Labor & Employment Digest: September 2015

BY RICH STEEVES (/AUTHOR/RICH-STEEVES)
SEPTEMBER 1, 2015

While some of these issues may just now be coming into focus, our hope is to get you and your team thinking about the challenges you may face down the line. Whether these matters come to a head in six months or six years, it's never too early to evaluate your strategy to address these issues.

ADA and alcoholism

A trucking company did not violate the Americans with Disabilities Act (ADA) by firing an alcoholic driver in order to comply with Department of Transportation Regulations, according to the 11th Circuit Court of Appeals in *Jarvela v. Crete Carrier Corporation*. The court stressed that the employer "bears ultimate responsibility" for determining whether a commercial driver is qualified and does not violate the ADA by disregarding a physician's opinion, particularly if two conflicting medical opinions exist.

—Reggie Belcher, shareholder (Columbia, S.C.), Turner Padget Graham & Laney, P.A.

NLRB guidance on unlawful handbook terms

The National Labor Relation's Board's (NLRB) GC recently issued guidance for the regional personnel (GC 15-04) hoping to clarify the NLRB's vigorous and creative campaign to eradicate any employee handbook provisions that just might interfere with employees' rights. As the general counsel noted, "most employers do not draft ... handbooks with the object of prohibiting or restricting" protected employee activities, but "the law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the act.'" Employers still will be left guessing about how imaginative the NLRB can be in deciding

what employees' "reasonably"'could construe about the hidden effects of handbook provisions, but at least this guidance offers a list of concrete examples that could be useful in reviewing present handbook terms.

—Keith H. McCown, partner (Boston), Morgan, Brown & Joy LLP

Understanding the intricacies of state and local ban-the-box laws

As more cities and states continue to pass "ban the box" legislation, employers should understand the specific parameters of each law wherever they do business. "Ban the box" laws are not all identical, and they do not all prohibit employers from inquiring about a prospective employee's criminal history. Such laws typically require an employer to postpone a criminal background check until it has made a conditional offer of employment. Many statutes include exceptions for jobs involving the provision of services to minors and vulnerable adults, or for professions where the health, welfare and safety of others is a necessary prerequisite to the job. Be aware of these limitations, since many charges and administrative complaints can be dismissed because the employee or employer falls within a statutory exemption. Employers should seek the advice of counsel about what restrictions are imposed by laws in the cities and states in which they do business. This will make it easier for employers to identify where they may need to adjust their recruiting practices and how best to implement any changes.

—Jennifer A. Harper, partner (Washington, DC), FordHarrison LLP

Physicians and employers, take note

"Doctors routinely write notes to employers of pregnant patients, requesting a change of job duties during the pregnancy if specific accommodations are needed due to medical issues. Unspecific notes can backfire, however, as the Equal Employment Opportunity Commission reports that nearly 70 percent of pregnancy-related cases in the past decade ended in the termination of a female employee—some due in part to these notes.

There is only one federal law that protects an employee who goes on leave for the purpose of bonding with a newborn—the Family and Medical Leave Act . It offers an employee only 12 weeks of unpaid leave during a 12-month period. If it is used to accommodate a disability during pregnancy, the employee won't have the full 12 weeks for bonding with a newborn.

However, employers have an obligation under the Americans With Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA) to treat women who have complications that arise from pregnancy as they would any other employees who have disabilities.

The ADA requires an interactive dialogue between the employee and the employer, and ideally, this conversation would involve the physician. All three parties would work together to come up with accommodations that allow the employee to perform the essential job duties while meeting the employee's restrictions."

—Christina L. Lewis, partner (Boston), Hinckley Allen

SENIOR EDITOR AND COMMUNITY MANAGER

Rich Steeves

Richard P. Steeves is Senior Editor and Community Manager of InsideCounsel magazine, where he covers the intellectual property and compliance beats. Rich earned a B.A....

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