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**Semi-Monthly**

# General Counsel Report

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August 7, 2018

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# Tesla Just Implemented a Strict Attendance Policy, Should You?

Elon Musk has been in the news quite a bit lately. While I'm not in any position to weigh in on his controversial mini-submarine, I am going to do just that on the controversial **attendance policy Tesla just rolled out**.

We work with employers every day to update Employee Handbooks and stand-alone policies, including attendance policies. **As we've discussed before**, well-written and consistently applied policies are crucial tools for employers. Because they follow a specific, prescribed, and generally non-negotiable process, so called "no-fault" attendance policies can an appealing option for employers. Should your organization implement a "no-fault" policy?

**What is a "no-fault" attendance policy?**
A no-fault attendance policy assigns points (also called steps or occurrences) each time an employee commits an attendance-related infraction. If an employee incurs a specific number of points, progressive discipline is automatically issued. When initially drafting a policy, an employer can determine how strict its approach will be. This varies based on:

- The employer's definition of an infraction: For example, Tesla assigns a 1/2 point if an employee is just one minute late or leaves one minute early. That's (obviously) a pretty strict approach. A more lenient employer may choose to not assign any points unless an absence exceeds 15 minutes.
- The correlation of points to discipline: Here again, Tesla's policy is quite strict. It does allow for multiple coachings/verbal warnings before any written documentation is required. But, termination is warranted at 4.5 points. In comparison, some employers' no-fault policies don't call for any discipline until 3 points and termination occurs at or above 9 points.
- The "expiration" of points: Tesla uses a rolling six-month period. Other employers use a rolling 12-month period. This approach is more employee-friendly and rewards corrected behavior. But, it can take away some of the administrative benefits of a no-fault policy and may result in a policy that ultimately fails to correct behavior.

**What are the pros and cons to a "no-fault" policy?**
There are some great advantages with a no-fault attendance policy. They're relatively easy for employees, managers, and HR to understand. While accurate tracking must occur, administration is straightforward. They're generally effective at deterring attendance problems. And, **if properly written to comply with federal and state laws**, they can reduce an employer's risk related to claims of discrimination because such policies mandate consistent treatment of all employees.

As you may have deduced from the bold, red font, that's a big "if." Policies that aren't drafted or implemented to specifically address an employee's right to time off under the FMLA, the ADA, and state-specific leave laws will increase compliance risks rather than decrease them. Policies must be written, and managers/HR trained, to ensure that employees aren't deterred from or disciplined for taking time they're entitled to under the law.

And then, there's the question of employee relations. If attendance is a problem for an organization, what is the most effective way to correct the issue? A no-fault policy might be the best solution. But, employers should consider:

- Vacation/personal time policy: If the employer has one, does it work well? If the employer doesn't have one, could one be implemented to encourage planned rather than unplanned absences?
- Sick time policy: Some states require paid or unpaid sick time. "No-fault" policies can be carefully drafted to comply with the Massachusetts Earned Sick Time law while providing both a carrot and a stick related to good attendance.
- Attendance incentives: Is the carrot more effective than the stick? Some employers provide attendance-based cash bonuses, other perks like extra PTO, or even pizza and ice cream parties.
- Wellness programs: Chronic illnesses, both physical and psychological, impact attendance and productivity.
- Overall morale: Not surprisingly, absenteeism is less prominent in workplaces with good morale and more prominent where employees are dissatisfied.

# It's Not Rocket Science. But, it's the ADA

Managers, HR professionals, and lawyers love it when a course of action is clear, unquestionable, and low risk. I mean, who doesn't love it when you can essentially follow a process flow that reveals a specific outcome to each possibility? **(Speaking of process flow diagrams, here's a diagram I recently created for a client training, that might be helpful to HR and management)** But, when questions arise that involve the ADA, the course of action can be unclear. It may not be rocket science, but it's pretty darn complicated. Today, I cover a couple of real-life ADA-related questions that demonstrate just how complex the ADA can be.

