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Can You Say That [in an Employee Handbook]?

A well-written Employee Handbook is a crucial tool for employers. It helps employees to understand expectations, benefits, privileges, and consequences. It helps management and HR to act consistently, over time, across departments, and across locations. But, a handbook can pose problems for the employer if it outlines:

1. A policy that is not adhered to in practice; or
2. A policy that is not compliant with state or federal law.

Sounds obvious, right? But, those two problems arise all the time. Let's quickly talk about the first problem and spend a little more time on the second as the National Labor Relations Board ("NLRB") recently published some new guidance on what it considers lawful and unlawful workplace rules.

Policies vs Practice

Often, when an employer drafts or redrafts a handbook, they will think about the policies they aspire to follow. They think progressive discipline is the best approach. Or, a mid-year and year-end performance appraisal process should be followed. They include their aspirational practices in the handbook. But, for a myriad of reasons, those may not be feasible for the organization to actually execute against on a consistent basis. So, progressive discipline isn't issued. Or the mid-year review isn't delivered. When that employee is terminated for performance and brings a claim against the company, he/she will say "Look here, at the handbook. It says I should have received these, and I didn't. I was treated unfairly." And, that can be a compelling argument. So, as you draft your handbook, really think about whether the policy your writing can and will be consistently implemented. If not, consider leaving it out or rewriting it to make implementation more successful.

Compliant with State and Federal Law

For multi-state employers, drafting a compliant handbook can be challenging because of the differing (and ever-changing) state (and local) laws: sick leave, family leave, weapons, smoking, background checks, deductions, payment of wages, final pay, to name just a few. The employer must either draft multiple versions of the same policy, or, adopt the most generous policies for all employees – which can be fiscally and operationally burdensome.

While it doesn't solve the multi-state conundrum, the NLRB recently published a memorandum that provides employers a quick reference list of policies that are and are not compliant with Section 7 of the National Labor Relations Act ("NLRA"). Remember, the NRLA applies to all employers, not just unionized workforces.

Lawful Policies:

- Civility Rules
- No-Photography Rules and No-Recording Rules
- Rules Against Insubordination, Non-cooperation, or On-the-job Conduct that Adversely Affects Operations
- Disruptive Behavior Rules
- Rules Protecting Confidential, Proprietary, and Customer Information or Documents
- Rules against Defamation or Misrepresentation
- Rules against Using Employer Logos or Intellectual Property

- Rules Requiring Authorization to Speak for Company
- Rules Banning Disloyalty, Nepotism, or Self-Enrichment

Unlawful Policies:

- Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions
- Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer

This isn't new news on the unlawful policies. The NLRB has long prohibited such policies/practices. But, the memo provides much needed guidance on how the NRLB will interpret the above-listed lawful policies.

Consider the NLRB's memo a good excuse to review and redraft your handbook to make sure it accurately describes your practices and is compliant with the law. We draft handbooks for multi-state employers everyday and would be happy to help with yours.

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Pregnancy Discrimination Is An Epidemic, According to the New York Times

On June 15, 2018, the New York Times published a piece highlighting the prevalence of pregnancy discrimination in the workplace. Discrimination that, according to the Times, extends into motherhood. Interestingly, this is coming as employers are frequently seeking to offer extended parental leave and creating custom nursing rooms as a means of attracting employees. So, what accounts for the disconnect?

According to the Times, employers continue to maintain incorrect stereotypes related to women's ability to work and their commitment to the job once pregnancy and children are in the picture. This in turn leads to less professional growth, slowed wage increases, and dead end career prospects. In more physical positions, pregnant women often struggle to obtain accommodations for their pregnancy and face termination if they complain.

As the media casts a further spotlight on sex-based discrimination, it is important for employers to remember that the Pregnancy Discrimination Act of 1978 amended Title VII of the Civil Rights Act of 1964 to "prohibit sex discrimination on the basis of pregnancy," and the Act covers discrimination "on the basis of pregnancy, childbirth, or related medical conditions."

In 2015, the U.S. Supreme Court clarified that the Pregnancy Discrimination Act also requires employers to provide accommodations to pregnant employees in certain situations. In *Young v. UPS*, the plaintiff worked for UPS as a pickup and delivery driver. When she became pregnant, her doctor restricted her from lifting more than 20 pounds during her first 20 weeks of pregnancy and 10 pounds after that. UPS informed Young that she could not work because the company required drivers in her position to be able to lift parcels weighing up to 70 pounds. As a result, Young was placed on leave without pay and lost her employee medical coverage. Important to the case was that UPS had a policy of accommodation other non-pregnant drivers. At the time, UPS provided light duty accommodations to drivers who were injured on the job; drivers who lost their Department of Transportation certifications; and drivers who suffered from a disability under the Americans with Disabilities Act.

The Supreme Court held that if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer must treat her in the same way as it treats any other temporarily disabled employee. In short, this means that if an employer offers light duty to employees injured on the job or those with an ADA protected disability, they must offer offer similar accommodation to pregnant employees with medical restrictions who request it.
Specifically, the Court adopted a three-step approach:

1. An employee generally can challenge a light duty program that excludes pregnant employees.
2. The employer may seek to justify its exclusion based on a "legitimate, nondiscriminatory reason."
3. The employee can challenge the employer's reason and reach a jury to consider her claim if she provides sufficient evidence that the company's policy imposes a significant impact on pregnant workers and its reasons are not sufficiently strong to justify the burden.

In effect the Court established a balancing test, though it offered little in the way of guidance as to what a "legitimate employer interest" might be. It did say that any employer's claim that adding pregnant workers is less convenient or more expensive would not qualify.
In short, this means that if your organization has a light duty program that excludes pregnant employees, you should assume it may be challenged, and if so, that the case likely will end up before a jury.

