Legal Matters®

Employment
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Reopening presents traps for employers

The coronavirus pandemic has created an unpredictable landscape for employers. As of right now states are in various stages of their phased reopening plans and many employers have either brought employees back to the physical workplace or are planning to do so.

Wherever you currently find yourself, it is critically important to meet with an employment attorney to identify potential hazards that might result in a lawsuit.

Allegations of discrimination are possibly the biggest trap. When the coronavirus first hit and businesses had to shut down, many employers were forced to implement furloughs and layoffs quickly. Not all employers necessarily took the time to properly analyze (or better yet, engage an attorney to analyze) who was being affected. Some of those personnel decisions may be having a disproportionate effect on workers of a particular race, ethnicity, gender or age. If this has happened in your workplace, you could be vulnerable to a "disparate impact" claim under federal or state anti-discrimination law. Similarly, if you have been lucky enough to avoid layoffs or furloughs in large numbers but expect to have to implement them in coming weeks, you'll be setting yourself up for problems if you don't do it right. Review your plan with an attorney ahead of time to make sure you can justify your personnel decisions on legitimate business grounds.

Wage-and-hour claims are another potential trap, particularly if you have had "non-exempt" (hourly or low-salaried workers) working from home during the pandemic. Work-at-home situations can lead to wage and hour claims because they lend themselves to blurred lines

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between company time and personal time, especially when workers are anxious about their job security. If you add in the lax recordkeeping that can occur during a chaotic time, your workers may end up with legitimate claims that you failed to pay overtime or minimum wage.

But non-exempt employees aren't the only ones you need to worry about. Let's say you've furloughed an exempt worker and she's sitting at home not getting paid, but you are calling or emailing her so she can walk you through certain tasks that she would otherwise be handling. She now may be entitled to a full week's salary for whatever time she spent helping you. It is also important to note that in

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Could 'pre-selecting' a job candidate be evidence of bias?

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The federal Age Discrimination in Employment Act (ADEA) protects workers over age 40 from negative employment actions, such as being turned down for a job, fired, passed over for a promotion, or reassigned based on age. Many states have similar laws. A pair of recent cases sheds some light on how they work.

The first case, from Michigan, involved Gregory Stokes, a longtime administrator for the Detroit Public Schools who had risen to the position of executive director of human resources. Toward the end of his six-month contract, he applied for what he viewed as a better position in the system. DPS interviewed three candidates, including Stokes, but hired a 28-year-old female instead.

Stokes sued the city for age discrimination under the ADEA as well as sex discrimination under Michigan's civil rights law. The DPS said that Stokes had a poor interview and claimed he was a bad candidate for the position as executive director of "talent acquisition" because DPS had trouble recruiting new teachers while he was working in his previous role. The trial judge agreed with DPS and dismissed his case.

But a federal appeals court reversed, pointing to evidence that DPS had "preselected" the younger candidate all along. For example, Stokes produced a letter written by someone involved in the hiring decision before any interviews were conducted that stated the younger candidate should be offered the position. The court said was this enough to let a jury decide for itself whether DPS really made its decision based on its stated reasons or whether that was a smokescreen for discrimination.

Meanwhile, a recent Rhode Island case shows that an employee can proceed with an age discrimination case even where he or she wasn't replaced by someone younger. There, plaintiff Elizabeth Cugini worked as community relations coordinator for one of the graduate schools at the University of Rhode Island. She was laid off in 2005 at age 53, but exercised her "recall rights" under her union's collective bargaining agreement to move to a different position as URI's assistant director for alumni relations.

Cugini's new supervisor eventually decided she lacked the necessary skills or professionalism for the position. But Cugini claimed that the supervisor resented her being hired because of union seniority, denied her adequate training and harassed her because of her age.

Cugini filed a grievance. The supervisor then sent her a formal letter of reprimand. Cugini was ultimately told to accept another layoff with a one-year right to seek employment elsewhere at the university or be terminated.

She subsequently brought state and federal age bias and retaliation claims. The university argued that the claim should fail because Cugini could not show that URI replaced her with someone younger.

But a federal judge ruled that her claim could proceed.

Specifically, the judge pointed to evidence that the supervisor sought only negative comments from Cugini's co-workers when putting together a performance review and that her younger co-workers were treated with less hostility. The judge also rejected the university's argument that Cugini never actually faced an adverse employment action, finding instead that the choice she was given might qualify as a "constructive discharge."

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'Poor performance' doesn't justify denial of benefits

A Missouri court recently ruled that a man's termination for "poor performance" at work didn't justify a denial of unemployment benefits.

The employee, Mark Wayne, was fired in 2019 after being written up several times for mistakes while loading freight. The employer challenged his unemployment claim, arguing that his failure to follow instructions amounted to "insubordination."

A hearing officer denied Wayne's claim and an appeals tribunal agreed. Both rulings relied on a 2014 state law that disqualified workers for unemployment compensation if they have violated an employer's "rules."

