Legal Matters®

Employment
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‘Pay transparency’ could be coming your way. What should you know about it?

Employers and employees have engaged in a song and dance around salary expectations and requirements for generations, with employees frequently not knowing how much a job paid until after they received an offer.

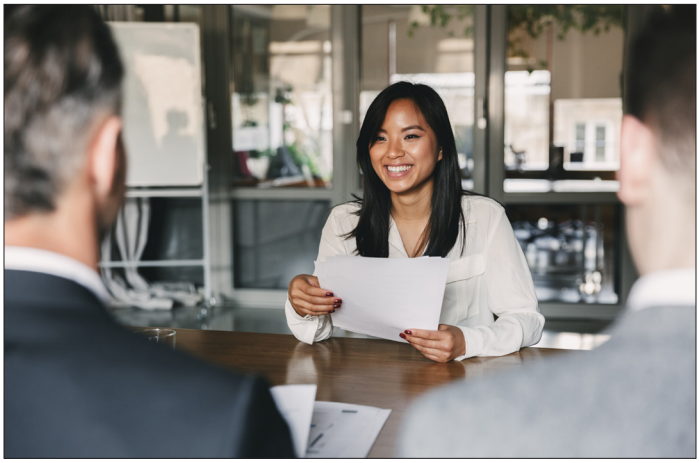
Employees also generally would not know if the pay was in line with what other employees of similar skill and experience were making. That’s because the employer would ask the job candidate their salary history or their salary expectations ahead of time and use that as a factor in setting the wage.

And just to make sure workers didn’t catch on, the employer might have workplace rules prohibiting employees from discussing their salaries and benefits with each other.

This has changed in recent years. Now, under federal labor law and many states’ laws, it’s illegal for employers to bar employees from talking about their pay because such conversations are considered protected, concerted activity.

Additionally, a number of states have made it illegal for employers to consider a candidate’s salary history when deciding who to hire or how much to pay them, since doing so can have a discriminatory impact.

But a new change that every employer should be aware of is the trend of “pay transparency” laws that have taken effect in nearly a dozen states. These laws require employers to disclose a specific wage



or a wage range to job candidates and, in many cases, to current employees.

The laws vary in how they work. Some places require disclosure in public job postings, others require it at a certain point in the hiring process, and others require it upon request. In some states, all employers must comply, while in other states, only employers of a certain size are affected.

For example, California requires employers to provide job applicants with the pay scale for the position they applied for, on

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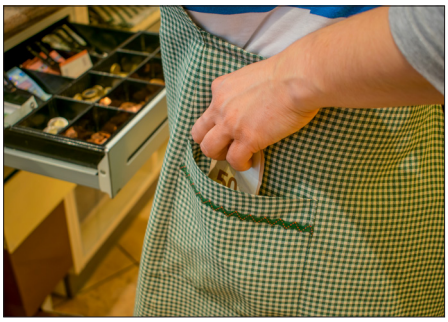
Suspect an employee of theft? Be sure to tread carefully



The issue of theft has long plagued employers. While employers understandably would want to take swift, harsh action against suspected perpetrators, a recent South Carolina case illustrates how important it is to investigate such suspicions thoroughly. That's because a recklessly false accusation could land an employer in hot water.

The employee in question worked at the front desk of a dentist's office for nearly four years when, in 2017, the employer fired her for stealing cash. The employee, who denied the accusations, found a new job, but in the meantime the employer sought to have her criminally charged.

Months later, the county sheriff's department arrested the employee, who was charged with "breach of trust over $2,000" and bound over for trial. Meanwhile, the employer told workers at the employee's new job that she had stolen money. Her new employer then removed her from any work that involved handling money, which resulted in her having to commute a long distance each day to a new location, where she had to work a reduced schedule in a call center.

Apparently, however, her original employer failed to conduct an investigation of any substance before it took action against her. Following her arrest, the employee hired a forensic accountant, who apparently confirmed that the accusations were reckless at best and malicious at worst.

