

ii. Worker shall have no substantial investment in the facilities.

iii. There is a continuing relationship between employer and worker.

G. Fair Labor Standards Act (FLSA) - Enacted by Congress in 1938 to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being for workers."

1. To accomplish this goal, the FLSA requires covered employers to pay nonexempt employees at least the Federal minimum hourly wage (presently $7.25) for all hours worked, and overtime at time and one-half the employee's regular rate.

2. However, this protection, along with other protections provided by the FLSA, do not apply to independent contractors.

3. 2021 Independent Contractor Rule – Before the adoption of the 2024 Rule, the DOL issued the 2021 Independent Contractor Rule. Under the 2021 Rule, worker classification was determined using the two "core" factors test. The factors to be considered under this test are:

a. the nature and degree of control over the relevant work (more probative);

b. the individual's opportunity for profit or loss (more probative);

c. the amount of skill required for the work;

d. the degree of permanence of the working relationship; and

e. whether the work is part of an integrated unit of production.

4. The two "core" factors, namely, (1) the nature and degree of control over the relevant work and (2) an individual's opportunity for profit or loss, were given more weight in the worker classification analysis. The three other factors were considered less probative.

5. The 2021 Rule was recently superseded by the 2024 Rule.

6. 2024 Independent Contractor Rule – The 2024 Rule abandons the two "core" factors approach in favor of a totality of circumstances approach wherein no one factor is given more weight. Under the DOL's 2024 Rule, the six factors relevant to this approach now include:

a. The opportunity for profit or loss depending on managerial skill;

b. Investments by the worker and potential employer;

c. The degree of permanence of the work relationship;

d. The nature and degree of control over performance of the work and working relationship

e. The extent to which the work performed is an integral part of the potential employer's business; and

f. The skill and initiative of the worker.

7. The 2024 Rule states that "additional factors may be relevant in determining whether the worker is an employee or independent contractor for purposes of the FLSA[.]" The DOL included this provision to emphasize that "the [above] enumerated factors are not to be applied mechanically but viewed along with any other relevant facts in light of whether they indicate economic dependence or independence."

H. National Labor Relations Act (NLRA) – text of the law specifically excludes independent contractors from coverage.

1. On June 13, 2023, the National Labor Relations Board ("NLRB") reinstated the common-law agency test for determining worker status found in the Restatement (Second) of Agency § 220. Under that test, the Board looks at the following factors, with no one factor being decisive:

a. The extent of control, which by agreement, the employer may exercise over the details of the work.

b. Whether or not the one employed is engaged in a distinct occupation or business.

c. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.

d. The skill required in the particular occupation.

e. Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.

f. The length of time for which the person is employed.

g. The method of payment, whether by the time or by the job.

h. Whether or not the work is part of the regular business of the employer.

i. Whether or not the parties believe they are creating the relation of master and servant.

j. Whether the principal is or is not in business.

I. Michigan Unemployment – The Michigan Unemployment Insurance Agency (UIA) administers the unemployment insurance program that provides temporary financial assistance to individuals who become unemployed through no fault of their own. Benefits are paid through taxes on employers covered under the Michigan Employment Security Act.

1. The UIA applies the IRS 3-factor test to determine if a person performed services as an employee or as an independent contractor. If a person performing services is an employee, then the employee's wages are subject to state unemployment taxation and the employee may be eligible for unemployment benefits. If, however, the person is found to be an independent contractor, then the employer pays no state unemployment taxes on the individual's earnings and the person's services are not covered employment.

2. IRS 3-Factor Test:

a. A. Behavioral Control - Does the company control or have the right to control what the worker does and how the worker does his or her job?

b. B. Financial Control – Are the business aspects of the worker's job controlled by the payer (these include things like how the worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)?

c. C. Relationship of Parties - Are there written contracts or employee type benefits (such as pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

J. Michigan Worker's Disability Compensation Act (MWDCA) – applies the three-part test set forth in the MCLA § 418.161(1)(n):

1. The worker does not maintain a separate business.

2. The worker does not hold himself or herself out to and render service to the public.

3. The worker is not an employer under the MWDCA.

II. CONSEQUENCES OF WORKER MISCLASSIFICATION

A. Tax Liabilities – If an employer misclassifies a worker as an independent contractor, the tax consequences can include substantial interest and penalties in addition to the principal amounts of the tax.

