Legal Matters®

Employment
summer 2024

It's important to be on the lookout for pitfalls in your severance agreements

This past spring, the NLRB – the government agency that enforces federal labor laws and regulations – filed a complaint alleging that Elon Musk's space technology company, SpaceX, had included illegal provisions in its severance agreements.

Specifically, the agency is alleging that terminated employees who wished to receive SpaceX's offer of severance payments were forced to agree to confidentiality clauses (which bar an ex-employee from discussing the agreement with anyone) and non-disparagement clauses (which bar an ex-employee from saying anything negative about the company).

The NLRB ruled a year ago in another case that such clauses illegally restrict workers from engaging in legally-protected activity like criticizing employer policies or discussing wages and working conditions with co-workers.

The agreement also apparently sought to prevent departing employees from testifying or participating in lawsuits against the company brought by other employees, which is illegal under federal labor law.

The SpaceX case has not yet been resolved. But it still offers some food for thought for other employers.

First, consider the type of severance agreement you're offering. One type, known as the "golden parachute" or "buy out," is incorporated into the employment agreement and requires the employer to pay the

employee a certain amount of money should they be terminated.

This acts as incentive to keep an employee around who is doing well and it usually ties the payout to how long the employee has been there. These agreements make a lot of sense for employees with unique skills that are in high demand and don't carry significant legal risk, although they do give the employer less flexibility.

The other, more common type is a "full release" severance agreement where the employer offers payment upon termination in exchange for a waiver of any potential legal claims the employee may have. This is what SpaceX used. Such agreements create more risk.

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Refusing accommodations can doom a disability bias claim

If you are an employee with a physical or mental condition that limits a major life activity such as sleeping, walking, talking, taking care of yourself or working, you may be considered to have a disability within the meaning of the federal Americans with Disabilities Act.

That means that if you can perform the necessary functions of your job with reasonable accommodations, the ADA protects you from being fired, demoted or paid less due to your disability. But if you refuse a reasonable accommodation, you might have a hard time claiming your employer discriminated against you, as a worker in Virginia recently learned.

In that case, Laura Tartaro-McGowan was a clinical nurse employed by a home healthcare company who provided care to patients in their homes. After undergoing knee surgery, she accepted a position as clinical manager. A major responsibility in the job description was field visits with patients that might require physical tasks like bending, lifting and stooping, but only on an "as needed" basis.

In May 2020, when the pandemic hit, the employer demanded that all staff perform field visits because of COVID-related staffing shortages. Tartaro-McGowan requested to be excused from the visits, citing limitations caused by her knees.

The employer suggested instead that she screen her field visits and select only those she could physically perform. They also permitted her to perform many tasks while sitting and said she wouldn't have to make back-to-back visits.

When Tartaro-McGowan's doctor described her physical restrictions, the employer reiterated its offer, which she declined. Neither party offered alternatives.

Eventually she was fired for not performing field visits and sued her employer in federal court, claiming that it violated the ADA by failing to accommodate her disability.

A federal trial court dismissed the case, and a federal appeals court upheld the ruling on appeal.

According to the court, as long as the employer's chosen accommodation was reasonable under the circumstances, it did not need to be perfect in order to satisfy ADA requirements.

In light of this ruling, employees are advised to consult with an employment lawyer before refusing an accommodation that they don't think is reasonable. And employers should speak with their attorney before taking a negative employment action against an employee with a disability.

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Warning to employers: Handle pre-hire background checks with care

A lot of employers like to conduct background checks during the hiring process that include credit reports. They do this because they feel a credit report gives them a sense of how responsible the candidate is and whether they might pose a theft or embezzlement risk. But a recent Massachusetts case shows that employers can wind up in hot water if they don't comply with all requirements of the federal Fair Credit Reporting Act, even the most hyper-technical ones.

In that case, when plaintiff Nicole Kenn applied for a position with a company called Eascare, she signed a disclosure form and authorization allowing Eascare to run a background check, including a look into her credit history. The disclosure form also included a waiver releasing Eascare from any liability resulting from the background check as well as other allegedly extraneous language.

Kenn left the company a year later, alleging her employer retaliated against her for complaining about sexual harassment. In addition to bringing discrimination and retaliation claims, she argued in court that the company violated the FCRA by including the liability waiver and other language on its disclosure form instead of having her fill out a standalone form as required by the act.

She also brought this claim as a class action, meaning she was suing on behalf of herself and other employees who were also subject to credit checks under the same conditions.

The employer argued that Kenn had no standing to bring the case in the first place because this technical violation of the FCRA did not constitute a concrete "injury-in-fact."

