Legal Matters®

Employment
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Employees working from home? There are issues to consider

There is no employer in this country whose operations were not dramatically impacted by the COVID-19 outbreak this spring. While the coronavirus disrupted the workplace in countless ways, one of the biggest sudden adjustments was the massive increase in employees working remotely from home.

For some employers, this was nothing new. For other employers, however, this probably has been a logistical adventure. Either way, having employees working from home raises a host of legal implications. That means it's a good idea to conference with an employment attorney to discuss issues like the following:

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Wage and hour laws

Under the federal Fair Labor Standards Act, any "non-exempt" employee (an hourly wage worker with no managerial or discretionary decision-making responsibilities or a salaried administrator, manager or professional who makes less than $684 per week) is entitled to overtime pay at 1.5 times their regular rate. But it can be very challenging to comply with the FLSA in a remote environment where work and home gets blurred.

For example, it can be hard to tell how many hours employees are actually working and when they're on or off the clock. It's critical to remember that the FLSA applies in both traditional and remote work settings and that if you do not have strong systems in place to monitor and record what your workers are doing, you could run afoul of the FLSA and find yourself subject to an enforcement action or a lawsuit.

Another FLSA issue is the minimum wage. The federal minimum wage is $7.25 per hour. But each state has its own minimum wage laws and some states' minimum wages are higher. If you have employees who live in multiple states commuting to the same physical workplace (for example, a St. Louis company with workers living in Missouri and Illinois), you're subject to the wage and hour laws of the state where your business is located. But when your employees work from home, this can complicate things.

continued on page 3

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Showing of ‘sex-based animus’ enough for bias claim


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Under the federal Equal Pay Act, employers who pay unequal wages to men and women performing jobs that require substantially equal skill, effort and responsibility under similar conditions in the same organization face legal liability.

To succeed, an aggrieved employee must provide “comparator evidence”: specific evidence that she is being paid less than a specific coworker for equal work. This can be a tough hurdle for a plaintiff to clear. But a recent decision from a federal appeals court suggests that an employee who can’t make that showing can still hold an employer responsible for pay discrimination under Title VII of the Civil Rights Act.

In that case, corporate vice president Danielle Markou claimed her employer paid her significantly less than male VPs who, like her, reported to the company’s CFO. When she complained, the CFO demoted her and allegedly said she’d have to take vacation time to leave the office for any reason at all, even to get coffee. Markou subsequently let the CFO know she was pregnant, at which point the CFO ordered an internal audit of her expense reports and emails, allegedly to dig up violations of corporate policy. A memo was also apparently placed in her file to show her performance was lagging, despite a history of positive reviews. When she refused to resign, Markou was fired.

In a federal discrimination and retaliation suit, Markou alleged pay discrimination as one of her claims. The judge tossed out the claim because she didn’t have comparator evidence to show unequal pay for equal work. (The company’s VPs apparently each had different responsibilities).

But the appellate court reversed the decision and reinstated the claim. Specifically, the court said that while the Equal Pay Act may require comparator evidence, Title VII — which forbids sex-based employment discrimination — does not.

> Pay discrimination cases can succeed even where there is no other worker in the organization that does “equal work.”

Here, the court said, Markou’s evidence that male peers received above-market pay for their respective positions and she didn’t, paired with evidence of sexist comments by the CFO, was enough to support her claim.

This case shows that pay discrimination cases can succeed even where there is no other worker in the organization that does “equal work,” underscoring the importance of reviewing your compensation structure with an employment attorney.

‘Fair Chance Act’ to take effect next December

If, like a lot of businesses, your company does contract work for the federal government, you should be aware of the Fair Chance Act, a new federal law scheduled to take effect in December 2021 that bars the federal government and federal contractors from asking job applicants about their criminal history early on the hiring process.

This new measure follows a trend of cities and states passing “ban the box” laws that prevent employers from using arrest records and/or prior criminal convictions as a screening mechanism. The idea behind these laws is to give those with a criminal past the opportunity to find work instead of being eliminated automatically at the outset.

Employers who violate the new federal law will face a progressive disciplinary policy consisting of a warning for the first violation and potential suspension of payments due under the relevant contract for subsequent violations. Repeat violators can also face civil penalties.

The act does not apply to jobs related to law enforcement or national security. It also does not apply to jobs that require access to classified information or which would otherwise require a criminal history investigation under the law. In those cases, a criminal history inquiry is allowed before extending an offer.

If your company does government contract work, you should consult an employment attorney to review every facet of your hiring process to ensure compliance.

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Employees working from home? Things to consider

continued from page 1

If a non-exempt employee is working from home in a state with a higher minimum wage, a court could decide they're entitled to earn that rate. An employment attorney can help you navigate this trap.