1. Failure to Withhold: If an employer fails to withhold, then the employer is liable for:

a. 1.5% of wages paid to employees.

b. 20% of employee's share of FICA (Social Security tax).

c. 100% of employer's share of FICA.

d. 100% of federal unemployment tax.

2. Personal liability for the unemployment taxes owed may be imposed on any person who has effective control over the finances of the employer.

B. Wage Claims Under FLSA.

1. FLSA requires that employers pay employees time and one-half of their regular rate of pay for every hour they work in excess of 40 hours in a given workweek.

2. If employer misclassifies its workers as independent contractors, it could give rise to wage and hour claims under FLSA.

3. The penalties under FLSA include backpay and "liquidated damages" in an amount equal to the amount of backpay unless they can show (i) their actions were taken in good faith, and (ii) they had reasonable grounds to believe they were complying with FLSA.

C. ERISA Exposure.

1. Failure to properly classify workers as employees could lead to disqualification of a qualified retirement plan, which, in turn, could lead to adverse tax consequences to plan participants.

2. NOTE: To prevent retroactive extension of eligibility for workers who are initially classified as independent contractors, but are later reclassified as employees, benefit plans should include language that states any worker that is reclassified shall not be retroactively deemed an employee for purposes of eligibility in the plan.

D. Family Medical Leave Act ("FMLA") Violations

1. Similar to FLSA, liquidated damages in an amount equal to the wages, salary, employment benefits or other compensation denied or lost due to the employer's violation of FMLA may be awarded to the aggrieved worker unless the employer can show their actions were taken in good faith and that they had reasonable grounds for their actions.

E. I-9 Violations

1. Employers are responsible for obtaining and maintaining properly completed I-9 Forms for each employee.

2. Penalties for failure to complete properly or retention of the I-9 forms can range from $250-$3,000 per employee.

F. Other Potential Consequences.

1. Age Discrimination Claims

2. WARN Act Violations

3. Worker's Compensation Violations

III. LATEST DEVELOPMENTS AND TRENDS

A. 2024 Independent Contractor Rule

B. *U.S. v. R&SL, Inc.*, 13 OCAHO no. 1333a, 1 (2020).

1. On January 6, 2022, an Administrative Law Judge (ALJ) issued a precedential decision in *United States v. R&SL, Inc.*, finding the company liable for more than 1,400 Form I-9 violations and assessing a penalty in excess of $1.5 million.

2. The ALJ found many of the forms were either backdated or never completed at all. Specific failures included:

a. Blank or missing pages of Form I-9

b. Lacking or incorrect employee or employer attestations

c. Lacking any check mark indicating work authorization status in Section 1

d. No alien number listed

e. No reverifications

f. Untimely completion of Section 2

g. No or invalid List A, B, and/or C documents

h. Incomplete expiration dates

i. Incomplete document numbers

3. The ALJ significantly reduced the fine for all violations except those where backdating was evident. R&SL is required to pay $1,527,308.90 in penalties in addition to the more than $102,000.00 in legal fees incurred prior to commencement of the hearing.

C. Michigan House Bill 4390

1. HB 4390 was introduced on April 13, 2023 and outlines specific criteria to define an "independent contractor" within its provisions. For an individual to be considered an independent contractor under this legislation, they must satisfy the following three conditions:

a. The individual operates without the control and direction of the payer during the execution of their work, both as specified in the contract and in actual practice.

b. The individual's work falls outside the customary scope of the payer's business.

c. The individual is regularly involved in an independently established trade, occupation, or business that aligns with the nature of the work performed for the payer.

2. This definition closely mirrors California's "ABC Test," recognized as one of the most stringent standards across the nation. Consequently, only a limited number of workers are likely to meet the criteria for classification as independent contractors under this rigorous standard.

D. New York City’s Minimum Pay Rule

1. The Appellate Division of the New York State Supreme Court has affirmed a law enacted in the summer of 2023 that raises the minimum wage for app-based delivery workers in New York City from $7.09 to $19.96. The court dismissed an appeal from the three major third-party delivery platforms. This is the first legislation of its kind that will significantly increase the previous minimum wage for independent contractors associated with the delivery apps. The three main delivery companies – Uber, DoorDash, and GrubHub all sought to delay the legislation from going into effect and claim it will negatively impact delivery workers and restaurants. The New York State Supreme Court denied their petitions for preliminary injunction and the legislation is set to take full effect in 2025.

