Legal Matters®

Employment
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Employers: Tread carefully, take note of failure-to-rehire claims

It's common for employers to furlough workers or temporarily lay them off during recessions, government shutdowns and other periods when there's not enough demand for goods or services to keep all their employees on the payroll.

This often happens with the expectation that employees will return to work once the economy picks up again.

If your business needs to let people go for the time being but expects they'll ultimately be brought back, you should consult with an employment attorney to go over your plans and policies. Because if you decide not to bring back certain workers and you do so for non-neutral reasons, your company could be vulnerable to a "failure to rehire" suit.

This doesn't mean you have to bring back bad employees. But tread carefully when deciding not to rehire those you consider "troublemakers" who complain a lot or question the boss. They may be engaging in legally protected activity.

Take, for example, the worker who's inconvenienced you with requests to take leave under the federal Family and Medical Leave Act (FMLA) to deal with a temporary health condition or a sick relative. Or the person who complained that you calculated their hours in a way that left them just short under state or federal minimum wage or overtime laws. And perhaps you got annoyed by the employee who pointed out safety hazards in the workplace or filed a workers' comp

claim for what you thought was a minor injury.

If any of these individuals have evidence that such conduct played a role in your decision not to bring them back, they potentially could claim you were discriminating against them and you would be facing a costly lawsuit under state or federal wage and anti-discrimination statutes. Many of these statutes double or triple the employees' damages and enable them to collect attorneys' fees if they win.

What's more, a recent Massachusetts case indicates that an employer can face failure-to-rehire liability for conduct that occurs

continued on page 3

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Missouri verdict provides case study of 'hostile work environment'

Workplace harassment, whether gender-based, race-based or based on any other protected category, falls under the general umbrella of discrimination.

One way for an employee to make out a successful claim is by proving the employer maintained a "hostile work environment" — meaning one in which the employee was subjected to insults, verbal abuse, slurs, intimidation and inappropriate remarks based on their sex, race, religion, disability or other "protected class."

In order to win, the employee has to show the employer knew or should have known of the conduct and failed adequately to address it. The employee also has to establish that the misconduct was severe, pervasive and offensive enough to potentially cause mental/emotional distress.

The consequences for an employer that maintains or tolerates such an environment can be severe. For example, a St. Louis jury recently awarded nearly $2 million to a pair of female salespeople who endured several years of pervasive harassment at a local car dealership.

The jury found that their sales manager constantly yelled and screamed at them, physically intimidated them, constantly referred to women as "bitches," and sabotaged their sales opportunities while treating male employees much more favorably.

The sales manager also intimidated the saleswomen by bringing a gun into the workplace in violation of company policy because he was concerned about protestors following the police shooting of Michael Brown in nearby Ferguson. (Relatedly, they claimed he treated Black customers differently than white ones by giving them less favorable financing deals and screening their legal and socioeconomic profiles on social media.)

The two plaintiffs complained repeatedly to management to no avail, until they filed a written complaint, after which an investigation concluded that there was no problem. Ultimately, both employees quit rather than endure further harassment.

At trial, the dealership claimed the employees fabricated their claims and colluded in their written complaint. But other former employees corroborated their claims at trial, as did the notes of the lawyer who conducted the investigation.

This may seem like an extreme scenario, and it may in fact be. But the underlying facts do not necessarily need to rise to this level to constitute a hostile work environment.

If you're concerned about your own company's work environment, it would be a good idea to have an employment attorney audit your employment practices, including your procedures for reporting, investigating and responding to allegations of harassment.

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Conducting a workplace investigation? Beware of these traps

A botched workplace investigation can create significant headaches for your company. It can raise additional questions instead of providing answers, it can undermine employment relationships, and it can open up your organization to legal liability.

That's why you should always involve a lawyer who is experienced in conducting workplace investigations when you need to look into claims of workplace policy violations, conflicts between employees, or allegations of harassment. In the meantime, you should be aware of some basic, common mistakes employers make.

One mistake is choosing an inappropriate investigator for the particular allegation. If the issue is too complex for your HR person, or they have a personal relationship with the parties involved, you should assign the investigation to someone such as an attorney who is qualified to conduct it and free from any bias.

Another mistake is dragging your feet. Quickly acknowledge the complaint in writing and start gathering evidence while memories are fresh so you obtain more reliable findings.

Meanwhile, if a particular employee is a target of the investigation, it is important to remember that they have rights as well. It's best to inform the employee of the investigation quickly, explain in writing the circumstances giving rise to it, provide details of the accusations, and give the employee an opportunity to respond.

Failure to take these steps before imposing consequences could result in the employee in question holding your company accountable in court. At the same time, failure to properly document all interviews, findings, decisions and remedial measures could make it difficult to establish in court that your process was fair.

Finally, one of the biggest mistakes employers make is failing to prevent retaliation against those who report wrongdoing or provide honest answers to investigators. Check in with parties throughout the investigation and afterward to determine if they have experienced any kind of blowback from co-workers or supervisors. If they have, make sure you confer with a lawyer and address the issue as quickly as possible.