**ADA Scenario 1 – The employee who needs to work a limited schedule.**
A client recently called and explained that an employee was requesting a limited schedule. The employee (who was not FMLA eligible) said she needed to be absent one day a week to attend medical appointments. The employee also indicated that she did not want to exceed a certain number of hours daily, because doing so would jeopardize her ability to collect disability payments.

What does the ADA require of employers? It requires that employers provide reasonable accommodations that will allow the employee to perform the essential functions of her position.

The employee's second request – to limit her hours so that disability payments are not jeopardized – is not a request for a reasonable accommodation. It's not something that, if granted by the company, would allow the employee to *perform her job duties*. So, the employer has no obligation under the ADA to grant this request. The employee's first request – to take time off to attend appointments – does fall under the ADA. The employer must consider: 1) whether daily attendance/full-time work is an essential function of this employee's job; and 2) whether granting the reduced schedule poses an undue hardship on the organization.

There is ample case law that supports the notion that attendance is an essential function of a job. But, this is not always true. There are examples where courts have questioned whether attendance is essential to the specific role. In fact, the Sixth Circuit Court of Appeals just reversed a summary judgement finding for the employer. The appeals court **found** that the evidence did not clearly demonstrate that this specific plaintiff's attendance was essential: there was no degradation in the quality of the department's work, her colleagues were not negatively impacted by her absences, and the employee never received negative performance feedback, even after incurring the absences.

What does this case tell us about the employee's first request? It's a reminder that, when it comes to the ADA, bright-line rules are risky. Rather, requests must be assessed on a case-by-case basis. Attendance may be essential to one role, but not another. It may be essential at certain times of the year, but not others.

**ADA Scenario 2 – The employee who broke his leg.**
Another client recently reached out to ask if they had ADA-obligations related to an employee who broke his leg. As a general rule, a condition is not a disability if it is temporary. A cold, the flu, a sprained joint, and the stomach bug are generally not considered disabilities because they are "temporary, non-chronic impairments of short duration with little or no residual effects." A broken bone can also fall into this category…except when it doesn't. Some breaks may take a long time to heal or may not heal properly and require additional treatment or cause residual impairments. It's in these situations where the broken bone can be a covered disability and where a failure to accommodate can pose compliance risks for an employer. The tricky part is that a broken bone may

initially appear to be a temporary impairment (and therefore not ADA covered) but turn into a disability. And, if the employer hasn't accommodated throughout, it may face an ADA suit. So, as with all things ADA-related, the best approach is to engage in the interactive dialogue with the employee (and his doctor, as appropriate) and focus on the requested accommodation rather than the definition of a disability.

If you have an ADA question, please reach out.

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# How Not to Conduct Background Checks

To the tune of $3.7 million, Target recently settled a lawsuit that alleged the company's criminal background check process was biased against Latinos and African Americans seeking jobs with the retailer.

The applicants were denied jobs because they failed to clear a background check. According to the complaint, job seekers were discounted because of offenses that were not relevant to the positions they were applying for, or for incidents that had occurred years before.

Where did Target go wrong? It appears the applicants were discounted for employment for criminal offenses that were unrelated to the job they would be doing for Target. According to EEOC guidance, to avoid liability, any time an employer uses an applicant's or employee's background information to make an employment decision, regardless of how that information is obtained, the employer must comply with federal and state laws that protect applicants and employees from discrimination. That includes state and federal discrimination laws.

According to the EEOC, any background information you receive from any source must not be used to discriminate. To avoid a discrimination claim, the EEOC advises employers to:

- Apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, if you don't reject applicants of one ethnicity with certain financial histories or criminal records, don't reject applicants of other ethnicities because they have the same or similar financial histories or criminal records.
- Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. This is where Target ran into trouble. In legal terms, the policy or practice has a "disparate impact" and is not "job related and consistent with business necessity."
- Be prepared to make exceptions for problems revealed during a background check that were caused by a disability. Before discounting an applicant because of a problem caused by a disability, allow the person to demonstrate his or her ability to do the job – despite the background information – unless doing so would cause significant financial or operational difficulty.