SEX, DRUGS AND ROCK & ROLL

By: Ronald A. Sollish, Esq.

I. OVERVIEW

A. Understanding the Legal Context in Which Consensual Workplace Relationships Operate, Their Effects on the Workplace, How to Manage Them, and What Other Employers are Doing.

B. Discussing Policies and Best Practices for Managing Employee Behavior on Social Media.

C. Addressing the Legalization of Cannabis in the Workplace.

II. CONSENSUAL WORKPLACE RELATIONSHIPS

A. Workplace Romance.

1. Historically, sitcoms and dramas in the pre-2000s era romanticized a pairing between co-workers or between a boss and their subordinate. The shows relied upon workplace romances to provide the dramatic and much anticipated event of a coupling. The resulting romantic liaison rarely encountered legal implications. However, with the turn of the 21st century, sitcoms and dramatic television shows began to address workplace romances realistically and included plots of legal implications, threats, affairs and the trickledown effect of a workplace romance. A weekend spent binge-watching The Morning Show and The Bear reflects some recent realistic trends, on opposite ends, addressing the concept of a "work-spouse."

2. Newsrooms are not safe from the unfortunate circumstances resulting from work-place romance tales and harassment. However, unlike television sitcoms and dramas, these unscripted scandals cover front-page news of printed publications and social media feeds.

3. In the "real world," the issues that unfold are different, yet the same.

B. Workplace romance is a common issue across the United States.

1. In January 2024, Society for Human Resource Management (SHRM) conducted a survey with a sample of 1,073 workers. Of those surveyed, twenty-two percent (22%) of U.S. Workers are currently, or have previously, been in a workplace romance.

a. This makes a lot of sense, considering people spend the majority of their time at work and are likely to share common interests with those they work with.

b. A different SHRM survey found U.S. workers who are in a current relationship with a co-worker, or have been in a past relationship with a co-worker, were mostly motivated by love (57%) or self-interest (28%) while only one percent (1%) were motivated by

power, career advancement or security. The remaining U.S. workers surveyed said none of these factors influenced their desire for a workplace romance.

c. According to SHRM research, thirty-three percent (33%) of Generation Z and younger Millennials are more apt to be open to being in a workplace relationship.

d. Some employers may even support employees finding romantic relationships at work.

2. However, workplace romance creates the potential for intimidation, sexual-harassment or retaliation claims, real or perceived favoritism, and a negative effect in the workplace.

a. Ten percent (10%) of U.S. workers who have been in a workplace romance left their employment because of the break-up.

b. Of those U.S. workers who have been in a relationship, one in five, or eighteen percent (18%), describe the break-up negatively impacted their career.

C. Legal context of consensual workplace relationships.

1. There is nothing illegal about a consensual, romantic or sexual relationship between coworkers.

2. However, workplace relationships can lead to legal issues.

a. Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sex and sexual harassment. Additionally, many states have anti-harassment statutes, such as Michigan's Elliott-Larsen Civil Rights Act.

i. These laws prohibit many forms of sexual harassment that pertain to workplace relationships, including:

(A) Any unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

(B) "Hostile Work Environment" - Any offensive conduct that is based on sex or gender and is severe or pervasive enough that it creates a hostile, offensive, or intimidating work environment for the targeted person.

(C) "Quid Pro Quo" harassment, such as, people in positions of power making sexual demands in exchange for a promotion or other employment benefit.

b. Employers can be held vicariously liable under Title VII to a victimized employee for actionable discrimination caused by a supervisor. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

c. Additionally, Title VII contains an anti-retaliation provision that makes it illegal for employers to retaliate against an employee who has "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.

D. Effects on workplace.

1. The presence of workplace relationships may have negative effects on the workplace and employees' attitudes.

a. Supervisor and subordinate relationships are a major cause of concern.

i. For example, if a subordinate employee is engaged in a romantic relationship with a supervisor and is somehow benefited (whether it be promotion, raise, or just special treatment), co-workers are bound to notice and may think "must I sleep with a supervisor to get ahead?"

ii. Relationships lead to gossip and rumors that can cause a general disturbance in the workplace that leads to lower productivity and a negative office morale.

iii. Also, what happens when the relationship ends? What if it ends badly? Will there be animosity between the parties? Will one party be retaliated against in the workplace for what happened in the relationship?

iv. All these questions pose major concerns for employers.

b. Extra-marital affairs are another major concern.

i. According to a July 21, 2023 Forbes article citing workplace romance statistics, forty percent (40%) of employees admitted to cheating on their partner with a colleague at work.

ii. These relationships are particularly problematic for organizations because these employees will naturally want to keep the relationship secret. If the organization is unaware of the relationship, it makes it more difficult to monitor to ensure there is no favoritism and to guarantee that professionalism is maintained in the workplace.

iii. Commonly in these situations, it is the spouse of the employee that finds out about the extra-marital relationship and creates issues for the employer.

