A Publication of The Cavanaugh Law Firm, LLC

THE JOB DESCRIPTION

What Employers Should Learn from New EEOC Statistics

The EEOC reports that the number of charges filed last year was at an all time high, and represents a 7% increase from the year before. The most common charges are retaliation, race, and sex. These statistics should remind employers of the real risk of an EEOC charge arising from a termination or a hostile work environment. Managing these risks is as important as ever. Furthermore, the fact that retaliation is the number one type of charge reminds us that the employees who complain about harassment or discrimination or otherwise assert their rights have a heightened sensitivity to being treated poorly as a result. Employees who complain or assert their rights are not immune from discipline or termination – but they are protected from discipline, termination, or any other adverse treatment *because of* their legally-protected complaint or assertion of rights. Disciplining, correcting, or terminating an employee who has complained about perceived discrimination or harassment, encouraged someone else to do so, participated in an investigation into alleged discrimination or harassment, or otherwise engaged in legally-protected conduct warrants a heightened standard of care in dealing with that employee since the risks are greater to manage. Careful planning and documentation are key to demonstrating that your decisions are motivated solely by legitimate business reasons.

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In This Issue:

The Cavanaugh Law Firm, LLC is committed to your company's success. We are available to provide you knowledgeable advice on the full range of labor and employment law issues and to defend your company and its managers in lawsuits and agency proceedings. If you have any questions about the contents of this newsletter or about any issue affecting your company, please contact us.

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Update on the "Facebook Case"

Last month, the NLRB announced that it had reached a settlement with AMR, an employer it prosecuted because AMR allegedly discharged an employee after the employee posted a "negative remark" about her boss on Facebook using her home computer. According to the NLRB, the settlement requires AMR to:

- Revise its Internet policy to allow workers to discuss wages, hours and working conditions with co-workers outside the workplace; and
- Refrain from disciplining or discharging employees for engaging in those discussions.

AMR also reached a separate, private settlement with the employee who, among other things, called her boss a "scumbag as usual" on her Facebook page.

It is clear that the NLRB's position allows employees to discuss their working conditions, even critically, on social media. What remains unsettled, however, is how negative an employee's online comments must be before he or she loses the NLRA's protections.

In any event, the AMR/Board settlement of the "Facebook Case" is a cautionary tale for employers to review and, if necessary, to revise their Internet and social media policies so that they are compliant with all applicable laws, including the Act.

Social Media Guidelines

***Do not** prohibit employees from criticizing the company, their wages, or conditions of their employment.*

***Do** limit the amount of time employees may spend on their personal social media site while they are on the clock.*

***Do** monitor your company's sites daily to delete any unnecessarily negative comments and to keep the content updated.*

Missouri Legislative Update

Two bills that the Missouri Legislature just sent to Governor Nixon would mean a big victory for employers if signed into law. Courts have steadily enacted pro-worker measures to increase protections under the Missouri Human Rights Act and to make it easier for plaintiffs to obtain large verdicts. These bills would reign in that expansion and bring the Missouri Human Rights Act more in line with federal law. Among other things, these bills would cap the amount of emotional distress and punitive damages available to a plaintiff, do away with individual supervisor liability, and raise the bar for a plaintiff to prove unlawful discrimination in court. We will keep you updated on the Governor's action and the outcome of these important bills.

Reducing the Legal Risks of a Reduction in Force: to WARN or not to WARN?

Some companies are facing the difficult decision of whether to lay off large numbers of employees, or close entire divisions. What legal risks must be considered when taking such actions?

Most employees are at-will, which means employers are not required to provide employees with notice of layoff. A notable exception involves large layoffs. The federal Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. §2102 *et seq.*, requires qualified companies to provide employees written notice at least 60 days before a large layoff or plant closing.

The purpose of WARN is to establish a bridge from one job to another. The employees' unemployment benefits would support this bridge, but Congress was concerned that if a large company in a community laid off a majority of its workforce without warning, the local community and its families would be devastated.

Under WARN, a company must have more than 100 full-time employees or employ 100 or more employees who work at least a combined 4,000 hours per week and plan to lay off at least 50 employees at a single site of employment. Additionally, state law and a collective bargaining agreement may provide additional protections to employees. For instance, Illinois's WARN requires companies with only 75 employees to provide written notice of layoffs or closings.

If a company meets the initial employee threshold requirement for WARN notice, it must provide notice to the following employees, who are protected under WARN:

- Employees who are terminated or laid off for more than 6 months or who have their hours reduced by 50 percent or more in any six-month period as a result of the mass layoff or plant closing;

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- Employees who may reasonably be expected to experience an employment loss as a result of a proposed mass layoff or plant closing;
- Employees who are on temporary layoff but have a reasonable expectation of recall (this includes employees on medical, maternity, or other leave); and
- Part-time employees.

For plant closures, a company needs to provide notice to employees when it:

- Permanently or temporarily closes a business operation that involves at least 50 employees at a single site;
- Lays off 500 or more employees at a single site for a 30-day period or lays off 50 to 499 employees when such layoffs constitute 33% of the workforce at that site;
- Believes the layoff will be less than six months, but it extends beyond the 6 months; or
- Reduces the hours of 50 or more employees by 50% for each month in a six-month period.

Obviously the decision to lay off a large number of employees or to eliminate an entire department is a difficult business decision. A company should also ensure it does not violate WARN when it takes action.

Sir Thomas More
Patron of Lawyers

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EEOC Discusses Use of Unemployment Status in Applicant Screening

The EEOC recently held a public meeting to discuss the employment practice of excluding individuals from applicant pools because of their current unemployment status. Noting that some employers are using unemployment status to disqualify applicants in a way that could have a disparate impact on protected classes, the EEOC cautioned employers that automatic rejection of applicants based on current unemployment status could constitute unlawful discrimination in certain situations. Unemployment status is not a protected class under federal laws the EEOC enforces. However, employment practices such as applicant screening mechanisms that have a disparate impact on groups that those laws protect can be unlawful.