The criminal charges were soon dismissed and the employee took the employer to court for malicious prosecution and defamation. A jury found in her favor and awarded substantial damages for emotional distress, shame, humiliation and embarrassment, and tacked on additional amounts as "punitive damages" to deter similarly outrageous conduct in the future.

Clearly, a thorough, unbiased investigation is important any time an employer seeks to discipline a worker. It's even more critical when accusations of theft are involved, given the explosiveness of such allegations.

A good employment lawyer can help implement a written protocol for such investigations (which must then, in turn, be followed to the letter) and may also be able to help you conduct an investigation when necessary.

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Addressing mental health issues in the workplace

A study by the National Alliance on Mental Illness reports that 20 percent of adults in the United States — more than 50 million people — experience an occurrence of mental illness every year.

Meanwhile, data from the Occupational Safety and Health Administration reports 120,000 stress-related deaths per year, with more than 80 percent of Americans reporting work-related stress with such symptoms as depression, anxiety and headaches.

With so many workers dealing with mental health issues, it's critical that every employer be aware of the potential legal implications.

First, employers need to know that a worker's mental health condition may be considered a disability within the meaning of the Americans with Disabilities Act. Under the ADA, employers may not discriminate against workers in hiring, firing, promotion or pay based on their disability. They are also required to provide reasonable accommodations that enable an otherwise qualified worker with a disability to do their job.

When an employer knows or should know that a worker needs an accommodation, they must engage in an interactive process with the employee to determine what type of accommodation is reasonable under the circumstances. Such accommodations might include flexibility in scheduling, a quiet workspace or the ability to use headphones to block out noise, permission to work from home, or more consistent shift assignments, among other things.

It's also important to note that while an employee might not directly ask for an accommodation, situations may arise in which the employer should pick up on the fact that the employee may need one. In such cases, the employer's best course of action is to initiate the interactive process without a formal request.

Similarly, employers should tread carefully before disciplining what they perceive as inappropriate workplace behavior, since it also could be unusual conduct related to a mental health condition that can be dealt with through an accommodation.

Employers should further be aware that other laws, such as the Family and Medical Leave Act, which requires many employers to allow up to 12 weeks of unpaid, job-protected leave over a 12-month period, protect employees with certain mental health conditions. Employers subject to the FMLA must grant such leave if the employee provides proper notice, though their words and actions, including atypical behavior, could provide notice as well.

Finally, employers need to comply with any state antidiscrimination and medical leave laws, which often provide workers greater protections than the ADA or FMLA.

An employment attorney can review an employer's practices to ensure they are in compliance with all the laws and help address any vulnerabilities that may exist.

Case illustrates importance of knowing both federal, state OT laws

The federal Fair Labor Standards Act sets out the rules that employers across the country must follow in paying their workers overtime. Under the act, employers must pay "non-exempt" workers (in simplest terms, those who perform manual or technical tasks, are paid by the hour, and earn less than $684 a week) at least one-and-one-half times their regular hourly wage for all hours worked above 40 in a workweek.

But it's important to note that every state has its own overtime provisions, and many state laws demand more of the employer than FLSA. Overlooking state laws can end up costing employers significantly, as a recent Colorado case shows.

In that case, Amazon offered warehouse workers like Dan Hamilton both "holiday pay," which entitled employees to their regular hourly pay rate on company holidays such as New Year's Day and Labor Day regardless of whether they actually worked that day, and "holiday incentive pay," which paid them time-and-a-half if they actually worked on a designated holiday.

In 2022, Hamilton brought a class action against Amazon on behalf of himself and other similarly situated workers claiming the company had violated Colorado's wage law, which entitles employees to overtime at one-and-one-half times their "regular rate of pay" whenever they work more than 40 hours in a workweek. The law defines "regular rate of pay" as the hourly rate actually paid to workers in a particular regular, non-overtime workweek.