(A) The non-employee spouse may persuade their spouse to claim sexual harassment, or worst-case scenario, might decide to commit an act of workplace violence in a fit of rage.

c. The commonplace of 'work spouse' relationships.

i. According to a June 2023 Psychology Today article, work spouse relationship present both advantages and disadvantages:

(A) Work spouses function together as a team, protecting one another from information and/or actions which may present as punitive or hurtful.

(B) Work spouses celebrate successes, navigate the complexities which may arise by way of organizational dynamics, and offer one another an outlet for venting frustrations.

(C) Work spouses, however, are often misunderstood and subject to questioning.

(1) Some believe a work spouse is simply a cover for sexual attraction or romance and become targets for office gossip;

(2) When work spouses are identified as a unit, it becomes difficult to recognize either of their contributions individually.

ii. The 2024 SHRM survey identified that thirty-four percent (34%) of the U.S. workers surveyed share an emotionally intimate, close and platonic relationship with a co-worker or business associate.

(A) Additional data found, however, forty-three percent (43%) harbor feelings for their work spouse, while forty-five percent (45%) felt their relationship with their work spouses needed to be hidden from their signification other.

E. How to manage romantic relationships in the workplace.

1. Fraternization Policies

a. What is a fraternization policy?

i. Fraternization or anti-fraternization policies are also referred to as dating policies or workplace romance policies.

ii. These policies explicitly communicate to the employee the company's policies, expectations, procedures, and consequences regarding romantic relationships in the workplace.

b. Benefits of having a fraternization policy:

i. Supervisors feel better because they know what to do if a romance springs up on their team.

ii. Employees understand what is expected of them if they decide to engage in a romantic relationship with a co-worker.

iii. Such policies can also demonstrate an employer's good-faith effort to comply with sexual harassment laws.

c. Employers should consider including the following components in their fraternization policies:

i. The policy's goal of upholding appropriate boundaries between personal and business relationships.

ii. The employer's decision whether to prohibit or just discourage fraternization between managers and subordinates.

iii. The requirement to report participation in such relationships, including those with vendors and other business associates.

(A) Disclosure is an effective way to limit the potential for favoritism, retaliation and sexual harassment claims.

iv. The employer's right to modify reporting structures, such as transferring a boss who is in a relationship with a subordinate.

(A) The employer should maintain the company's discretion. The company may allow the relationship in some cases and prohibit/change reporting structure in other cases.

v. The prohibition on physical contact between employees during work hours.

(A) Encourage open communication

(1) If the company is willing to work with the couple, then it is more likely that the involved parties will communicate their problems in an appropriate manner.

vi. Prohibiting U.S. workers from using company resources such as e-mail, Teams and Slack to further a romantic relationship with a colleague.

d. It is not recommended that fraternization policies prohibit dating, sex, and romance entirely. Any policy that is seen as overreaching or intrusive may discourage reporting to HR.

2. Policies should be broadcasted to all employees.

    a. Of the U.S. workers surveyed in 2024, thirty-one percent (31%) surveyed said that their employer requires disclosure of workplace romance, while forty-four percent (44%) provide disclosure of workplace romance is not required, and twenty-five percent (25%) do not know the policy regarding disclosing a workplace romance.

    b. It is critical that organizations guide employees on how to go about pursuing romance in a professional manner.

    c. Employees should know what is expected from them and what they should expect from the company in the case of a romantic relationship in the workplace.

3. Provide training to HR, supervisors, and employees.

    a. Another proactive measure is to advise HR, supervisors, and managers as to how they might discreetly address romantic and sexual behavior in the workplace.

    b. Companies may also consider bystander training to recognize, report, and prevent harassment in the workplace.

