Legal Matters®

Employment
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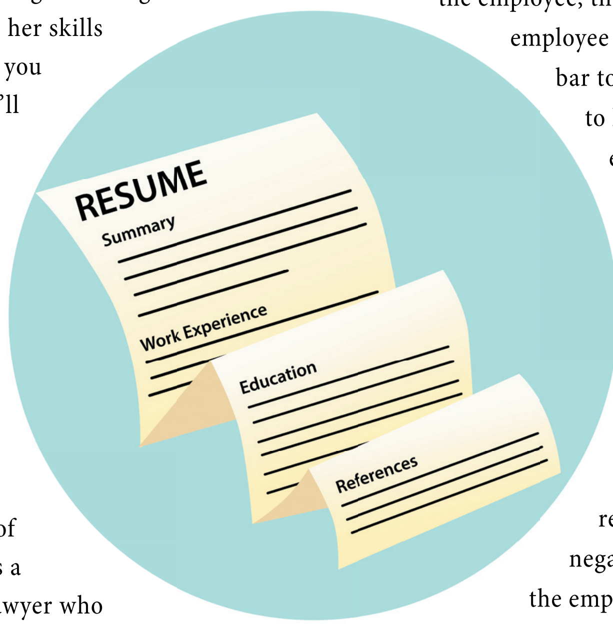
Handle employee references with care

Imagine that an employee comes into your office, announces she's looking for a new job and asks for a letter of reference.

She's not a top performer and you don't mind seeing her go, so to help expedite her exit you give her a glowing recommendation that embellishes her skills and abilities. You're also afraid that if you don't provide a positive reference, she'll claim defamation or discrimination.

She turns out to be a legitimately harmful hire for her new company, and now they're seeking to hold you accountable. You regret ever providing a reference, because even if the other company doesn't prevail in court you've still had to deal with time-consuming and expensive litigation.

This scenario illustrates the perils of recommendations and shows why it is a good idea to talk to an employment lawyer who can review your policies and practices surrounding job references and help you figure out where you might be vulnerable.



In the meantime, here are some things to consider.

Providing a negative reference to a prospective employer can potentially leave you vulnerable to a defamation claim if the employee doesn't get the job in question. These cases can be difficult for an employee to win, because generally the employee needs to show the employer made a false statement of fact about the employee, that he or she did so in bad faith and the employee suffered actual harm. That's a high bar to clear — but it's not one you want to have to test. Some states do protect employers from liability for untrue or defamatory statements in the context of giving job references, but there's no protection if the statement was made maliciously.

Employers can also potentially get in trouble for providing positive references that aren't really true. For example, if you give a positive reference but knowingly leaving out negative details about the employee and the employee commits a crime or hurts someone at their new job, it's possible you could be held responsible, depending on the circumstances.

So what can you do to limit your exposure?

First, consider adopting a policy of not providing substantive references at all. Instead, you opt to simply verify employees' titles,

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Your noncompete may not survive sale of company assets

Noncompetition agreements are contracts between employers and employees where the worker agrees not to work for a competitor for a certain period of time following his or her departure. They are often accompanied by other "restrictive covenants" like nonsolicitation agreements — where the employee pledges not to poach the employer's clients or customers after leaving to pursue new opportunities — and nondisclosure agreements, which bar the employee from sharing proprietary company information.

Such agreements can be useful for businesses trying to maintain their edge in a competitive marketplace, but a recent Michigan case shows that they may not survive a change in the company's circumstances.

In that case, Aaron Symonds, a shareholder with insurance brokerage Lighthouse Insurance Group, left to work for a direct competitor. He also filed suit against Lighthouse, seeking a declaration from the court that the noncompete, nonsolicitation and nondisclosure agreements he signed when he became a shareholder were unenforceable.

A judge denied his request and issued an injunction allowing him to remain with his new company but with all restrictions in effect, which severely limited his ability to do meaningful work.

But the Michigan Court of Appeals reversed, at least with respect to the noncompetition agreement.

That's because two months after Lighthouse secured the injunction, it sold nearly all its assets to an entity called "Lighthouse Group, an Alera Group Agency, LLC," leaving Lighthouse Insurance Group (with whom Symonds had contracted) as an "empty shell."

Because Alera purchased a collection of Lighthouse assets rather than Lighthouse stock, and Lighthouse itself now existed as an entity that did not sell insurance, Symonds could no longer compete with it by selling insurance, the court said.

The court did find, however, that the nonsolicitation and nondisclosure agreements still applied.

Lighthouse's successor may have been able to save the noncompete agreement if it had structured the asset sale differently. If you are thinking of buying or selling a company whose employees have restrictive covenants in place, be sure to consult with an employment attorney who can counsel you on how the purchase might impact them.

Inconsistent retention raises may create bias claims

Employers who want to hold on to good workers in a competitive labor market often look to "retention raises" to keep them in the fold. But a recent decision from a federal appeals court suggests that if employers do so based on overly subjective criteria they could be walking right into a discrimination suit.

The case involved a female professor at the University of Oregon who filed a lawsuit in federal district court accusing the university of committing sex discrimination by paying male professors more than comparable female ones. The trial judge threw out the case, finding that the disparity was a result of retention raises to certain male professors that were "job related" and "consistent with business necessity."

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The professor appealed, however, and the appellate court sent the case back to the lower court to proceed to trial.

