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THE JOB DESCRIPTION

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In This Issue:

Recent NLRB Decisions Challenge At-Will Disclaimers and May Impact HR Investigations

Earlier this year, the National Labor Relations Board ("NLRB") held that mandatory arbitration agreements requiring all employment disputes to be resolved through individual, bilateral arbitration violate the National Labor Relations Act ("NLRA") because such agreements impermissibly restrict employees' rights to engage in "concerted action for mutual aid or protection." Although some courts have already rejected that holding, two recent pronouncements call into question additional, commonly-used and accepted employment practices after finding they also had a "chilling effect" on employees' rights to engage in protected, concerted activity. Even though it remains to be seen whether these decisions will survive full NLRB and/or appellate court review, their rationale applies to union and non-union workplaces, and both decisions are worth reviewing now for the impact they may have on employer practices in these and other areas.

At-Will Disclaimers

Most employee handbooks incorporate acknowledgements of at-will employment. Offer letters typically include strong at-will language as well. Some employer policies even indicate that the at-will relationship can never be amended and cannot be changed, unless the owner of the company signs a written contract with the employee. Despite this common practice, an NLRB judge held this year that such language violates the NLRA because employees would reasonably understand it to limit their ability to alter the at-will arrangement through collective bargaining or other concerted activity.

Continued on page 2

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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Confidentiality in HR Investigations

Individuals conducting internal HR investigations routinely ask employees not to discuss the matter under investigation with coworkers in order to protect the investigation's integrity and the privacy of the parties involved. Such a confidentiality policy may also be repeated in employee handbooks or policies. But the NLRB ruled that a blanket policy requiring employee confidentiality in the course of an HR investigation violates employees' rights to engage in concerted activity under the NLRA. In other words, NLRB said employers cannot have a policy that keeps employees from talking to one another about problems in the workplace.

Under this decision, employers can still ask employees to keep quiet about investigations, but only if they first establish that confidentiality is justified by "legitimate business needs" that outweigh the employees' NLRA rights. According to the NLRB, factors to consider in whether a confidentiality instruction is warranted include (1) whether any witnesses need protection, (2) whether there is any risk of testimony being fabricated or evidence being destroyed, or (3) if there is a need to prevent a cover-up.

An employer can still request employees to keep the details of an investigation confidential, but the employer should be able to back up its request with specific reasons, on a case-by-case basis.

Conclusion

What's next? These most recent pronouncements are further examples of the NLRB's expanding employees' rights under Section 7 of the NLRA, which has already affected social media policies. Union and non-union employers should be on the watch for continued efforts by the Board to redefine and expand employees' NLRA rights.

New Forms for Background Checks Required by January 1, 2013

Three essential forms required by the federal Fair Credit Reporting Act ("FCRA") used in the background screening process must be modified by January 1, 2013.

The three forms at issue are:

- A Summary of Your Rights Under the Fair Credit Reporting Act
- Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA
- Notice to Users of Consumer Reports: Obligations of Users Under the FCRA

Each of the three notices is required to be used if an employer uses a third party (such as the Highway Patrol, a credit reporting agency, or a pre-employment screening company) for background checks of employees or applicants.

The changes are the result of the creation of the federal Consumer Financial Protection Bureau as part of the Dodd–Frank Wall Street Reform and Consumer Protection Act, which was signed into law in 2010. This change underscores that background screening and evaluation of those screening results is increasingly subject to regulation, litigation, and legislation on both the state and federal level. Employers should follow the FCRA's procedures carefully and avoid the appearance of unlawful discrimination when rejecting applicants based on the results of background checks.

Can an Employer Force an Employee to Go Home Sick?

Employers sometimes struggle with absenteeism due to sick employees. On the other hand, what about employees who show up to work with symptoms of an illness? Can the employer send those sick employees home? Must the employer send those sick employees home?

An employer can require a sick employee to go home because of hacking, sneezing, runny nose, congestion, coughing, and/or vomiting. If we are talking about a common cold, flu, or seasonal allergies, then the company has the right to manage its workforce by excluding sick employees, even if they are ready, willing, and able to work. Just because an employee is physically able to perform the job does not mean the employer must allow it. An employer can control the safety of its workplace and is required by OSHA and state workers' compensation acts to provide a safe workplace for its employees. This does not mean that allowing an employee to work near a co-worker with a cold would violate OSHA or other applicable law, but employers should be guided by those laws' principles of creating and maintaining safe and healthful workplaces. Absent some strange circumstance, catching a common cold or flu from a co-worker will not be serious enough to be covered by workers' compensation laws or to violate OSHA.

The law usually does not require giving employees paid time off, so employers can make their own rules on whether an employee must use sick or vacation pay if sent home under these circumstances. The employer is allowed to charge the employee's sick or vacation pay for the time missed. If that employee is out of paid time off, the employer cannot deduct his or her pay if the employee is exempt but can decide not to pay him or her for the missed time if the employee is non-exempt.

If someone is sick enough to qualify for protection under the Family and Medical Leave Act or the illness causes a disability covered by the Americans with Disabilities Act, then this straightforward advice does not apply, and the employer will need to dialogue with the employee further.

Pregnant Workers Fairness Act Introduced in Congress

The Pregnant Workers Fairness Act, recently introduced in the U.S. Senate, would require employers to make reasonable accommodations for pregnant employees, job applicants, and those with limitations related to childbirth. Modeled off of the Americans with Disabilities Act, the PWFA would create nondiscrimination and anti-retaliation protections for employees who request reasonable accommodations related to pregnancy, childbirth, and medical conditions arising from childbirth. It would also prohibit an employer from requiring a pregnant employee to leave her job if she could perform her job with a reasonable accommodation. The same rights and remedies available under Title VII would also apply to the PWFA. The EEOC would be charged with implementing and enforcing this law.

Using Interns: is it Legal?

A shaky economy and poor job market may tempt employers to use "free labor" – interns who are willing to work for free to obtain on-the-job experience. While this practice may seem like a "win-win," it is dangerous for employers. The federal Fair Labor Standards Act ("FLSA") and many state laws heavily regulate the use of interns. If an individual really acts like an employee – even if he or she is called an "intern" – a court or the U.S. Department of Labor will consider that individual an employee who must be paid at least minimum wage and overtime pay for all time over 40 hours in a workweek. Penalties and attorneys' fees are additional risks.

The following is a brief guide to the use of interns under federal law. Keep in mind that these are only general guidelines and that state and local laws may be more restrictive. Interns, whether trainees or students, are not employees under the FLSA only if all six of the following criteria are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

When educational or training programs are designed to provide students with professional experience in the furtherance of their education and are academically-oriented for the benefit of the students, the students will not be considered employees of the organization, provided the six criteria are met.

Establishing all six criteria can be difficult. The fourth criterion is especially problematic. The Department of Labor will ask whether the productive work performed by the interns is offset by the burden to the employer from the training and supervision provided. If it is not offset – if the interns provide productivity to the employer – then the interns will be deemed employees. As a practical matter, this may mean that interns can only perform busy work or shadow regular employees.

Employers considering adopting an internship program must be self-critical and ask themselves what is motivating them. If the answer is that having "free labor" will provide an immediate boost to the bottom line, the program is likely illegal. On the other hand, if the program is truly designed to further educational objectives and there is no immediate benefit to the employer, it probably is lawful under the FLSA.

An employer can avoid these legal risks by paying interns minimum wage for all time worked (and an additional hourly amount of ½ minimum wage for all time worked over 40 hours in a workweek).

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