4. U.S Workers have opinions about workplace policies.

    a. The 2024 SHRM workplace romance research survey reported sixty-four percent (64%) of the U.S. workers surveyed stated their employer should not have a policy prohibiting romance in the workplace.

    b. However, seventy-eight percent (78%) of the U.S. workers surveyed agree the employer should provide guidelines to employees on how to handle workplace romance.

5. What other companies are doing:

    a. Many organizations forbid intimate relationships even outside supervisory relationships. Organizations may enact policies forbidding romances between employees who report to the same supervisor or prohibiting employees in different departments to date.

        i. Facebook has a "no means no" policy that prohibits one worker from asking another out again if the co-worker has already said no once before.

        ii. Facebook has internal "Managing A Respectful Workplace" training sessions in which the nuances of employee interactions and what is considered to be appropriate behavior are discussed using examples and hypotheticals.

iii. Google strongly discourages employees from involving themselves in relationships with colleagues that they manage or report to, or if there is any question whether one individual has power over the other.

iv. Google has moved employees to different roles in the event that a relationship between a supervisor and subordinate does occur.

v. Additionally, Google provides regular training to executives in order to best address the topic.

b. Some organizations now opt for 'love contracts' that set out a clear code of conduct and require employees to disclose their status as a couple to HR.

i. These 'love contracts' entail having the dating parties sign a contract stating that the relationship is consensual, explaining what the parties should do if the relationship ever ceases to be consensual, and affirms that the employees are aware of the company's policies on sexual harassment and workplace ethics and understand the consequences of failure to follow those policies.

ii. These 'love contracts' protect companies from future claims that may be brought by the parties involved in the relationship against the company.

III. CHALLENGES OF SOCIAL MEDIA IN THE WORKPLACE

A. Overview

1. Hackers and online scams can result in security and/or data breaches.

2. Outlet for employees to provide negative comments about the employer and/or customers.

B. A previous SHRM article addressing social media and its influence in sexual harassment allegations provided "Social media is another way employees complain about harassing behavior..."

1. According to a Cigna Vitality Report, the top five social media platforms are YouTube, Instagram, TikTok, Snapchat and Facebook.

2. The majority of us have a Facebook, Twitter, Instagram, Snapchat, LinkedIn, or other social media account on which we post about our lives, thoughts, feelings, and even work.

3. Thanks to social media, we seem to be opening up and freely discussing topics, such as politics, in the public space where we might not have done so even in the recent past.

a. However, this is leading to major issues for employers.

i. What if an employee posts something negative about their employer?

ii. What if an employee posts a company's confidential information onto social media?

iii. What if an employee insults a co-worker or supervisor on social media?

b. If any of those situations occur, it could significantly impact the workplace.

C. This raises the question of whether or not an employer can discipline an employee for something they post on social media.

1. Interestingly, private employees do not have a constitutional right to free speech at work.

a. The First Amendment protects citizens from the government, not from private companies.

2. However, private employers cannot prevent all speech by employees.

a. Speech related to protected concerted activities is protected by Section 7 of the NLRA.

i. Protected concerted activity includes dialogue between co-workers about working conditions, pay rates, or management.

(A) This "concerted activity" is protected by federal labor law.

(B) Employees do not have to be unionized to enjoy this protection.

b. Employees also have the right to talk about possible unlawful conduct in the workplace.

i. Under various federal laws, employees may complain about harassment, discrimination, workplace safety violations and other issues without being retaliated against by an employer.

3. Employees have the right to:

a. Discuss terms/conditions of employment (wages, hours, policies, complaints).

b. Criticize employer's labor practices and treatment.

c. Discuss terms and conditions of employment with third parties, including the media.

4. Where the employer has a legitimate protectable interest, employees' posts are not protected.

a. Such legitimate protectable interests include:

i. Interaction with clients and customers.

ii. Protection of confidential information.

5. Additionally, employees are not protected when they express racist, sexist or other discriminatory comments.

6. Legal Actions to identify anonymous posters.

a. Glassdoor provides a platform for people to anonymously post their opinions about their jobs.

i. If legal action is taken to try and determine who (User) wrote a review, Glassdoor fights for the User's First Amendment Right to post anonymous opinions.

ii. Glassdoor's website provides a list of their "Greatest Hits" in defending their users' anonymity.