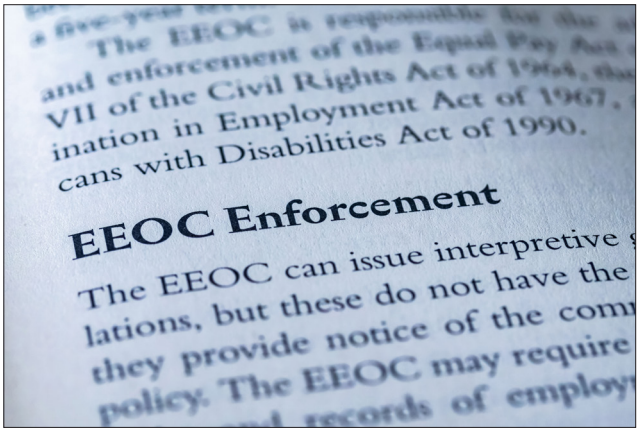
EEOC taking closer look at employers' qualification standards under ADA

If your company imposes qualification standards on employees, such as requiring them to meet certain medical or physical standards, pass certain tests, or complete certain trainings, you should have an employment law attorney review your policies, standards and testing processes.

Over the past year, the U.S. Equal Employment Opportunity Commission has been putting employers under a microscope to determine if they are running afoul of the federal Americans with Disabilities Act by using qualification standards to screen out persons with disabilities.

For example, the EEOC initiated an enforcement action last fall against Union Pacific Railroad for requiring locomotive engineers and conductors to pass a "light cannon test" to confirm that they did not have a color vision deficiency. According to the EEOC, the test does not accurately assess whether someone can identify the color of railway signals, and it has resulted in the illegal termination of employees on the basis of perceived disability. The EEOC is seeking back pay and damages for affected employees.

The EEOC has also sued Alliance Ground International, a major cargo logistics and handling company that allegedly refused to hire a qualified applicant to handle mail at one of its facilities because he was deaf.



Alliance Ground allegedly denied the applicant a position because of a false assumption that hearing-impaired individuals cannot work safely in a warehouse setting. According to the EEOC, Alliance Ground failed to explore the numerous accommodations that could be made to enable qualified deaf workers to perform the required job functions.

Meanwhile, the EEOC brought an enforcement action against retail giant Walmart alleging that Walmart violated the ADA by firing employees with disabilities who, despite satisfactory job performances, failed to pass a training course shortly after they were hired. The EEOC claims the test was unrelated to the employees' duties.

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continued from page 1

after the employee has been terminated and when they haven't even applied for a newly open position.

In that case, Thomas Cafarella worked at the Massachusetts Institute of Technology for 14 years before his position was eliminated for economic reasons. Less than a month later, MIT posted an opening for a position similar to his former job, but he claims a manager said he wasn't well-suited so he didn't apply.

A former colleague soon told him of another job he was qualified for that was about to be posted, but MIT filled the job without ever posting it.

In a failure-to-rehire suit, Cafarella claimed MIT refused to rehire him because he had filed a wage violation claim and complained about age discrimination after he was terminated.

While MIT argued that higher courts had ruled previously that an aggrieved worker actually needs to have applied for the jobs they were allegedly denied in order to bring such a claim, a U.S. District Court judge decided otherwise.

The judge ruled that Cafarella had presented enough evidence to go to trial on a charge that MIT altered its usual practice of posting job openings publicly before filling them once it heard he was interested in being rehired. Now MIT faces significant costs.

The lesson? Talk to an employment attorney when making decisions like this so that you don't walk into a similar trap.

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Even in wake of ruling, employers need to be careful of FMLA retaliation

The 11th U.S. Circuit Court of Appeals issued a ruling this past winter that seems to make it more difficult for employees to bring claims against their employers accusing them of retaliating after they request time off under the Family and Medical Leave Act.

Despite the decision, however, employers still need to be very careful to avoid even a whiff of retaliation when a worker requests protected leave in order to deal with a medical issue or care for a sick family member.

In the case in question, Doris Lapham, a veteran Walgreens employee, spent several years working overnight shifts so she could care for her disabled son during the day. Between 2011 and 2016, she also requested and received periodic FMLA leave to care for him.

During that time, she also apparently received below-average performance reviews with supervisors complimenting her customer service skills but criticizing her ability to complete tasks, her excessive break-taking, and her alleged dishonesty and insubordination.

In the spring of 2017, while an intermittent leave request was pending, HR terminated Lapham after further documenting her alleged deficiencies.

In a federal FMLA retaliation suit, Lapham argued that Walgreens should be held liable because her leave request was at least a motivating factor in the decision to fire her given the close timing between her request and termination, as well as the fact that her supervisor discussed the request with HR while they were deliberating an employment action.

But the 11th Circuit ruled that she had to prove the termination was because of the leave request, not just that it contributed to the decision.

While the ruling may have employers breathing a sigh of relief, keep in mind that it only holds force in the 11th Circuit states of Florida, Georgia and Alabama. In other circuits it may remain sufficient for the worker to show that a leave request was a motivating factor.

Additionally, employers that lack a clear process for responding to leave requests in a timely manner and aren't careful about avoiding discussion of the FMLA in performance evaluations leave themselves vulnerable under any standard.

That's why now is as good a time as any to meet with an attorney to discuss your policies and procedures.