There are some important things to note about the limitations of the *Young* ruling – most notably, it does not require employers to offer light duty to all pregnant employees. Rather, it is only those with a medical restriction that requires light duty. However, it is also important to consider that the Pregnancy Discrimination Act is not the only law that requires employers to provide accommodations to pregnant women. Impairments resulting from pregnancy (for example, gestational diabetes or Preeclampsia) may be disabilities under the Americans with Disabilities Act (ADA). In those cases, employers must provide a reasonable accommodation (such as leave or modifications that enable an employee to perform her job) for a disability related to pregnancy, absent undue hardship (significant difficulty or expense).

It is also important to be aware that a growing number of states are passing Pregnant Worker Fairness Acts (most recently, the Massachusetts Pregnant Worker Fairness Act). These laws require employers to provide accommodations for **all** pregnant employees, not just those with medical conditions. These laws also extend to pregnancy related conditions, such as breastfeeding. It is notable that in states where pregnancy accommodation laws have passed, there has in fact been a decrease in the number of pregnancy discrimination claims filed, so employers can expect states to continue to pass these laws.

With the growing focus on sex-based discrimination in all forms, employers should consider reviewing their policies and practices to ensure they avoid a pregnancy discrimination claim.

Bargaining On Beacon Hill

It is not on par with the Great Compromise of 1787, but the "grand bargain", which sped through the Massachusetts legislature yesterday, seeks a middle ground between special interests on the issues of minimum wage, paid leave, and the sales tax. The bill lands on Governor Baker's desk today, and if executed, would reportedly:

1. Raise the minimum wage to $15.00 per hour over the next by January 1, 2023, not thereafter indexed to inflation;
2. Raise the tipped minimum wage to $6.75 per hour over the next by January 1, 2023;
3. Phase out time-and-a-half pay for Sunday and Holiday work by January 1, 2023;
4. Afford covered employees paid leave time of up to 12 weeks for family leave, 20 weeks for medical leave and up to 26 weeks to cover for a service member or 26 weeks combined total in a year starting January 1, 2021; and
5. Establish an annual sales tax holiday in August.

Various special interest groups have championed ballot questions on these issues that are set to be voted upon by the public in November. The bill before the Governor will give each group some of what it was seeking, but not all.

Raise Up America is pushing for a minimum wage of $15 per hour by 2022, thereafter indexed to inflation, and a tipped minimum wage of $9.00 by 2022. Various union groups are seeking 16 weeks of paid family leave, 26 weeks of paid medical leave, or an aggregate of no more than 26 weeks of paid family and medical leave per year starting July 1, 2020. The Retailers Association of Massachusetts supports a ballot question that would decrease the Commonwealth's sales tax to 5% and create a tax-free weekend. The impact of this proposed law on these ballot initiatives remains to be seen.

The paid leave bill will reportedly include some other important provisions:

1. Covered workers whose regular pay is less than 50% of the MA average weekly pay, would receive 80% of their average weekly wages while on leave, but those earning more would receive only 50% of their average weekly wages up to $850/week max.
2. The bill would create a trust fund into which employers (of 25 or more employees) and employees would contribute funds for medical leave, while employees alone would contribute the funds for family leave. The contribution rate will be adjusted periodically to ensure that the trust fund maintains 140% of the prior year's payout.
3. Creates a Department of Family and Medical Leave for added red tape…I mean to implement the law.

If the Governor executes the Bill, we plan to issue a Newsletter with more detailed information about the law. So keep your eyes on your Inbox…

When Concern for Safety Becomes Discrimination

This week, the U.S. Equal Employment Opportunity Commission ("EEOC") announced that it is suing a Washington-based employer for terminating an employee who has epilepsy. The EEOC alleges that the company discriminated against the employee on the basis of her disability in violation of the Americans with Disabilities Act ("ADA").

According to the EEOC's press release, when the employee "disclosed that she has epilepsy to her direct supervisor, he… unilaterally concluded without further inquiry that she could not safely work at heights – even though [her] epilepsy was well controlled on medication, she had not requested any accommodation, and was able to work without restriction."

The EEOC's release paints a picture of a company that may not have had the best intentions. But, even companies with good intentions struggle to balance employee rights against safety concerns. The struggle is real and the answers aren't black and white. So, if an employee's disability causes concern for his/her safety or the safety of others, what should an employer do?

1. Talk to the employee.
2. Obtain additional information, if necessary.
3. Perform an individualized assessment.

Talk to the Employee & Obtain Additional Information

It is permissible for an employer to make inquiries and/or require a medical examination to evaluate whether an employee is: a) able to perform the essential functions of his/her job; and b) whether he/she can perform the job without posing a direct threat due to a medical condition. The ADA allows inquiries and examinations if they are "job-related and consistent with business necessity." Inquiries and exams that establish A and B, above, would generally be considered job-related and consistent with business necessity.

EEOC guidance specifically tells us: "An employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination."

Perform an Individualized Assessment

The ADA defines direct threat as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." The determination that an individual with a disability poses a direct threat must be based on an individualized assessment of the person's present ability to safely perform the essential functions of the job. In determining whether an individual poses a direct threat, the factors to be considered include:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

EEOC guidance tells us that the determination that a direct threat exists "must be based on objective, factual evidence – not on subjective perceptions, irrational fears, patronizing attitudes, or stereotypes – about the nature or effect of a particular disability, or of disability generally. Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability.

We help our clients navigate the ADA every day. Please reach out if we can assist.