D. Policies and practices to manage employee behavior on social media.

1. Social media policies.

a. The best way to combat issues presented by employees' social media usage is through a comprehensive social media policy with sufficient examples, distributed at the commencement of employment, and enforced consistently.

i. Social media policies should:

(A) Include a definition of what the term "social media" includes.

(B) Define what is and isn't proper use of social media.

(C) Include a disclaimer for speech protected by law to comply with the National Labor Relations Act.

(D) State that the employee is solely responsible for what they post online.

(E) State that inappropriate posts that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject the employee to disciplinary action up to and including termination.

(F) Include a "no social media while at work" provision.

(G) Include an anti-retaliation provision for reporting violations.

(H) Include a requirement that employees include a disclaimer on their social media stating that any views expressed are not the views of the company.

2. Confidentiality Policies

a. Companies should update their confidentiality policies to include prohibitions against employees sharing confidential company information on social media.

3. Open-Door Policy

a. Employers should encourage open communication between all employees and management at work.

i. Encourage employees to bring complaints to supervisors or HR, instead of posting on social media.

4. Tips:

a. Supplement your policy with training. Having a policy isn't enough. Company owners, managers, and supervisors should be trained on the policy and informed of what can happen when they use social media to vent about an employee or a workplace situation.

b. Discourage supervisors (or any other higher-ups) from being Facebook friends, becoming Twitter followers of, or connecting via social media with their subordinates.

c. Prohibit employees from engaging in social media activities during compensable work time.

d. Address complaints made on social media the same way you would respond to any other complaint about inappropriate workplace conduct. That means HR should thoroughly investigate the allegations and respond by taking proper corrective action.

E. Monitoring of employees' social media.

1. There are a handful of approaches that employers commonly use when monitoring their employees' use of social media:

a. No Monitoring: Employee can access all social networks on company or personal devices with no monitoring or supervision.

i. The riskiest approach for an employer is to allow employees full, unmonitored and unsupervised access to all social networks.

ii. In this case, an employer is exposing their business and employees to a myriad of risks associated with social media activities including strategic, operational, legal, financial and reputational risks.

b. "Unofficial" Monitoring: Many employees, managers or leaders will connect with each other on LinkedIn or Facebook, "outside the office." This can be construed as "monitoring" their teams' personal social media activities.

i. If this is the case, make sure employees are aware of and consent to any monitoring that is taking place of their personal social media profiles.

c. Intentional Monitoring of Specific Networks: Allow and monitor employee use of "approved" social networks while monitoring employees' personal and work-related use of social media. Embedded spyware and monitoring software which tracks viewing history assists in monitoring employee social media.

i. Intentional monitoring should include processes to gain monitoring consent from employees, approvals of specific social networks for use by employees, methods for employees to request an exception, and letting employees know they are being monitored.

F. Employee engagement is reduced through use of social media.

1. A July 2023 Forbes article reports the average worker spends more than 2 ½ hours per day using social platforms. Scrolling results in decreased productivity and employee disengagement.

2. Social media use exposes employers to cybersecurity issues, harassment claims, negative exposure, potential lost productivity, legal violation and wage and hour issues.

G. Other claims an employee might bring for adverse employment actions related to social media posts.

1. Discrimination.

a. If an employee posts something about their religion, sexual orientation, ethnicity, or any other protected characterization and is later fired, the employee may claim they were fired for an illegal reason.

i. For example, if an employee posts something about their religion on Facebook and is later fired, the employee may claim that they were fired by their employer because of their religion (and not the actual post), which would be an illegal reason for termination under Title VII.

2. Invasion of privacy.

a. An employee may claim that an employer invaded their privacy by checking their social media accounts.

i. However, since social media activity is available for public viewing, it is a very hard cause of action for employees to win on.

3. Michigan has enacted the Internet Privacy Protection Act.

a. Prohibits employers from:

i. Requesting an employee or an applicant for employment to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

ii. Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for employment for failure to grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.

4. State laws protecting employee's off duty conduct.

a. Michigan does not have a specific state law that protects employee off-duty activities and behavior.

b. However, some states like California, Colorado, New York, Nevada and North Dakota, have laws which protect the legal off-duty conduct of employees.

i. Employers in those states may be prevented from disciplining or terminating an employee for off-duty conduct that was legal, even if the message of the conduct was contrary to the values of the employer.