Discrimination laws

The coronavirus situation has led to remote work by necessity. As the crisis clears, many workers will probably opt to have their employees back in the physical workplace. Others, however, may decide to continue to allow a certain degree of working at home as a privilege. If this is the case, it's critical that work-from-home eligibility be based on neutral factors such as job responsibilities, past performance, seniority and the like and that these requirements be applied consistently. It is equally critical that remote employees be subject to the same rules and expectations as other workers. Failure to do so could potentially lead to a discrimination suit if an aggrieved worker can somehow tie unequal treatment to his or her race, sex, religion, ethnicity or disability.

Similarly, employers need to make sure there's a clear written policy in place regarding the use of electronic communications like email or text. It's very easy for workers to treat these mediums as informal communication and let their professional guard down, creating the risk of inappropriate comments that could be interpreted as sexual or racial harassment.

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Privacy and security

The more employees you have working remotely, the greater the possibility of a data breach that could result in legal trouble. That's why it's important to have a written work-from-home policy with clear protocols for accessing and transmitting confidential information. That's also why employers need to make sure remote access to company resources is secure with passwords, firewalls, antivirus software, encryption and other security technology. Employees working remotely will also likely be using their own Wi-Fi (or public Wi-Fi if they camp out at Starbucks or Panera for a change of scenery in a non-pandemic situation). If that's the case, it's important to have protocols in place about what kind of information they can access or transmit.

These are just a few issues to consider. Employers also need to consider the health and safety of the employee's workspace for OSHA compliance purposes and because work-at-home injuries may result in workers' comp claims. Talk to an employment lawyer where you live to discuss these and other issues.

Remember to consider transfers as an ADA accommodation

Under the federal Americans with Disabilities Act an employer cannot fire, demote, refuse to hire or take other negative actions against a worker based on his or her disability. Additionally, employers are required to provide reasonable accommodations to enable otherwise qualified employees to do their job.

A recent decision by a federal appeals court suggests that employers, in seeking to reasonably accommodate a worker with a disability, must look beyond simply modifying the worker's current position and consider alternative positions as well.

In that case, a Nissan production technician who suffered from a kidney disease unsuccessfully sought a transfer to a less physically demanding job when his problems worsened. When he returned from leave for a kidney transplant, he was placed in a situation he found even more demanding, was allegedly denied extra breaks or half-time work and still couldn't secure a transfer to an easier position. Unable to come to agreement with the employer on an appropriate situation, he was ultimately terminated.

A federal judge threw out the man's disability bias claim, finding that the employer engaged in a proper "interactive process" as required by law before determining the worker couldn't do his job even with reasonable accommodations.

But the appellate court disagreed, ruling that while Nissan didn't need to create a new job for the plaintiff it was obligated to consider available transfers that might meet his needs before terminating him, and that the company had failed to document any evidence that it did so.

Now the man will have an opportunity to bring his case before a jury. Getting an employment lawyer to review your own interactive process can help protect you from a similar situation.

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Investigate before taking action over alleged misdeeds

Employers must walk a fine line when they suspect an employee is engaging in misdeeds. On one hand, if they don't act quickly and forcefully they could risk liability for harm to co-workers or customers. But at the same time, acting too quickly or forcefully poses the risk of liability for defamation, as recent cases illustrate.

For example, a graphics company in Charleston, S.C., recently agreed to pay a significant settlement to former employee George Walton, who had been wrongly accused of embezzlement and arrested. Walton had left the company a few years earlier to take a new job. After he left, his old boss Maria Elliott saw what she thought was a $10,000 discrepancy in payments to him. Elliott didn't have her outside accountant conduct a forensic analysis, apparently because she didn't want to pay for it. Instead, she fired her bookkeeper over the alleged discrepancy and notified the police after combing through the books herself.

Walton's own forensic accountant, however, allegedly determined that Walton had been overpaid by mistake, something Walton claims he told Elliott himself months before he left.

After the charges against Walton were dropped, he sued his ex-employer for defamation. Elliot never admitted fault, but she agreed to settle for multiple times the alleged discrepancy.

Similarly, a hospital nurse in Indiana accused a doctor, Rebecca Denman, of having alcohol on her breath while on duty. Though the hospital's policy mandated immediate reporting and blood testing in such situations, the nurse waited 13 hours to report Denman, denying the doctor an opportunity to defend herself. These allegations were later raised among administrators and Denman's colleagues and she was suspended without pay.

Denman filed suit, claiming the accusation was not only false but damaged her reputation. A jury agreed and awarded substantial damages.

It's critically important to conduct an appropriate investigation when you suspect an employee of wrongdoing. A good employment lawyer can assist in the process.