Wayne appealed further and an appeals court overturned the denial.

According to the court, the 2014 law had been misapplied and a rule violation couldn't be considered misconduct if the employee wasn't aware of the rule. Even if the employee knew his mistakes violated company rules, rules on mistakes, accidents, poor workmanship or bad judgment weren't what the law intended to cover.

The lesson from this case is to talk to an attorney before challenging an unemployment claim, since overreaching could end up costing you more than the claim itself.

Move to reopen presents traps for employers

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many states, a wage law violation means you'll have to cover not only any unpaid wages, but also the worker's attorney fees and double (or even triple) their damages.

Worker safety is a third area of risk for employers. Penalties can be significant under state and federal workplace health and safety laws, some of which may even provide financial incentives for "whistleblowers" to report violations. Employees could also potentially bring lawsuits claiming they contracted COVID-19 when they went back to work because their employer failed to follow state and federal guidelines for social distancing or provision of masks and other personal protection equipment.

Realistically, these may be tough suits for an employee to win. After all, it's difficult to prove where you contracted a virus and a court may also find that worker's compensation is the sole available remedy. But litigation is disruptive and costly even when you prevail, so strict compliance with guidelines is still your best defense.

Yet another tricky issue is handling older workers and workers with preexisting conditions or who live with someone who is high-risk. Because of their heightened vulnerability to the coronavirus, such workers may be uncomfortable returning to the workplace. Before telling them, "come back or you're fired," you need to talk to your attorney and determine whether you're obligated to accommodate them under state and federal law and, if so, how best to do that. You might need to allow them to continue to work at home or give them time off from work. (Family and medical leave laws could come into play here.)

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Finally, as you take steps to keep your workplace safe, remember that while guidelines permit you to take workers' temperatures and ask questions about symptoms, you must protect their privacy. If you fail to keep medical information confidential, you risk liability under HIPAA and state privacy laws.

These issues are just the beginning. More will arise as we move through the process. But it's never too early to sit down with an attorney to review policies, procedures, laws and guidelines.

Employer pays for injuries worker suffers at retreat

Employers who hold offsite recreational retreats for their workers, particularly retreats involving alcohol, need to be very vigilant about safety or they might end up paying more than they planned.

For example, in a Missouri case the owner of a fiberoptic cable company held a retreat for workers at a Lake of the Ozarks resort, where he rented a pontoon boat for employees to enjoy.

The boss spent part of the day on the lake with his workforce before returning to the resort, but allowed a group of employees take the boat back out on the lake without him. The fun continued, and so, apparently, did the drinking.

A no-wake zone surrounded the resort. When the boat returned to the resort, it was going full-speed as it hit the no-wake zone. The operator, who allegedly had been drinking, suddenly cut back the throttle, causing it to slow quickly. A worker who was standing at the front of the boat in front of the safety railing lost his balance when the boat lurched and fell overboard.

When the worker hit the water, the boat's propeller cut his arm and lacerated a nerve. It took emergency surgery to save his arm.

The worker took his employer to court, arguing that he had negligently entrusted the boat to an intoxicated person. The employer claimed the accident was the worker's fault, because he was intoxicated and was not standing in a safe place.

Meanwhile, the employer's liability insurer tried to deny coverage, claiming this was a worker's compensation case, although the employee argued that the retreat was a voluntary activity and thus the injury was not work-related.

Ultimately, the case settled for a very substantial sum, suggesting the employer was nervous about what might happen if it went to trial.

While this won't be the outcome for every injury that happens in a work-related recreational setting, if you are planning a retreat for your employees meet with an attorney to review your liability coverage and the activities you plan to offer.

'Joint employer' can create wage-and-hour issues

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If your company relies on workers provided by a different entity, it is a good idea to have an attorney vet the arrangement. That's because if that company is violating federal or state wage and overtime laws, you could find yourself on the hook for those violations as a "joint employer." The key element in determining if you're an employer is whether you exercise "direct or indirect control" over the worker's work.

A recent Massachusetts case involved this very issue. In that case, energy and wireless companies hired a firm called Credico LLC to market their services. Credico, in turn, hired a small sales-consulting outfit called DFW to make door-to-door sales on behalf of Credico clients.

The DFW salespeople later brought a class action suit accusing DFW of illegally misclassifying them as "independent contractors" to avoid paying them minimum wage and overtime. Presumably because DFW was a small company with few assets, the salespeople also went after Credico as a joint employer.

A Massachusetts trial court judge ruled that the workers were indeed misclassified but let Credico out of the suit. According to the judge, there was insufficient evidence of Credico exercising control. Specifically, the workers didn't show that Credico had the power to hire or fire DFW workers, control their schedules or set their pay.

This case could easily have gone the other way in a different state. Talk to a local attorney to discuss the situation where you live.