IV. CANNABIS IN THE WORKPLACE

A. Cannabis use in the workplace results in safety risk, decreased productivity, litigation, increased worker compensation and unemployment compensation claims, and high turnover. The THC in marijuana affects reaction time, depth perception and coordination, as well as other motor skills. THC also creates sensory distortion.

1. Statistics

a. In 2021, the National Safety Council conducted a survey specific to the impact of cannabis in the workplace. The focus group consisted of 500 employers and 1,000 employees.

i. Of the employees surveyed, 1/3 reported observing cannabis use during work hours.

ii. Observation of cannabis use in safety-sensitive positions was greater than those in non-safety-sensitive positions.

iii. With respect to employees who may be too impaired to work, only 42% reported feeling comfortable reporting the impairment to a supervisor while 71% of employers believed the employees would feel comfortable reporting the impairment to a supervisor.

b. A 2022 survey by Substance Abuse and Mental Health Services Administration (SAMHSA), conducted in-person or via the web, provides statistics re illicit drug use and substance use disorders.

i. Marijuana was the most commonly used illicit drug.

(A) Adults 18-25: 38.2% or 13.3 million people;

(B) Adults 26 or older: 20.6% or 45.7 million people.

ii. Substance Use Disorders:

(A) Adults 18-25: 27.8% or 9.7 million people;

(B) Adults 26 or older: 16.6% or 36.8 million people reported a substance use disorder.

c. National Institute of Health – National Institute on Drug Abuse: Cannabis Research Report July 2020. Studies suggest certain links between marijuana use and adverse consequences in the workplace (ex: injury or accidents).

i. A study conducted with postal workers, comparing workers who tested positive for marijuana on the pre-employment drug screen (urinalysis) versus workers who tested negative, found:

(A) 55% more industrial accidents;

(B) 85% more injuries; and

(C) 75% greater absenteeism.

d. In 2022, Quest Diagnostics reported on urine drug tests and occurrence of positivity rates of marijuana.

i. In a sample based on more than 6 million urine tests performed in the general US workforce, positive rates continue to climb.

(A) 2017 – 2.6%

(B) 2020 – 3.6%

(C) 2021 – 3.9%

B. Work policies

1. Miscellaneous facts and statistics

a. Written policies are significantly higher in states where cannabis is illegal than states where cannabis is legalized. A written policy addressing cannabis exists in less than half of organizations.

b. According to a 2022 report from the US Bureau of Labor Statistics, 16% of private-sector employers test for drugs and/or alcohol.

c. Drug testing for marijuana face hurdles based on the evidence of the days and weeks the drug can stay in one's system. There is no marijuana drug test currently available to determine an employee's sobriety at work.

2. Policy recommendations

a. Establish a succinct policy to prevent impairment while also offering employee support.

b. Include language detailing cannabis used both during work hours and after-work.

c. Define tolerance policies for cannabis use (ex: consider zero-tolerance for safety-sensitive positions).

d. Review of compliance specific in application of federal vs state law.

i. Requirement;

ii. Expense;

iii. Employee response;

iv. Retaliation.

3. Implement cannabis education and training

a. Proper training for management and supervisors including how to recognize signs and symptoms of impaired workers and detailed steps for response.

i. Changes in physical appearance;

ii. Changes in behavior patterns;

iii. Changes in job performance.

b. Educate all staff regarding safety risks of cannabis.

c. Regularly disseminate internal office communication which detail government regulations, internal policies and appropriate disciplinary action.

i. Define use.

ii. Define possession.

iii. Establish protocols for post-accident testing.

d. Support for employees with a SUD, including formal assistance programs such as EAP and referrals for local resources.

C. Legal definitions and precedents

1. Unemployment Insurance Agency (UIA) claims.

a. Disqualifiers to claims

i. Positive drug test for marijuana was caused by the ingestion of marijuana at the workplace

ii. Discharge is based on the fact that the claimant was under the influence of marijuana at the workplace

iii. Inability to demonstrate that he or she is a qualifying patient who has been issued and possesses a registry identification card under the Michigan Medical Marijuana Act.

b. Hurdles

i. As the Medical Marijuana Act does not define "under the influence,", investigations need to demonstrate the use of the medical marijuana placed the safety of people and/or product at risk.