As the appellate court noted, female professors did make, on average, $15,000 less than male professors and the disproportionate use of retention raises may indeed have been a key factor. But while the court did not outwardly determine that this was discriminatory, it found that a jury should have an opportunity to figure out whether the disparity was nondiscriminatory or whether there was bias involved in faculty members' comparative ability to negotiate such a raise. The court also ruled that the plaintiff should be afforded the opportunity to argue that general across-the-board raises could help the university hold onto talented faculty just as well as selectively applied retention raises.

Though the professor has not won her lawsuit at this point, the case sends a message to employers to be sure merit-based salary increases are based on clear criteria that can be documented with hard evidence.

Employer may be accountable for alleged GINA violations

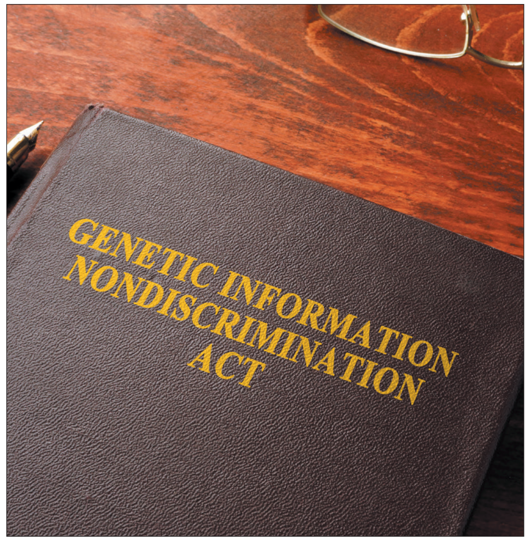
Many employers implement employee wellness programs as a way to improve health and productivity in the workplace. It's also common for employers to hire third-party wellness providers to implement such programs. But a recent North Carolina case shows that any employer that does so should have an employment attorney look over any paperwork the provider may collect from employees to ensure the provider isn't setting the employer up for a lawsuit.

In the North Carolina case, the village of Pinehurst contracted with a wellness company called SiteMed to provide health examinations for members of its police force as a condition of their employment. SiteMed agreed to comply with all federal, state and local laws.

As part of the process, SiteMed gave certain forms to employees to complete as part of its collection of blood and urine samples. The employer relied on SiteMed's experience and had no part in creating these forms.

The village later terminated a police officer when he balked at filling out the forms, which asked whether he or anyone in his immediate family had ever had certain diseases. The officer filed a complaint in federal court accusing the village of discrimination and wrongful termination under the federal Genetic Information Nondiscrimination Act (GINA), which bars employers from making personnel decisions based on individuals' genetic information.

Citing a "hold harmless" provision in the vil-



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lage's contract with SiteMed, in which the wellness company agreed to reimburse the village for certain losses it might incur, the village went after SiteMed to cover any liability it might have for the officer's GINA claim.

But a federal judge found that the village had no right to such contribution because GINA didn't specifically provide for it and because GINA put the burden on employers, not contractors, to ensure that no genetic information is collected as part of an exam meant to determine fitness to do a job.

The officer hasn't yet won his GINA case, but he will have his day in court, and if he prevails, it will be the employer that pays the price.

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dates of employment and salaries without giving a positive or negative evaluation. But if you do this, it is crucial that you do this for all employees. If you selectively give positive references for certain workers and "no comment" references for others, you run the risk of facing a discrimination claim.

Second, if you feel you need to give an honest appraisal to prospective employers, make sure any factual statements are completely truthful, or simply stick with opinion. But even in if you're only offering an opinion, you need to make sure nothing you are saying can be connected the employee's race, religion, gender or any other category that could open you up to a discrimination suit.

The best practice of all is to work with an employment attorney to develop a consistent policy on references and train all your managers and supervisors on how to follow it.

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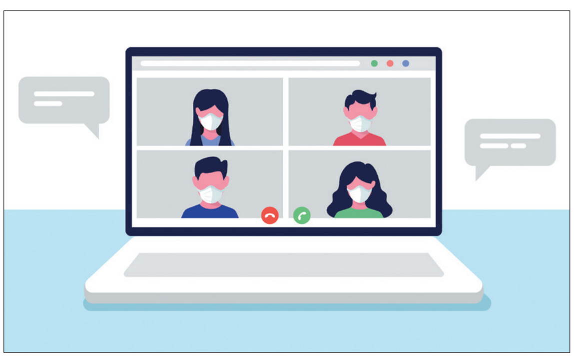
Employees working remotely out-of-state pose risks



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More than a year into the COVID-19 pandemic, telecommuting is the new normal for many employers, and many telecommuting employees are doing so from a state other than their employer's home state.

Although an arrangement like this may be fairly simple from a technological and logistical standpoint, employers with out-of-state remote workers should consult with an employment lawyer to discuss associated legal risks and develop policies to address them.

First, employment laws such as wage-and-hour protections; paid and unpaid family, medical and sick leave requirements; unemployment and workers' comp requirements; and even rules about what must appear on paystubs can vary from state to state. For example, California requires an employer to pay overtime to an employee who works more than eight hour in any one day. Meanwhile, Oregon employers only need to pay employees for any hours worked beyond 40 hours in a week. Let's say an employee working remotely from California for an Oregon employer works nine hours per day for four days straight. An employer that fails to pay overtime could find itself in court for violating California overtime laws.

Additionally, these arrangements might require employers to rethink their benefits packages. If an employer is using a regional health insurer, this may not adequately meet the needs of out-of-state remote workers. Meanwhile, an employer with unionized workers may need to take a close look at its collective bargaining agreement and how it defines such things as "principal place of employment."

The best way to address all these situations is to take a proactive approach by figuring out exactly where each employee is working and consulting an attorney to draft policies for remote work, including working hours and a definition of work space.