But the Massachusetts Appeals Court disagreed, pointing out that the FCRA authorizes people to sue in state or federal court for any "liability" created by its provisions. Eascare's willful failure to provide the type of disclosure required by the law, if proven, would create such liability.

Now the company faces potentially having to pay up to $1,000 in damages for each violation it committed. It could also be subject to punitive damages, which are unlimited, and be ordered to pay employees' attorney fees.

The lesson for employers who plan on conducting any kind of background check is to consult with an attorney to review the disclosure, authorization, waiver language forms and language to make sure they're not falling into a costly trap.

Worker termination didn't violate medical marijuana protection laws

Many states that have decriminalized the use of marijuana for medical purposes have also passed laws that provide job protections for medical marijuana users. This means employers need to proceed with caution before firing, suspending or taking other negative action against a worker who uses medical marijuana.

A Connecticut case, however, shows us that these protections don't necessarily render medical marijuana users bulletproof in the workplace.

In that case, a pre-school teaching assistant lost her job after her employer, which maintains drug-free workplace policies, investigated her alleged impairment on the job.

The employee, who has suffered from epilepsy her whole life, had a medical marijuana prescription to help her deal with her condition but allegedly did not inform her employer of that condition when she was hired. She also allegedly did not disclose her medical marijuana prescription.

A year after she was hired, the employee called a student by the wrong name and apparently admitted to a coworker that this was due to her feeling the effects of medical marijuana. That triggered an investigation during which another employee claimed to have observed her being "forgetful, droopy and unsteady on her feet."

When the company fired the employee, she filed a discrimination suit alleging that it had violated her rights under the state Palliative Use of Marijuana Act, which bars employers from discharging or

penalizing an employee based solely on their status as a medical marijuana user.

A trial court dismissed the claim and the Connecticut Appellate Court affirmed the ruling.

In the court's view, the reason the employer terminated this employee was her admitted impairment from medical marijuana while on the job. What was equally significant, said the court, is that the employer never told her she couldn't use medical marijuana, it simply informed her she couldn't be impaired at work due to safety concerns with children in her care.

Of course, this is just one decision from one state. The laws may be different elsewhere. But if you live in a state that permits medical marijuana, call an employment attorney near you for guidance on managing employees who are qualified medical marijuana users.

Be on the lookout for pitfalls in your severance agreements

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For example, some agreements purport to waive rights that can't, by law, be waived, such as the right to file a discrimination charge with federal or state antidiscrimination agencies or the right to testify, assist or participate in an agency proceeding. Employers include this language to deter administrative complaints, but such language may render the agreement unenforceable.

Similarly, a severance agreement can't waive rights and claims that might arise after the agreement has been signed. So, if the company commits new acts of discrimination or retaliation against an employee after they've left, the employee can keep the severance pay and still bring claims over such acts.

Meanwhile, the federal Older Workers Benefit Protection Act imposes a series of requirements that employers must satisfy when entering into severance agreements with terminated employees age 40 or older, including rules that the agreement be written in plain language, give the older worker 21 days to consider the agreement, advise the worker to consult with an attorney and give the worker seven days to revoke the agreement.

Of course, this is only a broad overview of a complicated area. To really protect yourself, an employment lawyer should review your agreements today.

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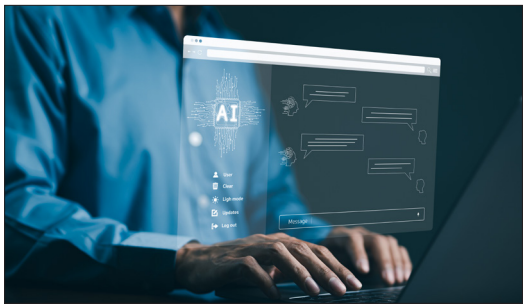
Do you have an AI policy for your employees?



Artificial intelligence tools have become common in many workplaces as a way of helping employees create visual work product and written content.

However, AI tools can create legal traps. For example, an employee under a tight deadline might access a free AI tool on the internet and type in a question that the tool answers in the form of a generated response based on millions of sources it has digested. If the worker passes off the work as their own, problems could arise, because the work product is not based on the worker's own research and could contain factual misinformation. It could also be based on out-of-date or low-quality sources, which could cause business or legal problems for the company. This is a particular risk if the worker is a trusted employee whose work a supervisor is less likely to fact-check.

Another risk is that employees could potentially enter confidential information into an AI tool. Many of these tools have policies stating that users give the tool's owner the right to use information that's been input. This can put a company's proprietary information at risk.

If AI use is a concern in your workplace, it's critical to meet with an employment lawyer who understands the technology and can help you create a written policy governing the use of such tools and establish steps employees need to take to use them. A policy would also lay out consequences for unauthorized use.

Interested in learning more? Talk to an attorney today.