2. Michigan Civil Service Commission Policy: This policy and regulation established the standards as they relate to authorized testing.

a. Prohibited activity includes consuming drugs while on duty; reporting for duty while under the influence with a prohibited level of drugs; and refusing to submit or interference with required drug test and sample.

b. Types of testing

i. Pre-appointment testing;

ii. Reasonable suspicion testing;

iii. Follow-up testing; and

iv. Defining testing of new hires and conditional offers of employment.

V. CONCLUSION

A. Consensual workplace relationships are a common issue that employers need to handle with care. Although they are not illegal, workplace relationships can lead to negative effects in the workplace and plethora of legal issues for employers. Employers should manage workplace relationships with a publicized, comprehensive, and tailored Fraternization Policy.

B. With the pervasive presence of social media, employers should have policies that address employee behavior on social media and are careful not to infringe on employee rights under the NLRA.

C. Given the current limitations to identify when an employee may have used cannabis, employers best way to test in its current application cannot determine when cannabis was last used. Employers can only get ahead of this issue through the solid work place policies.

VI. POLICY TEMPLATES:

A. Disclaimer: These policies are for informational purposes only and do not constitute legal advice.

Dating and Relationship Agreement and Acknowledgement of Harassment-Free Workplace Policy

It is (the "Company's") policy to provide an equal opportunity in hiring, employment, promotion, compensation and all other employment-related decisions without regard to race, color, being over the age of 40, religion, sex, marital status, national origin, citizenship, veteran status, sexual orientation, being a qualified person with a disability; or any other basis set forth in the applicable laws or regulations relating to discrimination in employment.

The Company does not tolerate unwelcome or offensive conduct or conduct that creates a hostile work environment that is in any way based upon or related to a person having any of the characteristics described above.

In addition, the Company does not tolerate sexual harassment, which is a form of unlawful discrimination. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

a. submission to such conduct is made, explicitly or implicitly, a condition of an individual's employment or advancement;

b. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

c. such unreasonable conduct interferes with an individual's work performance or creates an intimidating, hostile or offensive working environment.

We, the undersigned employees, have entered into a personal relationship with each other. We have read and understand the Company's Harassment-Free Workplace Policy, part of which is outlined above, and we agree as follows:

1. Our relationship is entirely voluntary.

2. Our relationship will not have a negative impact on our work.

3. We will not engage in any public displays of affection or other behavior that creates a hostile work environment for others, or that makes others uncomfortable.

4. We will act professionally towards each other at all times, even after the relationship has ended.

5. We will not participate in any Company decision making processes that could affect the other's pay, promotional opportunities, performance reviews, hours, shifts, or career.

6. We will inform the Company immediately if the relationship ends, or if the conduct or advances of the other person are no longer welcome.

7. We agree that, if the relationship ends, we will respect the other person's decision to end the relationship and not pursue that person or seek to resume the relationship or engage in any other conduct towards the other person that could violate the Harassment-Free Workplace Policy.

8. We understand that, after the relationship ends, one of us may choose to date others in the workplace, and that we will not react with jealousy or spite or in any manner that is less than professional with respect thereto.

Dated this _____ day of _____, 20_____.

Employees: _____ _____

Social Event Policy

Purpose

The purpose of this Social Event Policy (the "Policy") of . . . (the "Company") is to provide guidance on the expectations of the Company regarding "Social Events".

Definition

"Social Events" refer to any Company mixer, party, activity, or event, whether conducted on or off Company premises. Social Events are designed to improve Company morale and strengthen relationships. Alcohol may be served at Social Events.

Social Events are Strictly Voluntary

Your attendance at Social Events is strictly voluntary and on unpaid time. Participating in Social Events and/or consuming alcohol (if served) is optional. Employees will not be subject to any disciplinary actions or repercussions for failing to attend or participate in Social Events.

Appropriate Decorum

When attending Social Events:

1. Be responsible;
2. Conduct yourself in an appropriate business, non-impaired, manner;
3. Consume alcoholic beverages only in moderation;
4. The Company will make transportation arrangements for employees who request a ride;
5. If you become impaired, ask the Company to provide a ride;
6. You will not be subject to repercussions if you request a ride; and
7. Stop drinking alcohol several hours before you intend to drive or request the Company to make transportation arrangements.

Updates

From time to time, the Company may update this Policy in its sole and exclusive discretion.

Acknowledgment

I have read this Policy and understand its contents. I agree to abide by this Policy and understand that my conduct will be governed by this Policy.

_____

[Employee Signature]

_____

[Print Name]

_____

[Date]