According to Hamilton, Amazon violated the law when, on several occasions, it failed to properly pay overtime he and others worked during weeks that they also worked on a company holiday.

Specifically, he argued, overtime pay should have been calculated after determining an employee's regular rate of pay based on everything paid to them for the 40-hour workweek, including any holiday incentive pay, and then dividing the sum by the total hours worked. Because Amazon failed to include his holiday incentive pay when calculating his rate of pay for the weeks in question, he claimed Amazon failed to pay all the overtime it owed him.

The Colorado Supreme Court found that, under the state wage law, Amazon indeed should have included holiday premium hours in calculating the regular rate of pay for overtime purposes, even if the FLSA did not have a similar requirement. The court specifically emphasized that "states are free to provide employees with benefits that exceed those set out in the FLSA."

Now, Amazon faces potentially stiff penalties under Colorado law. Given the complex interplay between state and federal wage laws, it's a good idea to have an employment lawyer review your pay practices to help you avoid a similar situation.

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request, even if the applicant hasn't had a first interview. They also need to provide employees with the pay scale for their current position, on request. An employer with 15 or more employees must include the relevant position's pay scale in any job posting.

Meanwhile, Massachusetts has a new pay transparency law set to take effect in summer 2025 that requires employers with more than 25 employees to disclose pay ranges in job postings, provide a position's pay range to any current employee being offered a promotion or transfer, and, on request, provide the range to current employees who plan to apply for it. The law also protects employees against retaliation for asking for salary ranges when applying for a job or promotion.

New Jersey also has a law in the works. It would require employers with at least 10 employees to disclose hourly wages or salary range and a general description of benefits for internal job candidates.

It's critical to know that these laws have teeth and that violations can subject employers to lawsuits and/or state enforcement actions that bring heavy fines. Some laws even provide multiple damages and attorneys' fees for aggrieved workers and applicants.

And if an employer has workers in multiple states, the employer could be subject to pay transparency laws in each of those states. That's why it is so critical to consult with an employment lawyer who can review all applicable laws and conduct a pay equity audit to ensure your organization is fully compliant.

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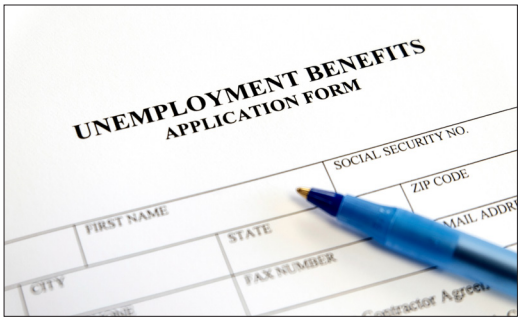
Employers: contest unemployment benefits with caution

Generally, an employee who has been terminated is entitled to unemployment benefits unless they were fired for engaging in workplace misconduct, like harassment, safety violations, or misappropriation of company property.

But if you fire a worker for cause and they file for unemployment, does that mean you should contest it? Not necessarily.

That's because conduct that justifies termination doesn't always equate to misconduct. For example, maybe you fired the worker because of a customer complaint. Would you be able to prove to a hearing board that the customer was being truthful? And even if the employee violated a company policy, do you have enough evidence to prove the employee was aware of the policy at the time and that they intentionally disregarded it?

If the answer to either question is "no," you may lose. And if the employee wins the unemployment hearing, that may be enough ammunition to convince them they have a worthy wrongful termination claim — especially if there's evidence you haven't enforced your policies consistently — and to hire a lawyer. Even if you win the lawsuit, you'd still be spending time and effort defending against it.



On the other hand, let's say you win the unemployment hearing. Now they may feel financially desperate enough to hire a lawyer as well, even if they're not as likely to win.

The bottom line is that it may be worthwhile to contest a claim if the employee left by choice. But if they didn't, your best bet is to consult with an employment attorney who's experienced with unemployment proceedings before reflexively fighting the claim.