Finally, state laws may also address the issue of discriminatory background checks. In 2012, the EEOC released **guidance** related to the discriminatory impact of background checks. It is a great place for employers to start when looking into their background check policies.

If you are concerned about your organization's use of criminal background checks, we are here to help.

# Here We Go Again!

The regulations that govern today's workplace are extensive and expanding and reach employers of all sizes and in all industry sectors, particularly in Massachusetts. Congratulations! It seems the rules of the road when it comes to protecting your company's business interests are about to change again.

On Wednesday, July 25, 2018, the Massachusetts Senate voted to approve legislation that would limit non-competition agreements. If the current version of the bill becomes law, then the following would occur:

1. A non-compete restriction could not exist for longer than one (1) year;
2. The non-competition agreement would require consideration from the employer of either a payment of half of the employee's wages during the restricted period or another type of compensation agreed upon between the employer and the employee; and
3. Employers could not enforce non-competition agreements against certain lower wage earning employees, student interns, teenagers or anyone who is laid off.

This bill, like so many before it, appears to seek a compromise position between those who wish to outlaw non-competition agreements and those who champion them as necessary to protect businesses. Unlike Napoleon at "Waterloo" (gratuitous ABBA reference), neither side in this war appears ready to surrender. However, as in years past, this battle over non-competition agreements may be forestalled by the July 31, 2018 end of the Legislative current session.

For those impacted, the progress of the legislation bears watching as it transitions to the House. Only time will tell which special interest will prevail.

If this Senate bill becomes law, there will be a need to review and update existing Restrictive Covenant Agreements. Those Agreements will need to be carefully drafted to avoid the very costly garden leave payments contained within this bill. The lawyers at Foley & Foley, PC assist employers with the implementation of enforceable employments agreements. If you have questions about your company's non-competition agreements, we can help.

# Are Your I-9s In Order? ICE Doubles Enforcement Actions.

In its 2017 fiscal year, U.S. Immigration and Customs Enforcement (ICE) opened a total of 1,716 worksite investigations and initiated 1,360 I-9 audits. Just three-quarters of the way through its fiscal 2018, ICE has **already doubled** its 2017 activity. So far in fiscal 2018, the agency has opened a total of 3,510 worksite investigations and initiated 2,282 I-9 audits.**[1]**

ICE is responsible for enforcing the Immigration Reform and Control Act (IRCA) , which requires that employers verify the identity and work eligibility of all individuals they hire and document both using the Form I-9. Failure to comply with the obligations imposed by the IRCA can result in significant penalties. In FY17, **a privately held Philadelphia-based company** was sentenced to pay $95 million dollars for its failure to comply with immigration law. Given the increased number of investigations and audits, FY18 penalties assessed against employers nationwide are certainly expected to rise.

In its press release addressing its increased actions, the Acting Assistant Executive Director, Derek Benner encourages employers **"to understand that the integrity of their employment records is just as important to the federal government as the integrity of their tax files and banking records. All industries, regardless of size, location and type are expected to comply with the law…"**

How does an employer comply?

- Provide all new employees with the complete **I-9 form**, including instructions.
- Require that the I-9 form be completed, and supporting documents provided, within 3 days of hire.
- Accept documentation that appears to be genuine.
- Accept documentation that is included on List A or Lists B and C as "acceptable." Do not require that the employee provide specific types of acceptable documentation.
- Reject documentation that does not appear to be genuine or does not appear to relate to the employee.
- If acceptable documentation is not provided within 3 days of hire, separate employment.
- If an employer becomes aware that a previously provided document is not genuine, work with the employee to immediately obtain genuine documentation of identity and work authorization. If such documentation cannot be obtained, separate employment.

If you are unsure of whether your current onboarding or personnel record practices are compliant, please reach out, we can help.

For more information on the "dos and don'ts" of Form I-9, please refer to **our previous post**.

**[1] https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-already-double-over-last-year**

# General Counsel Office Hours

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Attorney Michael E. Foley's bio.

As General Counsel, Mike will be available within his virtual and gratis office hours for all SCHRC members in good standing from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help SCHRC members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his SCHRC General Counsel Office Hours at 508-548-4888.