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Discrimination claims in Covid-19 era: a potential trap for employers?

The Covid-19 pandemic has created a lot of thorny issues for employers, such as navigating wage-and-hour laws with employees working from home, workplace safety regulations for those still at the office and the overall complexity of operating as normally as possible in an abnormal world.

Additionally, there's the reality that many businesses are struggling to stay afloat. While nobody likes to let employees go who haven't done anything wrong, staying in business in many cases may necessitate reductions in force. That doesn't change the fact that these layoffs are coming at the worst possible time for your workers, with job opportunities so scarce.

This means those who are laid off may be more motivated than ever to view their termination as discriminatory or otherwise unlawful and to take their employer to court. In some instances their perceptions may be correct, as there are instances of employers who have used the pandemic as an excuse to get rid of workers for discriminatory or retaliatory reasons. But even if a worker doesn't have a valid claim, you don't want to deal with the headache of litigation. That's why it's critical to review your layoff plans with an employment attorney before carrying them out.

In the meantime, here are some tips that may help you stay out of hot water.

First, when considering layoffs examine your own plans carefully

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for red flags that could look like signs of discrimination. For example, the federal Age Discrimination in Employment Act makes it illegal to terminate workers over 40 based on their age. If your layoff targets only workers in this category, you risk a lawsuit, even if where you think you have valid non-discriminatory reasons for your decision. Similarly, if your layoffs disproportionately target workers of a particular ethnic group (even if unintentionally), the affected workers are likely to see the reduction in force as discriminatory.

Employers also need to be very careful when their layoff plans include individuals requesting paid family leave under the Emergency

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ALLRED, BACON, HALFHILL & YOUNG, PC

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

Walmart settles claim over 'physical ability tests'


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A recent Equal Employment Opportunity Commission action against Walmart illustrates the dangers of hiring assessments that could be seen as discriminatory, particularly when they impact men and women differently.

In this case, Walmart imposed a "physical ability test" on people seeking jobs at its 44 regional grocery distribution centers. Employees at the center take cases of grocery items from shelves and stack them onto pallets, which are then wrapped and loaded on to trucks to be delivered to retail stores. According to Walmart, the job required the ability to lift up to 80 pounds. When the company imposed the test in 2010, it apparently had a disparate impact on female applicants, resulting in many more men being hired to fill the positions.

After a group of rejected female applicants complained to the EEOC, the agency initiated an enforcement action, claiming the test overstated the physical demands of the job. Although Walmart denied the test was discriminatory, it agreed to settle the action for $20 million, which will result in thousands of women receiving back pay. Walmart also agreed to stop using the test and perform additional anti-discrimination training.

Walmart may be the biggest company to fall into this trap, but it's not the only one. A dairy cooperative in Buffalo, N.Y., recently settled a sex discrimination suit for $1.35 million over a hiring exam that required applicants to lift a 50-pound crate. The exam led to the company hiring 155 men and only five women over a 6-year period.

While physical ability tests are not universally illegal, they do create discrimination traps if the employer is not careful, as these cases show. If you believe such tests or other kinds of hiring exams are useful for your workplace, check with an employment attorney first to ensure the legal risks don't outweigh the benefits.

Supervisor's remark leads to age bias claim

A recent Michigan case shows that even when an employee may have been fired for legitimate performance-based reasons, a lone stray remark suggesting improper motives could land you in court.

In that case, Kenneth Lowe, a 60-year-old manager at a molding plant, was fired after 40 years with his company, supposedly for performance and behavior reasons and because his position was no longer necessary.

According to the employer, a new general manager at the plant quickly noticed that Lowe had limited understanding of the newer equipment and relied heavily on his subordinates. After the company transferred the subordinates from Lowe's department, he was left managing only part of the building and doing maintenance.

Two years later, an HR manager noticed that Lowe had only a few janitors reporting to him, apparently calling into question whether his position was needed. She also claimed she received complaints that Lowe had been used vulgar language and had made sexually charged comments in the workplace. She documented six alleged incidents and recommended Lowe be terminated following the final incident, which involved a lewd gesture and inappropriate comment he allegedly made in a meeting.

During the termination meeting, Lowe asked why he was being fired and the general manager allegedly replied that he was "getting up in years," was "at retirement age" and that he should "go one way" while the company was "going the other."

Lowe sued the employer in federal district court claiming age discrimination under Michigan's civil rights act. The judge ruled in the employer's favor, concluding that even if the general manager made the remarks in question, they were "too attenuated" to show direct evidence of discrimination.

But a federal appeals court reversed, finding that such a remark did, in fact, constitute direct evidence of discrimination as a "literal statement" that his age was the actual reason he was terminated. The court also found that the employer failed to show it would have fired him regardless of any age-based animus.

Now Lowe has a chance to bring his case to a jury, and employers have yet another case study that shows how useful it is to have an attorney review termination policies and help train managers on conducting terminations in a non-discriminatory manner.

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Family and Medical Leave Expansion Act or on temporary disability, and be mindful that such employees may see the situation as retaliatory. Similarly, layoffs that include workers who have complained about a lack of PPE or sanitary measures in the workplace or who have recently filed sexual harassment or other internal discrimination complaints leave businesses vulnerable to retaliation claims as well.

A recent Ohio case illustrates how employers who think they're laying off workers with the best of intentions could find themselves at the business end of a discrimination suit. In that case, a physical therapy/rehab clinic laid off a 60-year-old human resources assistant who was the oldest employee at the company. The employer allegedly told her that a woman of her age wasn't suited to be working for a company that large in light of the coronavirus.

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The employee filed an age discrimination suit which the employer now will have to fight in court.

Assuming the allegations are true, it's possible that the employer thought it was trying to protect her from a potentially deadly infection. Nonetheless, its decision would still be based on age, which would be illegal under federal and most likely state law.

The lesson here is that it's a good idea to consult with an attorney to find out if your layoff plans put you at risk of a discrimination suit. That's a lot better than having to consult with your attorney after being served with a complaint.

Federal court ruling on 'joint employers' creates uncertainty

A recent ruling by a federal court judge in New York expanding the definition of a "joint employer" may put employers who use staffing agencies at greater risk of wage-and-hour liability.

The Department of Labor's recent "final rule" had changed the standard for joint employment under the federal Fair Labor Standards Act for the first time in 60 years. Previously, in determining if a business was a "joint employer" of another company's workers and therefore jointly responsible for any wage-and-hour violations committed by that other company, the analysis focused on a combination of the alleged joint employer's level of control over the employee and the employee's level of economic dependence on the alleged joint employer.

The new final rule however, put in place a "balancing test" based on whether the alleged joint employer could hire or fire the worker in question, supervise and control the employee's work schedules or conditions of employment, determine the employee's rate of pay and maintain his or her employment records. The final rule also stated that maintaining the right to control the employee's working conditions wasn't enough for joint employer liability. The employer had to actually control them. This made it tougher for aggrieved workers hold anyone other than their direct employer accountable for wage law violations.

But a group of 18 states filed a lawsuit seeking to block the final rule from taking effect. They argued that it narrowed the definition of "joint employer" beyond what FLSA allows, particularly in the context of "vertical" employment relationships where companies use workers provided by staffing agencies and other middlemen.

A federal judge agreed. Specifically, the judge found the new rule relied too much on "control" in determining whether a joint employment relationship exists as opposed to the worker's economic dependence on the purported joint employer. The judge also said the DOL didn't sufficiently consider the costs the final rule could impose on workers.

The decision will no doubt create uncertainty for companies using workers from staffing agencies as to whether they could face liability for labor practices committed by such agencies. If your company is in that situation, consult with an attorney who can help you navigate these murky waters.

ALLRED, BACON,
HALFHILL & YOUNG, PC
11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

Employer that fired worker for using CBD didn't violate ADA


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A municipal employee who used cannabidiol (CBD) for anxiety could not bring a disability bias claim against her employer for firing her after she failed a drug test, a federal trial judge recently decided.

The employee, Mae Hamric, worked as a cultural arts program specialist for the Murfreesboro, Tenn., parks and rec department. She was diagnosed with bipolar disorder in 2011 but did not disclose that to the city when it hired her. However she later disclosed to her supervisor that she was bipolar and suffered from anxiety and confided in her that she used CBD to treat her symptoms.

The supervisor eventually recommended Hamric's promotion to a position that required a drug test. When she failed the test, the city forced her to resign.

Hamric sued the city under the federal Americans with Disabilities Act alleging it fired her because of her medical condition. She also claimed the city failed to reasonably accommodate her disability.

But the trial judge dismissed the claim, finding that there was no evidence that the supervisor or the supervisor's boss, who may have known of Hamric's disability, informed the human resources department before the HR director pressured her to resign. Further, the judge also dismissed Hamric's failure-to-accommodate claim, finding that the assertion in her resignation letter that the city should revise its drug policy did not constitute a request for reasonable accommodation.

This is just one trial judge's interpretation of the law, and other judges in other places may view the issue differently. Still, it's a good idea to talk to an employment attorney before making termination decisions in situations like this to ensure your actions comply with the law.